SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **12**
Justice

----------X

WILLIAM DEUTCH,

Plaintiff,

- v -

RVL PROPERTIES, LLC, *et al.*,

Defendants.

----------X

INDEX NO. 152531/16

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

On October 30, 2014, plaintiff allegedly tripped and fell on a raised border of a cellar door in front of 52 Carmine Street in Manhattan, premises owned by defendant RVL Properties and rented to defendant Spirits of Carmine, which leased the entire basement from RVL including the cellar door. Defendant Building Equity Management LLC (BEM) managed the premises for RVL. (NYSCEF 27). According to plaintiff, the border of the door was approximately three-quarters of an inch above the surrounding sidewalk, and his foot became caught on it. (NYSCEF 31, 33).

By notice of motion, RVL and BEM move pursuant to CPLR 3212 for an order dismissing plaintiff's claims and cross claims against them or, alternatively, for judgment on their cross claims against Spirits for contractual and common law indemnification. Spirits opposes and, by notice of cross motion, moves for summary dismissal of the complaint, cross

claims and any counterclaims. RVL and BEM oppose the cross motion; plaintiff opposes both motions.

I. PERTINENT BACKGROUND

The lease between RVL and Spirits provides, as pertinent here, that:

(1) Spirits may only make non-structural changes to the premises, but only with at RVL's permission;

(2) RVL must maintain and repair the public portions of the building, external and internal;

(3) Spirits must maintain the premises and fixtures and appurtenances thereto and adjacent sidewalks in good condition, and at its sole cost and expense must make all non-structural repairs thereto;

(4) Spirits must indemnify RVL for any damages sustained by Spirits's breach of a lease covenant or condition or its carelessness, negligence, or improper conduct; and

(5) RVL has the right, but not the obligation, to enter the premises at any time for any emergency, and at other times to examine and make repairs, replacements, or improvements as it may deem necessary upon Spirits's failure to make repairs or perform work which it is obligated to perform.

The rider to the lease, which governs in the event of any inconsistency between it and the lease, provides that Spirits's permitted use of the premises includes the ground floor and basement, and requires that it "upgrade" "all access doors to the Basement." RVL disclaims any obligation to pay for or cure any violation that existed then or in the future within the premises or which may result from Spirits's use, claiming that it was agreed that such obligation is solely Spirits's. (NYSCEF 39).

BEM's owner testified at a deposition that Spirits had exclusive access to the cellar door and that RVL could not access the basement unless Spirits opened the door. He denied knowing of prior incidents involving the door or that Spirits ever complained about it or the sidewalk. He

did not know how long the uneven condition had existed before plaintiff's accident. (NYSCEF 34).

Spirits's co-owner testified, in pertinent part, that the cellar door constitutes the only entry into the cellar, that Spirits used the door daily to enter the cellar, that Spirits had exclusive control over the cellar and could deny access to the property manager, and that when not using the cellar, the door was closed. The condition of the door was the same since the lease commenced in 1999, and he never saw anything wrong with it, nor did he register any complaints about it. In 2000, the former management company instructed Spirits to paint the border of the door yellow. Spirits paid for the paint; the management company performed the job. (NYSCEF 35).

A member of the former management company testified at his deposition that he saw no differential between the border of the door and the sidewalk, and if he had, he would have notified Spirits to fix it, as it was Spirits's responsibility to maintain the door. He too denied that any prior incidents involving the door had occurred. (NYCEF 36).

According to a member of RVL, Spirits has exclusive access to the door, and was obligated by the lease and rider to repair any misleveling between it and the sidewalk. RVL performs no day-to-day management of the building, nor does it maintain, repair, or collect rent there. (NYSCEF 37).

