At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 11th day of October, 2018.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

SAMIRA MAMMADOVA,

Plaintiff,

-vs-

PACE ENGINEERING, P.C., et al,

Defendants.

Motion Sequences #3, #4, #5
INDEX No. 518541/16

2018 OCT 25 AM 7:34
KINGS COUNTY CLERK
FILED

The following papers numbered 1 to 22 read on this motion	Papers Numbered
Notice of Motion and Affidavits (Affirmations) Annexed	1-2, 3-4, 5-6
Answering Affidavit (Affirmation)	7, 8, 9, 10, 11, 12, 13, 14
Reply Affidavit (Affirmation)	15, 16, 17, 18, 19, 20, 21, 22

Upon the foregoing papers, defendant York Restoration Corp. ("York") moves (motion sequence #3) for an order, pursuant to CPLR § 3212, granting partial summary judgment on the issue of liability in its favor and dismissing plaintiff Samira Mammadova's ("plaintiff") claims and all cross-claims insofar as asserted against it. Defendants Capital One, N.A., Capital One Bank (USA) N.A., and Capital One Financial Corporation (collectively, "Capital One") move (motion sequence #4) for an order, pursuant to CPLR § 3212, granting partial summary judgment on the issue of liability in their favor and dismissing plaintiff's claims and all cross-claims insofar as asserted against them. Pace Engineering, P.C. ("Pace") moves (motion sequence #5) for an order, pursuant to CPLR § 3212, granting partial summary judgment on the issue of liability in its favor and dismissing plaintiff's claims and all cross-claims insofar as asserted against it.

Plaintiff commenced the instant action to recover compensatory damages for personal injuries she sustained on September 27, 2016 (the "subject accident") when she tripped and fell on a sidewalk in front of the premises located at 176 Broadway in New York, New York (the "subject premises").

At the time of the subject accident, the subject premises was owned by defendant 176 Broadway Owners Corp ("176 Broadway"). York is a construction company that was hired by 176 Broadway to serve as contractor after submitting a bid for a facade repair project at the subject premises (Notice of motion, exhibit I, Agreement between 176 Broadway and York; Contract Big dated February 3, 2015). Pace was retained by 176 Broadway to serve as engineer for certain projects at the subject premises. Defendant Consolidated Scaffolding Inc. ("Consolidated") was also retained to perform construction work at the subject premises, including the installation of a sidewalk shed on the exterior of the premises. Capital One is a commercial subtenant whose business is located on the ground floor of the subject premises.

DISCUSSION

YORK'S MOTION FOR SUMMARY JUDGMENT

Based upon a review of the record submitted by the parties and the relevant law, York's motion for summary judgment is denied without prejudice as premature, with leave to renew upon completion of depositions as significant discovery remains outstanding (CPLR § 3212 [f]; *Rodriguez v County of Westchester*, 120 AD3d 1331, 1331 [2d Dept 2014], *citing Wesolowski v Francis Hosp.*, 108 AD3d 525, 526-27 [2d Dept 2013]). In support of its motion York submits, among other things, copies of verified bill of particulars submitted by plaintiff in response to demands from defendants (Notice of motion, exhibit G); an affidavit from York Vice-President, Rami Taha ("Mr. Taha"), to which copies of the contract between York and 176 Broadway, as well as the bid proposal York submitted for the repair project, are annexed (*id.* at exhibit I); and a copy of a work permit issued by the New York City Department of Buildings ("DOB") to Consolidated (*id.* at exhibit H).

In the verified bill of particulars that plaintiff submitted in response to York's demand, plaintiff alleges, among other things, that defendants were negligent in "failing to properly maintain

[the] sidewalk . . . in allowing the sidewalk to become obstructed, blocked, congested and/or in a state of disrepair and/or improper repair; in failing to inspect said sidewalk; in improperly leaving placing, and/or permitting scaffolding pipes to remain on the sidewalk; [and] in causing, permitting and allowing a trap, hazard and nuisance to be and exist for an excessive and unreasonable period of time, despite actual and constructive notice," among other things (Notice of motion, exhibit G, Verified Bill of Particulars dated October 25, 2017).

In Mr. Taha's affidavit, he states, among other things, that "York . . . was not hired to furnish, erect, dismantle, or maintain any supported scaffold, sidewalk bridge, or pipe scaffolding on, at, or near 176 Broadway . . . prior to or on the date of September 27, 2016" (*id.* at exhibit I, ¶ 9). Mr. Taha further states that York never brought any pipe scaffold, supported scaffold, or sidewalk bridge materials . . ." to the subject premises, nor did it "control, rent, own or purchase" any of the above prior to or on September 27, 2016 (*id.* at ¶10, ¶12). Mr. Taha further states that "[t]he work performed by York . . . did not involve the use of outrigger scaffolding" but rather, "[t]he work . . . only required utilization of C-Hooks based scaffolding" which Mr. Taha contends "does not involve scaffolding pipes" (*id.* at ¶ ¶ 15-16). Based upon the above, York contends that it is entitled to summary judgment because it was only "hired to perform facade maintenance and restoration at the [subject] [p]remises, [and] had no duty to [p]laintiff to install, maintain, replace or repair the scaffolding or scaffolding pipes at the [subject] premises where [p]laintiff allegedly fell" (Attorney affirmation, ¶ 5).

It is noted by the court that the proffered work permit issued by the DOB was issued to Consolidated and describes the work to be performed by Consolidated as "Sidewalk-shed installation of a heavy duty sidewalk shed as per plans during general construction work" (Notice of motion, exhibit H).

However, as noted by plaintiff in opposition, neither York nor any other party has been deposed in the instant action (Attorney affirmation in opp, ¶ 2). At this juncture, the parties' respective relationships to one another in regards to the construction project at 176 Broadway is unclear. Although the work permit to construct the sidewalk bridge/shed was issued to Consolidated, as noted by plaintiff, York's name is present on a sign taped to the top of the sidewalk bridge/shed (Attorney affirmation in opp, ¶ 5; exhibit A). Moreover, although York asserts that it was not responsible for any of the pipe scaffolding at the subject premises, as noted by 176 Broadway in opposition, paragraph 26 of the Rider to the contract between York and 176 Broadway provides, in pertinent part, that York was responsible for "undertak[ing] all necessary procedures and precautions to insure the safety of [the] job and provide reasonable protection to prevent injury, damage or loss to all persons and property at the [w]ork site or adjacent thereto and all areas inside and outside the [b]uilding" (Taha aff, Rider to contract dated May 31, 2016, ¶ 26 [c]). The Rider further provides that "all safety outriggers, netting, barriers and *scaffolding* must be designed and constructed so as to prevent falling and bouncing material from landing on the roof of any adjacent buildings, courtyards, or on the sidewalk or street" (*id.* at ¶ 26 [d]). Thus, the court finds that, at this juncture, questions of fact exist, including, but not limited to, how the pipe scaffolding came to be on the sidewalk and whether, pursuant to the terms of the parties' contract, York maintained responsibility for the safety of the sidewalk area where plaintiff fell, despite the fact that Consolidated constructed the sidewalk shed/bridge. Accordingly, the portion of York's motion for summary judgment dismissing plaintiff's claims against it is denied without prejudice with leave to renew upon the completion of discovery.

For the reasons stated above, the court also denies the portion of York's motion for summary judgment dismissing the cross-claims asserted against it.

PACE'S MOTION FOR SUMMARY JUDGMENT

The court now turns to Pace's motion for summary judgment. Pace contends that it did not perform any maintenance, installation, or repair of the scaffolding or make any use of scaffolding pipes as part of its engineering work at the subject premises, and therefore it asserts that it did not cause or create the alleged condition that caused plaintiff's injuries.

In support of its motion, Pace submits an affidavit from Baris Acar ("Mr. Acar"), a principal of Pace's engineering practice. According to Mr. Acar's affidavit, Pace was retained by 176 Broadway to serve as engineer on three different projects at the subject premises. Pace was first retained pursuant to an agreement dated August 25, 2011[1], "to oversee facade repairs and to provide a Local Law No. 11/98 report" (Acar aff, ¶3). According to Mr. Acar, Pace's service on this project "was limited to monitoring the progress of facade repair work and [Pace] did not supervise the means and methods of any construction work" (*id.*). Pace was thereafter retained pursuant to an agreement dated January 3, 2012[2], "to perform professional services related to the main roofing system replacement for the [p]roject" (*id.* at ¶ 4). Pace was thereafter retained pursuant to an agreement dated January 4, 2014[3], "to perform professional services related to side walk vault [repair] at the [p]roject" (*id.* at ¶ 5). According to Mr. Acar, under this contract Pace was responsible for "monitor[ing] the work in progress, review[ing] shop drawings and submittals, issu[ing] field reports and attend[ing] project manager meetings" (*id.*). Mr. Acar avers that under both the roof and sidewalk vault agreements, Pace was not to be "responsible for the means, methods, sequences, or procedures of construction selected by the contractor(s) or the safety precautions and programs

[1] A copy of this agreement is annexed as exhibit D to Pace's Notice of Motion.

[2] A copy of this agreement is annexed as exhibit F to Pace's Notice of Motion.

[3] A copy of this agreement is annexed as exhibit G to Pace's Notice of Motion.

incident to the work of the contractor" (*id.* at ¶ 6; *see* 2012 Roof Agreement, Terms and Conditions, 4; *see* 2014 Sidewalk Agreement, Terms and Conditions, 4). The court notes that both agreements also provide that Pace "shall not be responsible for the design, erection, or maintenance of sidewalk sheds associated with the project, or for the maintenance of sidewalks or pedestrian walkways beneath the sheds" (2012 Roof Agreement, Terms and Conditions, 4; 2014 Sidewalk Agreement, Terms and Conditions, 4). Mr. Acar further notes that "[t]he permit for the sidewalk vault was [not] issued [until] 2017 . . . . and P[ace] did not begin monitoring the sidewalk vault work until the construction began after the permit was issued and the sidewalk was closed off" (Acar aff, ¶ 9). A copy of the permit issued by the DOB for the installation of the sidewalk enclosure is annexed and has an issuance date of February 23, 2017 (Notice of motion, exhibit H).

Upon a review of the record submitted by the parties and the relevant law, the court finds that Pace has satisfied its initial prima facie burden of demonstrating that it did not have a duty to maintain the sidewalk area where the accident occurred and that it did not cause or create the alleged sidewalk condition thereon (*see Hsu v City of New York*, 145 AD3d 759, 759-60 [2d Dept 2016]). Opposition to the instant motion has been submitted by Consolidated as well as plaintiff, whom incorporates by reference all of the arguments made by Consolidated. Despite its contention that the instant motion is premature, the court finds that Consolidated has failed to submit sufficient evidence in admissible form to demonstrate that further discovery would lead to relevant evidence regarding Pace's liability for the subject accident (*see Mogul v Baptiste*, 161 AD3d 847, 848 [2d Dept 2018]). Consolidated argues that it entered into an agreement with Pace with respect to the erection of the sidewalk shed, however, the court notes that none of the three contracts Consolidated proffers in opposition were signed by Pace, and none identify any obligations on behalf of Pace (*see* Pace affirmation in opp, exhibit B). Furthermore, in its reply, Pace denies having ever entered into any

agreements with any entity other than 176 Broadway regarding projects at the subject premises (Reply affirmation, ¶ 12). Accordingly, the court grants the portion of Pace's motion for partial summary judgment dismissing the claims in plaintiff's complaint insofar as asserted against it.

Upon a review of the record submitted, the court also grants the portion of Pace's motion for summary judgment dismissing all cross-claims asserted against it for common law and contractual indemnification, as well as failure to procure insurance. The court notes that none of the three agreements Pace entered into with 176 Broadway contain indemnification provisions or provisions obligating it to procure insurance, and in opposition none of the parties have submitted any evidence in this regard (Notice of motion, exhibits D, F & G). Moreover, in order "[t]o establish a claim for common-law indemnification, the party seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684 [2d Dept 2005], quoting *Correia v Professional Data Mgt. Inc.*, 259 AD2d 60, 65 [1st Dept 1999]; *see Zubaidi v Hasbani*, 136 AD3d 703, 704 [2d Dept 2016]). In light of the lack of evidence demonstrating that Pace caused or created the sidewalk condition at issue here, the court finds that there are no triable issues of fact with respect to whether Pace was guilty of some negligence. Accordingly, the court grants the portion of Pace's motion for summary judgment dismissing the cross-claims asserted against it for common law indemnification.

CAPITAL ONE'S MOTION FOR SUMMARY JUDGMENT

The court now turns to the motion for summary judgment made by Capital One. Capital One contends that it cannot be held liable for the subject accident because it did not own the subject premises and therefore did not possess a statutory duty to maintain the exterior portions of the building (Attorney affirmation, ¶ 26). Capital One further contends that it cannot be held liable

because it did not create or have notice of the alleged condition on the sidewalk, nor did it make any special use of the sidewalk and had no connection to the work being performed on the facade of the building at the time of the subject accident (*id.* at ¶ ¶ 30-31, 34). Capital One further asserts that it did not have any contract for indemnification and, therefore, all cross claims asserted against it for indemnification should be dismissed. Capital One contends that any cross-claims asserted against it for contribution should likewise be dismissed.

In support of its motion, Capital One submits an affidavit from James Masker ("Mr. Masker") and a copy of the commercial lease agreement between Capital One and Thureon Properties, Ltd., which rented the subject premises to Capital One. In his affidavit, Mr. Maskers avers, among other things, that Capital One "did not contract or subcontract with any entity to perform work, including on the facades and/or sidewalks" at the subject premises, that Capital One "did not hire any company to perform maintenance, including on the facades and/or sidewalks" at the subject premises, and that "[p]rior to and including September 27, 2016, no employees from [Capital One] managed, repaired or maintained the abutting sidewalk, facades" at the subject premises (Masker aff, ¶ ¶ 9-10, 12).

With respect to the proffered lease agreement, the court notes that in paragraph 4 it states, in pertinent part, that "Owner shall maintain and repair the public portions of the building, both exterior and interior," yet later provides that "Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto. . ." (Notice of motion, exhibit K, ¶ 4). In the Rider to the lease, there is a further sidewalk provision which provides that the landlord "shall be responsible for snow, ice and litter removal from the sidewalk outside the demised premises" (*id.* at Rider to Lease Agreement, ¶ 72). However, the provision also allows the landlord to receive reimbursement in the form of "additional rent" from the tenant in such instances (*id.*).

Upon a review of the record submitted by the parties and the relevant law, Capital One's motion for summary judgment is denied without prejudice as premature, with leave to renew upon completion of discovery (CPLR 3212 [f]; *Rodriguez*, 120 AD3d at 1331). The court finds that Capital One has not satisfied its initial prima facie burden of demonstrating entitlement to judgment as a matter of law at this juncture (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]).

As a general common law rule, "[a]n owner or occupier of land which abuts a public sidewalk owes no duty to maintain the sidewalk in a safe condition, and liability may not be imposed upon it for injuries sustained . . . except where the abutting owner or lessee either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the owner or lessee the obligation to maintain the sidewalk . . ." (*O'Toole v City of Yonkers*, 107 AD3d 866, 867 [2d Dept 2013]; *Campos v Midway Cabinets, Inc.*, 51 AD3d 843, 844 [2d Dept 2008]). Moreover, it is well-settled that "the provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party[,]" such as a pedestrian (*Hsu*, 145 AD3d at 760). Notwithstanding, "where a lease agreement is so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk, the tenant may be liable to a third party" (*id.* [internal citations and quotation marks omitted]). Here, in light of the competing sidewalk obligations for the landlord and tenant in the lease agreement, the court finds that further discovery in this matter is warranted in order to determine Capital One's liability for the subject accident. Accordingly, the court denies Capital One's motion for summary judgment.

CONCLUSION

Accordingly, York's motion for summary judgment is denied in its entirety without prejudice with leave to renew upon completion of discovery. Capital One's motion is likewise denied in its entirety without prejudice with leave to renew upon completion of discovery. Pace's motion for summary judgment dismissing the complaint and all cross-claims as asserted against it is granted in its entirety. Pace's claims are hereby severed from the instant action. The action shall continue against the remaining defendants. The parties are reminded of their appearance in the **Central Compliance Part** on **December 5, 2018.**

The foregoing constitutes the decision and order of the court.

For Clerks use only
MG #5
MD #3 + 4
Motion Seq. #
3, 4, 5

OCT 11 2018

ENTER

HON. LARRY D. MARTIN
J.S.C.

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

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