II. RVL/BEM'S MOTION TO DISMISS

A. Contentions

RVL contends that neither it nor its agent BEM may be held liable for plaintiff's accident as it is an out-of-possession landlord with no duty to maintain or repair the premises. It asserts that it divested itself of control of Spirits's premises, and that Spirits had the sole duty to

maintain and repair the premises. Alternatively, RVL contends that it is entitled to contractual indemnification by Spirits based on Spirits's breach of the lease in failing to maintain and repair the door, or to common law indemnification as Spirits alone was negligent. (NYSCEF 27).

Spirits denies owing any duty to plaintiff, relying on New York City Administrative Code § 7-210, which imposes a duty on landowners to repair and maintain the sidewalk abutting their property and liability upon their failure to do so, and Code § 19-152(a)(6), which requires an owner to repair a substantial defect on the sidewalk, including "hardware or other appurtenances not flush within 1/2 inch of the sidewalk surface," or "cellar doors that . . . are otherwise in a dangerous or unsafe condition." Spirits also denies that the lease requires it to maintain and repair the sidewalk, or that it may be held liable where it has not created the dangerous condition. Absent any contractual duty to repair the sidewalk, Spirits denies that it is required to indemnify RVL and BEM, and contends that lease requirement that it "upgrade" the door, absent any reason or deadline for doing so, does not create a duty to maintain or repair it. (NYSCEF 44).

Plaintiff contends that there is a triable issue as to whether RVL owed him a duty of care, as RVL retained the right to inspect and repair the premises, and its property manager visited the premises at least twice a month. He also argues that Spirits's continual and longtime usage of the door raises a factual issue as to whether it created the defective condition or had actual or constructive notice of it. (NYSCEF 61).

In reply, RVL/BEM assert that Spirits's assumption of the obligation to upgrade the door constitutes an obligation to maintain or repair it, and that it was obligated to take good care of the premises and fixtures or appurtenances thereto, including the door which is a fixture. (NYSCEF 60).

Spirits maintains that even if the lease divested RVL of the obligation to repair structural defects caused or created by Spirits, there is no evidence that Spirits created the condition. (NYSCEF 65).

B. RVL'S DUTY

Pursuant to New York City Administrative Code § 7-210, the owner of real property abutting a sidewalk has the duty of maintaining it in a reasonably safe condition, and is liable for any personal or property injury proximately caused by its failure to so maintain the sidewalk, unless the property is exempt. Pursuant to Admin. Code § 19-152, such an owner must repair substantial defects in a sidewalk, including hardware or other appurtenances that are not flush within a half-inch of the sidewalk or a cellar door that is in a dangerous or unsafe condition. The landlord bears the statutory duty to maintain a cellar door. (*Langston v Gonzalez*, 39 Misc 3d 371 [Sup Ct, Kings County 2013]).

Thus, even assuming that RVL is an out-of-possession landlord, it retains the statutory duty to maintain the sidewalk in safe condition. (*See Reyderman v Meyer Berfond Trust #1*, 90 AD3d 633 [2d Dept 2011] [out-of-possession landlord's duty to repair dangerous condition on leased premises imposed by statute or regulation, contract, or course of conduct]). And given this duty, it has failed to establish, *prima facie*, that it fulfilled its duty to maintain the sidewalk in a safe condition. (*See Hernandez v 34 Downing Owners Corp.*, 148 AD3d 554 [1st Dept 2017] [landlord not entitled to summary judgment where plaintiff injured by cellar door in sidewalk, as under lease it was obligated to maintain and repair cellar stairs and sidewalk, and did not establish lack of constructive notice of defective condition]; *James v Blackmon*, 58 AD3d 808 [2d Dept 2009] [abutting owner's summary judgment motion denied absent evidence that she properly maintained sidewalk; out-of-possession status no defense]).

RVL attempts to shift responsibility for maintaining the door to Spirits. However, as it is within the sidewalk, the cellar door is a structural element (*Wahl v JCNYC, LLC*, 133 AD3d 552 [1st Dept 2015]), and the lease imposes on Spirits no responsibility for maintaining structural elements. Rather, Spirits must maintain the sidewalk and appurtenances in good condition, and make all non-structural repairs to them. In specifying that Spirits has a duty to make non-structural repairs to the sidewalk, the parties apparently agreed that Spirits has no duty to make structural repairs. Moreover, the lease imposes on RVL the duty to maintain and repair the public portions of the building, including external elements.

That Spirits must "upgrade" the cellar door imposes no duty of repair. If the parties had intended that Spirits repair the door, they failed to do so, and RVL submits no authority for the proposition that an upgrade constitutes repair.

RVL thus fails to establish that it fulfilled its statutory duty to maintain the door in a safe condition or that the duty was delegated to Spirits.

C. Indemnification by Spirits

Notwithstanding a landlord's non-delegable duties to maintain sidewalks in good condition, a tenant may be required to indemnify the landlord if the tenant was contractually required to perform sidewalk repairs and failed to do so. (*O'Donnell v A.R. Fuels, Inc.*, 155 AD3d 644 [2d Dept 2017]; *Wahl*, 133 AD3d at 552).

Thus in *Wahl*, *supra*, the Court held that the tenant was required to indemnify the landlord for a trip and fall on a raised portion of the sidewalk in front of the landlord's building, as the lease provided that the tenant would comply with all laws requiring the sidewalk to be kept clear of obstructions or hazards, and that it would, at its sole cost and expense, be responsible for curing any violations of the law related to the premises existing on or before the

lease term began. There, the defective condition was shown to have existed before the commencement of the lease, and while the lease required the landlord to maintain and repair structural elements, including the sidewalk, the lease as a whole was found to have imposed on the landlord the responsibility to repair the sidewalk defects that arose after the lease term began. (133 AD3d at 552).

In contrast, in *Cucinotta v City of New York*, the Court found that the tenant was not responsible for repairing the structurally defective sidewalk condition as the lease required it to make non-structural repairs to the sidewalk, and it was responsible for structural repairs arising only from its negligence or misconduct or breach of the lease. The Court held that the lease and rider did not shift liability for the defect from the landlord to the tenant, and observed that there was no triable issue as to whether the tenant created the defect. (68 AD3d 682 [1st Dept 2009]).

Here, as the lease does not obligate Spirits to repair the door, and requires Spirits to indemnify RVL if it breaches the lease or if its actions cause an injury, RVL fails to demonstrate that it is entitled to a judgment on its cross claim for contractual indemnification against Spirits. Similarly, absent evidence of any negligence by Spirits, RVL is not entitled to common law indemnification.

III. SPIRITS'S MOTION TO DISMISS

A commercial tenant generally owes no duty to a third party to a lease, such as plaintiff. (*Collado v Cruz*, 81 AD3d 542 [1st Dept 2011]; *Berkowitz v Dayton Constr., Inc.*, 2 AD3d 764 [2d Dept 2003]). Such a tenant, however, may be held liable to a third party if it affirmatively created the defect which caused the party's injury, or made a special use of the sidewalk for its own benefit and thereby assumed the duty to maintain it in a safe condition. (*Kellogg v All Saints Hous. Dev. Fund Co., Inc.*, 146 AD3d 615 [1st Dept 2017]).

Plaintiff's speculative and unsupported assertion that Spirits may have created the defect through its use of the doors raises no triable issue. (*See e.g., Jordan v City of New York*, 23 AD3d 436 [2d Dept 2005] [opposition consisting of speculation did not raise triable issue of fact]).

Spirits thus establishes its entitlement to summary dismissal of the complaint against it, as well as RVL's cross claims for indemnification and any counterclaims.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of RVL Properties, LLC and Building Equity Management LLC is denied in its entirety; and it is further

ORDERED, that the cross motion of Spirits of Carmine Inc.'s for summary judgment is granted, and the complaint and any cross claims and counter claims are hereby severed and dismissed as against it, and the clerk is directed to enter judgment accordingly.

12/21/2017

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE