Vionito v Jaks Realty Enter. Corp.
2019 NY Slip Op 33300(U)
November 4, 2019
Supreme Court, New York County
Docket Number: 153448/2016
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 153448/2016

ADAM VIONITO,

Plaintiff,

MOTION SEQ. NO. 005 and 006

- v -

JAKS REALTY ENTERPRISE CORP., TOUBA MATHLABOUL FAWZAINI ELECTRONICS, MATHLABOUL FAWZAINI ELECTRONICS CORPORATION, EAST HARLEM GENERAL CONSTRUCTION CORPORATION,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131

were read on this motion to/for SUMMARY JUDGMENT.

Motion sequence numbers 005 and 006 are hereby consolidated for disposition.

In this personal injury action commenced by plaintiff Adam Vionito, defendant Jaks Realty Enterprise Corp. (Jaks Realty) moves (motion sequence 005), pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint and all cross claims alleged against it. Defendant Mathlaboul Fawzaini Electronics Corporation (MFEC) moves (motion sequence 006), pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint and all cross claims alleged against it. Jaks Realty cross-moves (motion sequence 006), pursuant to CPLR 3212, for an order granting it summary judgment on its cross claims for contractual indemnification and breach of contract against MFEC.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff alleges that, on the morning of June 18, 2015, he was injured when he tripped and fell after an unidentified person opened doors to the cellar in front of an electronics store (the store or the demised premises) located at 131 West 116th Street, New York, New York (the building). The doors were located on the sidewalk in front of the building. MFEC, a commercial tenant and occupant of part of the first floor of the building, operated the store. Jaks Realty owned the building and leased the store to MFEC. There was another commercial tenant on the first floor and 18 residential tenants on the remaining floors. Surveillance video taken on the day of the accident, as well as plaintiff's deposition testimony, reflect that someone inside the cellar suddenly opened the sidewalk cellar doors while plaintiff was walking over them, causing him to fall.

At his deposition, plaintiff testified that he owned a trash collection business, that MFEC was a client of his, and that he was walking to the store to give MFEC an invoice. The store had "a cellar door right in front and then there is a little path to walk into the store . . . " Doc. 83 at 13. The video footage from the date of the accident indicates that there were two trash cans on one side of the cellar doors and an orange cone located on the edge of the other side.[1]

Plaintiff testified that he did not see any garbage cans but that he saw an orange cone. He recalled that he "was walking and then I just fell on the floor. I - - then had a pain - - in other words, he tripped me up with my left leg . . . . He lifted up the gate of the cellar and took me out with my left leg. I fell down and he slammed the door and caught my right foot inside the two gates and closed the door . . . ." *Id.* at 22. Plaintiff did not allege that there was anything wrong

[1] Plaintiff's business collects MFEC's garbage in bags and the trash cans did not belong to MFEC.

with the concrete or sidewalk. Nor did plaintiff allege that there was anything wrong with the cellar doors; he merely maintained that they were lifted up just as he was "in stride." *Id.* at 3.

Alexandria Siena, president of Jaks Realty, testified that there was only one cellar entrance to the building and it was in front of MFEC's store. According to Siena, Jaks Realty hired defendant East Harlem Construction Corporation (EHC) to repair the rear wall of the building and that the said entity was performing work at the building on the date of the alleged incident.[2] EHC had access the cellar in order to perform its work and could only access the cellar through the sidewalk doors. Siena recalled that EHC usually placed a cone on top of the cellar doors while performing its work since "they were going in and out" of the cellar. Doc. 92 at 18. The superintendent of the building also placed an orange cone on the cellar doors if there was a reason for him to go into the cellar.

Siena admitted that only the building superintendent and the contractor working in the building had keys to the cellar doors and that no tenants were permitted in the cellar. Doc. 92 at 28-29. She further stated that, pursuant to its lease with Jaks Realty, MFEC was required to maintain the sidewalk and to indemnify Jaks Realty for any injuries occurring thereon. Doc. 92 at 47. When asked whether she considered if the sidewalk doors doors part of the sidewalk, she responded that the doors "were on the sidewalk." Doc. 92 at 48. Siena also testified that, pursuant to the lease, MFEC was required to maintain insurance for the benefit of Jaks Realty.

According to Abdalahad Cisse, owner of MFEC, only EHC and the superintendent employed by Jaks Realty had keys to unlock the cellar doors. Doc. 121 at 17. Cisse testified at his deposition that MFEC could not access the basement and was never given either an interior key to the basement or a cellar door key. Doc. 121 at 19. Cisse represented that MFEC was

[2] By order entered April 9, 2018, this Court granted plaintiff a default judgment against EHC. Doc. 67.

responsible for keeping the sidewalk clean and that it removed snow and garbage to keep the sidewalk clean for its customers. Cisse never touched or moved the orange cone that was sometimes on top of the cellar doors. Additionally, the garbage cans on top of the cellar doors did not belong to MFEC and he never moved them. Cisse saw "the super go in and out" of the cellar doors but was never asked to place the cone anywhere. Doc. 121 at 13. He also saw construction workers using the cellar doors.

The lease provided, in pertinent part, that MFEC "will take good care of the demised premises, fixtures and appurtenances" and make repairs necessary to preserve them in good condition." Doc. 82, at par. 2. The lease rider provided that "[s]idewalks and curbs, the width of rental length, (in front) of premises, shall be maintained by [MFEC]." Doc. 82 at par. 15. The rider expressly states that MFEC "does not have use of the basement or cellar space on the demised premises, without the written consent of the landlord." Doc. 82 at par. 25.

The rider to the lease required MFEC to provide "general liability policies of insurance," in the amount of $250,000, "protecting the landlord against any liability whatsoever occasioned by accident or disaster on or about the demised premises or any appurtenances thereto." Doc. 82 at par. 7.

The indemnification provision in the lease rider provided as follows:

> INDEMNITY: [MFEC] shall indemnify and hold harmless [Jaks Realty] from and against any and all liability, fines, suits, claims, demands and actions, and cost of any kind or nature by anyone whosoever, due to or arising out of any (a) breach, violation or non-performance of any covenant or condition or agreement in this lease set forth and herein contained on the part of [MFEC] to be fulfilled, kept, observed and performed, and/or any damages to person or property occasioned by [MFEC's] use and occupancy of the demised premises, and/or (b) any injury to person or persons, including injury or death, resulting at any time therefrom, occurring in or about the demised premises and/or sidewalks in front of the same, to the extent of one million ($1,000,000) Dollars."

Id., ¶ 8.

Plaintiff filed an amended complaint against defendants, sounding in negligence, alleging that defendants controlled the cellar doors and maintained them in a dangerous and defective condition, causing injury to plaintiff, "in that, while walking past the premises, the Defendants individually, and/or by and through [their] agents, servants and/or employees opened the cellar door hitting the Plaintiff in the leg causing him to fall and have the cellar door shut on his right foot." Doc. 49 at par. 18. Further, plaintiff alleged that his injuries were caused by defendants' failure to maintain the cellar doors "in a suitable safe condition." Doc. 49 at par. 21.[3]

In its answer to the amended complaint, Jaks Realty asserted cross claims against MFEC. Its first, second, third, and fourth cross claims sought contribution, common law and contractual indemnification, and breach of contract for failure to procure insurance, respectively. Doc. 52.

Motion for Summary Judgment By Jaks Realty (Motion Sequence 005)

In its motion for summary judgment, Jaks Realty argues that it did not breach its duty to maintain the sidewalk. Plaintiff did not claim that there was anything wrong with the sidewalk itself, nor was there a defect with the cellar doors. In addition, Jaks Realty argues that it did not create the allegedly dangerous condition of opening the cellar doors, nor did it have actual or constructive notice of the condition. The video footage and testimony demonstrates that plaintiff was injured when an unidentified employee of EHC, or its subcontractor, suddenly opened the cellar door. There was an orange cone placed on one edge of the cellar doors and two garbage cans lined up on the other edge. The cellars doors were on the sidewalk in front of the storefront

[3] Plaintiff was granted leave to amend his complaint to add EHC as a defendant. Doc. 43. EHC never appeared in this action and, on April 5, 2018, this Court granted plaintiff's motion seeking a default judgment against it. Doc. 67.

window, but did not block the store's front door and entranceway. According to Jaks Realty, plaintiff ignored these barricades and warnings, and walked over the cellar doors, in between the cone and the garbage cans in order to enter the store. Jaks Realty maintains that EHC had access to the cellar doors and that it cannot be liable for EHC's actions since it did not control the means or methods of EHC's work. Specifically, Jaks Realty maintains that it was not present at the time of the accident, did not place the cone or garbage cans on the cellar doors, and did not open the cellar door causing plaintiff to fall. It further insists that, since someone suddenly opened the cellar doors, it had no notice of any dangerous condition.

In opposition to the motion, plaintiff argues that Jaks Realty is liable for his injuries because it failed to maintain the sidewalk in a safe condition pursuant to Administrative Law § 7-210. Plaintiff further asserts that although EHC or one of its subcontractors opened the cellar door, thereby causing plaintiff's injuries, Jaks Realty is still liable because it was aware that the cellar doors would be accessed in connection with EHC's work. Plaintiff asserts that "based on the knowledge of [Jaks Realty] that construction was being done on his premises and that the cellar doors were going to be accessed, Jaks Realty's duty of care in its performance was non-delegable." Plaintiff's memorandum of law at 5.

In reply, Jaks Realty argues that since it did not create or have notice of the allegedly dangerous condition, it cannot be liable herein.

MFEC's Motion for Summary Judgment (Motion Sequence 006)

MFEC alleges that it cannot be liable for plaintiff's injury since it had no duty to maintain the cellar doors. It argues that Jaks Realty had exclusive control over the cellar doors, that it (MFEC) did not rent the cellar, and that it had no duty to maintain the cellar doors. Although

the lease required MFEC to maintain the sidewalk, it insists that it did not have the duty to repair an area controlled by Jaks Realty, such as the cellar doors. Thus, asserts MFEC, Jaks Realty and EHC must be liable for the plaintiff's injuries. Moreover, asserts MFEC, Jaks Realty had a nondelegable duty to maintain the sidewalk in front of the building.

MFEC further argues that Jaks Realty's first cross claim, for contribution, must be dismissed, since MFEC had no duty to maintain the cellar doors and no duty to the plaintiff in tort. It also asserts that the cross claims for common law and contractual indemnification should be dismissed because Jaks Realty had a nondelegable duty to maintain the sidewalk. MFEC further argues that Jaks Realty's cross claim for breach of contract must be dismissed since it (MFEC) was not responsible in any way for the cellar doors.

Plaintiff argues that MFEC's motion must be denied as untimely since a stipulation required that motions for summary judgment were to be made within 60 days after the filing of the note of issue. The note of issue was filed on November 13, 2018 and MFEC's motion was filed on January 14, 2019, 62 days later. Further, plaintiff argues that triable issues of fact remain as to whether MFEC is liable for plaintiff's injuries, including the identity of the individual who opened the cellar doors, and whether MFEC had the duty to maintain the sidewalk. Plaintiff also asserts that MFEC was responsible for cleaning the sidewalk and cellar doors.

Although Jaks Realty reiterates that it believes plaintiff's claims have no merit, it agrees with plaintiff that MFEC's motion for summary judgment is untimely and should not be considered. In addition, Jaks Realty argues that, although it hired EHC, it is not liable for that entity's negligence because it did not control the manner in which EHC's work was performed. On the date on the accident, Jaks Realty's superintendent was not at the building and did not

place the garbage cans down anywhere. Jaks Realty also maintains that it did not place the cone in the area of the cellar doors and that it was not responsible for doing so.

Jaks Realty cross-moves for summary judgment on its cross claims against MFEC for contractual indemnification and breach of contract. In asserting that it is entitled to contractual indemnification, Jaks Realty, relying on paragraphs 8 and 15 of the lease rider, argues that the lease requires MFEC to indemnify it for any injuries resulting from, or occurring in or about, the demised premises, including the sidewalks, and that no showing of negligence on MFEC's part is required to trigger the indemnification provision. Doc. 113.

Jaks Realty further asserts that the lease requires MFEC to maintain the sidewalks and that, if a factfinder determines that plaintiff's injuries resulted from MFEC's failure to maintain the sidewalk, MFEC would be in breach of the lease, and also would be contractually liable to indemnify Jaks Realty for such breach.

Regarding the cross claim for breach of contract for failure to procure insurance, pursuant to the lease rider, MFEC agreed to "provide and keep in force during the term of this lease for the benefit of the landlord, general liability policies or insurance, in standard form, protecting the landlord against any liability whatsoever . . . ." Doc. 82 at par. 7. It is undisputed that MFEC never purchased such insurance. Jaks Realty maintains that, as result of MFEC's failure to procure insurance it was "left without insurance against plaintiff's claims, and has had to pay out-of-pocket for all legal services and will have to pay out-of-pocket for any judgment entered against it." Doc. 113 at par. 21. As a result, MFEC is seeking summary judgment on this cross claim for breach of contract.

In opposition, MFEC argues that Jaks Realty's cross motion should be denied, since Jaks Realty has not offered proof that an insurer would cover a claim that occurred outside of

MFEC's store. MFEC also argues that, since it only leased the store, it would not have been able to obtain insurance covering the sidewalk. Doc. 128 a par. 14. Further, asserts MFEC, even if it had obtained insurance, the insurance would not have covered the cellar doors, which were not part of the demised premises.

MFEC makes similar arguments in opposition to Jaks Realty's cross motion for summary judgment on the contractual indemnification claim. MFEC asserts, inter alia, that the indemnification provision is too broad to be enforceable. Further, MFEC maintains that the part of the provision referring to sidewalk liability should be void insofar as the sidewalk was not part of the demised premises.

LEGAL CONCLUSIONS

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). If such a showing is not made, "the motion must be denied, regardless of the sufficiency of the opposing papers." *Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 479 (1st Dept 2018). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). "A

motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

I. Jaks Realty's Motion for Summary Judgment (Motion Sequence 005)

> "To sustain a cause of action alleging negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries. If there is no duty of care owed by the defendant to the plaintiff, there can be no breach and, consequently, no liability can be imposed upon the defendant."

Mojica v Gannett Co., Inc., 71 AD3d 963, 965 (2d Dept 2010) (internal quotation marks and citations omitted).

Here, Jaks Realty argues that it has no duty to plaintiff for negligent acts of EHC, its contractor, because it did not control the manner in which EHC's work was performed. Jaks Realty maintains that it gave EHC the key to access the cellar so that the contractor could repair the rear wall of the building. It insists that no employee of Jaks Realty was present on the date of the accident and that EHC was responsible for placing the cone in a warning position while doing its work.

In general, "[o]ne who hires an independent contractor is not liable for the independent contractor's negligent acts because the employer has no right to control the manner in which the work is to be done." *Id.* at 965 (internal quotation marks and citation omitted). However, there are certain exceptions to this rule, including where a party "is under a duty to keep premises safe." *Backiel v Citibank, N.A.*, 299 AD2d 504, 505 (2d Dept 2002) (internal quotation marks and citation omitted); *see also Emmons v City of New York*, 283 AD2d 244, 245 (1st Dept 2001)

("[T]here are exceptions to this rule of non-liability, including situations where the work of the independent contractor is for the benefit of the owner of a building under a non-delegable duty not to cause harm to members of the public traveling on the nearby public sidewalk").

Thus, as the owner of the building, Jaks Realty had a "nondelegable duty to see that the maintenance of [its] building posed no hazard to those lawfully on the sidewalk." *Kopinska v Metal Bright Maintenance Co.*, 309 AD2d 633, 633-634 (1st Dept 2003); *see also Backiel v Citibank, N.A.*, 299 AD2d at 505 (citations omitted) ("Where, for example, premises are open to the public, the owner has a nondelegable duty to provide the public with a reasonably safe premises and a safe means of ingress and egress. This duty may not be delegated by the owner to its agents or employees or to an independent contractor").

Jaks Realty has failed to establish its prima facie entitlement to summary judgment because it has not shown that it took reasonable precautions to ensure the safety of pedestrians traversing the cellar doors. Plaintiff was walking in front of MFEC's store and was about to enter the demised premises when the cellar doors suddenly opened without warning. Jaks Realty knew that EHC or one of its subcontractors would be working at the building and provided EHC with keys to the cellar doors. Despite its argument that it was not present at the time of the incident, Jaks Realty is the owner of the building and, as noted above, had a "non-delegable duty not to cause harm to those traveling on the nearby public sidewalk." *Porteous v J-Tek Group, Inc.*, 125 AD3d 411, 412 (1st Dept 2015). Thus, Jacks Realty's argument that plaintiff ignored the warnings and barricades placed in the area of the cellar doors by EHC does not warrant the granting of its motion, although it will of course be free to raise the affirmative defense of comparative negligence at trial.

In support of its motion, Jaks Realty relies, inter alia, on *Fobbs v Rahimzada*, 39 AD3d 811 (2d Dept 2007), in which a premises owner was granted summary judgment dismissing the complaint where plaintiff tripped and fell on a public sidewalk when the cellar doors began to open. The Appellate Division held, in pertinent part, that the owner "established that the plaintiff's fall was the result of an unidentified person, presumably the agent and/or employee of a tenant in possession, opening the cellar doors from inside, and was not caused by any defect or dangerous condition concerning the cellar doors," and that plaintiff failed to raise a triable issue of fact in opposition. *Id.* at 811. However, the situation herein is distinguishable, since the person who opened the cellar doors was a contractor hired by Jaks Realty, and the contractor had no affiliation with MFEC. *See, e.g., Olivieri v GM Realty Co., LLC*, 37 AD3d 569, 570 (2d Dept 2007) ("defendant may be held vicariously liable for the negligence of its independent contractor if such negligence violated the defendant's nondelegable duty as the property owner to provide safe ingress and egress"). Indeed, as Siena admitted, MFEC was not permitted to enter the cellar. Doc. 92 at 28-29. Additionally, the work that EHC was hired to do was to benefit Jaks Realty.

Since Jaks Realty failed to establish, as a matter of law, that it did not have a duty to protect pedestrians from the type of occurrence which injured plaintiff, its motion must be denied.

II. MFEC's Motion for Summary Judgment (Motion Sequence 006)

Despite plaintiff's argument to the contrary, MFEC's motion for summary judgment is timely. General Construction Law § 25-a (1) provides that "[w]hen any period of time, computed from a certain day, within which or after which or before which an act is authorized or

required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day . . .." The parties were directed file motions for summary judgment within 60 days after the filing of the note of issue. *See* NYSCEF Doc. No. 98 at 2. The note of issue was filed on November 13, 2018 and the time to file summary judgment motions thus expired on January 12, 2019. However, since January 12, 2019 was a Saturday, MFEC had until the next business day, January 14, 2019, to file the motion and it did so on that date. Doc. 100. Thus, MFEC's motion for summary judgment is timely. *See e.g. Vazquez v Flesor*, 128 AD3d 808, 809 (2d Dept 2015) (internal quotation marks and citations omitted) ("Here, the last day to make the motion for summary judgment fell on a Saturday. Accordingly, the defendant was permitted to file the motion on the next succeeding business day. Therefore, the defendant's motion [for summary judgment], which was made the following Monday, was timely").

Turning to the merits of the application, "[a] defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence." *Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, 526 (1st Dept 2013) (internal quotation marks and citation omitted). MFEC has established its prima facie entitlement to summary judgment. by proving that it had no control over, or any duty to maintain, the cellar doors. The documentary evidence, including video footage, indicates that plaintiff was injured when an unidentified individual suddenly opened the cellars door as plaintiff was walking by. The orange warning cone and the garbage cans placed on the edge of the cellar doors did not belong to MFEC. Testimony from both Jaks Realty's president and MFEC's owner confirms that, although the cellar doors were in front of MFEC's store, MFEC had no control over the doors and was not even permitted to access the cellar without the permission of Jaks Realty.

Siena confirmed that no tenants were allowed to access the cellar, that only the superintendent and EHC had keys to unlock the cellar doors, and that the doors were opened from the inside of the cellar. Moreover, there is no evidence that MFEC made any special use of the cellar doors.

In opposition, plaintiff fails to raise a triable issue of fact as to whether MFEC created or had notice of the condition. Although the exact identity of the person who opened the cellar doors may be unknown, the video footage indicates that the person was wearing a hard construction hat and was not an MFEC employee.

Plaintiff's argument that the lease provision requiring MFEC to maintain the sidewalk warrants the denial of its motion is without merit. Plaintiff does not allege that a dangerous condition existed on the sidewalk. Although the lease requires MFEC to maintain the sidewalk and curb in front of the demised premises, into which sidewalk the cellar doors were built, it is clear that plaintiff's accident was not caused by a sidewalk defect or by any defect in the cellar doors. It is undisputed that plaintiff tripped while traversing the cellar doors when someone suddenly opened them. MFEC had no control over the cellar doors and was not even permitted to access the cellar. *See e.g. Kellogg v All Sts. Hous. Dev. Fund Co., Inc.*, 146 AD3d 615, 617 (1st Dept 2017) ("[A] tenant, and not the owner, of the relevant property . . . cannot be held liable to a third party in tort absent a showing that (a) it affirmatively caused or created the defect that caused plaintiff to trip, or (b) put the subject sidewalk to a 'special use' for its own benefit . . ."); *see also Hardie v 128 E. 86th St. Assoc., LLC*, 2018 NY Slip Op 31480(U) (Sup Ct New York County 2018) ("a commercial tenant is only liable to a third-party who injures himself on the vault doors of a premises if the tenant created the condition which caused the plaintiff's injuries") (citations omitted).

Further, the general lease provisions obligating MFEC to maintain the sidewalk are not so "comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk." *Abramson v Eden Farm, Inc.*, 70 AD3d 514, 514 (1st Dept 2010) (internal quotation marks and citations omitted). Thus, even if MFEC's duty, vis-a-vis the lease, to maintain the sidewalk included ensuring the safety of pedestrians when the cellar doors were open, which it does not, MFEC would only be liable to Jaks Realty, not to plaintiff.

In opposition to MFEC's motion and in support of its own motion for summary judgment on its cross claims, Jaks Realty argues that, pursuant to the lease, MFEC had a contractual duty to maintain the store and the sidewalk and curb in front of the demised premises. Further, the lease provides that MFEC shall indemnify Jaks Realty for claims arising out of MFEC's nonperformance of any provision of the lease. It claims that, if it is determined that plaintiff's injury resulted from a failure to maintain the sidewalk, MFEC would be required to indemnify Jaks Realty for breaching that covenant of the lease. In support of this argument, Jaks Realty relies on *Wahl v JCNYC, LLC* (133 AD3d 552 [1st Dept 2015]), which held, in relevant part, that:

> "Although the Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk, a tenant may be held liable to the owner for damages resulting from a violation of . . . [a] lease, which imposed on the tenant the obligation to repair or replace the sidewalk in front of [the property]."

Id. at 552 (internal quotation marks and citations omitted).

Jaks Realty's reliance on *Wahl* is misplaced, however, since plaintiff does not allege that he sustained damages as a result of MFEC's failure to maintain the sidewalk. Although the lease

required MFEC to maintain the sidewalk and curb in front of the store, MFEC was not obligated to repair or replace the sidewalk, and plaintiff does not even allege that the incident occurred due to a failure to repair the cellar doors. As noted previously, MFEC did not have the key to the cellar doors and was not even permitted to enter the cellar without the consent of Jaks Realty. Thus, MFEC had no control over, or any involvement with, the cellar doors.

Since plaintiff and Jaks Realty fail to raise a triable issue of fact as to whether MFEC had any duty related to the cellar doors, MFEC is granted summary judgment dismissing the complaint as against it.

III. Jaks Realty's Cross Claims Against MFEC

Common Law Indemnification

"[A]ny defendant whose liability to an injured plaintiff is merely secondary or vicarious is entitled to common-law indemnification from the actual wrongdoer who by actual misconduct caused the plaintiff's injuries, and whose liability to the plaintiff is therefore primary." *Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 366 (1st Dept 2006) (internal quotation marks and citations omitted). Since MFEC was not responsible for plaintiff's accident, it is thus entitled to summary judgment dismissing Jaks Realty's cross claim for common law indemnification.

Contribution

MFEC is entitled to summary judgment dismissing Jaks Realty's cross claim for contribution. A claim for contribution lies where two or more defendants are liable for the same injury. See CPLR 1411. Given that MFEC is not liable to plaintiff, Jaks Realty's cross claim for contribution as against it must fail.

Breach of Contract

It is well settled that "[a]n agreement to indemnify is separate and distinct from an agreement to procure insurance. *Mt. Hawley Ins. Co. v American States Ins. Co.*, 139 AD3d 497, 498 (1st Dept 2016). The Court of Appeals has held that a lease provision requiring a tenant to maintain insurance for the benefit of the landlord is "generally valid and enforceable." *Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 (2001). "A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with." *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 (2d Dept 2003).

Here, Jaks Realty has established its prima facie entitlement to summary judgment on its claim for breach of contract for failure to procure insurance. The lease between Jaks Realty and MFEC requires MFEC to provide a general liability insurance policy protecting Jaks Realty from any accident on or about the demised premises. It is undisputed that MFEC did not maintain an insurance policy naming Jaks Realty as an additional insured. MFEC's argument that an insurance company may not have provided coverage for the alleged incident is speculative and fails to raise a triable issue regarding whether MFEC breached its obligation under the lease to obtain such insurance.

"A landlord who has no knowledge of a tenant's failure to acquire the requisite insurance and is left uninsured may recover the full amount of the underlying tort liability and defense costs from the tenant." *Inchaustegui*, 96 NY2d at 114 (citations omitted). Here, Siena testified

that Jaks Realty had no insurance of its own covering the building (Doc. 92 at 24); that neither Siena nor Jaks Realty knew whether MFEC procured insurance protecting Jaks Realty as required by the lease; and that she never asked MFEC for proof that such insurance was in fact procured. Doc. 92 at 24, 27. Thus, Jaks Realty has not established that it had no knowledge of MFEC's failure to procure insurance.

Nevertheless, given the failure of MFEC to provide the required insurance coverage, Jaks Realty is granted summary judgment on its claim or breach of contract to procure insurance as against MFEC. Jaks Realty's damages on this claim, which are to be determined at trial, shall be limited to "any out-of-pocket expenses such as premiums and any additional costs incurred including deductibles, copayments and increased future premiums." *Amato v Rock-McGraw, Inc.*, 297 AD2d 217, 219 (1st Dept 2002).

Contractual Indemnification

"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., Inc.*, 70 NY2d 774, 777 (1987) (internal quotation marks and citation omitted). This Court finds that, under the circumstances herein, the branch of Jaks Realty's motion seeking contractual indemnification from MFEC must be denied.

In seeking summary judgment on its cross claim for contractual indemnification, Jaks Realty relies on the indemnification provision set forth at paragraph 8 of the lease rider, as well as paragraph 15 of the lease rider, the terms of both of which are set forth above. The indemnification provision requires that MFEC indemnify Jaks Realty for any liability arising

from any "breach, violation or non-performance of any covenant" in the lease. The covenant which Jaks Realty claims was breached was set forth at paragraph 15, which required MFEC to maintain the sidewalk and curb in front of the premises. However, there is no evidence that MFEC breached this provision by failing to maintain the sidewalk and curb. Rather, it is evident that plaintiff was injured when someone suddenly opened the cellar doors, over which MFEC had no control, as evidenced by the fact that MFEC did not have a key to the cellar doors and was not even permitted in the cellar.

Similarly, the alleged injury to plaintiff was not "occasioned by [MFEC's] use and occupancy of the demised premises", given that it did not have access to the cellar or its doors.

Finally, the indemnification provision requires MFEC to indemnify Jaks Realty for any personal injury sustained at the premises "resulting at any time therefrom". Although it is unclear whether "therefrom" refers to a breach of a lease covenant by MFEC or MFEC's use and occupancy of the premises, MFEC is not required, as discussed immediately above, to indemnify Jaks Realty under either scenario.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendant Jaks Realty Enterprise Corp.'s motion for summary judgment dismissing the complaint and all cross claims against it (motion sequence 005), is denied in its entirety; and it is further

ORDERED that defendant Mathlaboul Fawzaini Electronics Corporation's motion for summary judgment dismissing the complaint and all cross claims against it (motion sequence 006) is granted to the extent of dismissing the complaint and the cross claims against it by Jaks Realty Enterprise Corp. for contribution, common law indemnification and contractual indemnification, and the motion is denied with respect to the cross claim for breach of contract for failure to procure insurance; and it is further

ORDERED that the cross motion by defendant Jaks Realty Enterprise Corp. seeking summary judgment on its cross claims against Mathlaboul Fawzaini Electronics Corporation for contractual indemnification and breach of contract for failure to procure insurance (motion sequence 006) is granted only with respect to liability on the claim for breach of contract for failure to procure insurance, with damages on that claim to be determined at trial, and the motion is otherwise denied; and it is further

ORDERED that the complaint is hereby severed and dismissed in its entirety as against Mathlaboul Fawzaini Electronics Corporation, with costs and disbursements to Mathlaboul Fawzaini Electronics Corporation, as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that all remaining claims and cross claims shall continue; and it is further

ORDERED that, within 20 days of entry of this order, defendant Mathlaboul Fawzaini Electronics Corporation is to serve a copy of this order, with notice of entry, on all parties, as well as on the General Clerk's Office and on the County Clerk by efiling protocol; and it is further

ORDERED that the parties are directed to appear for a previously scheduled early settlement conference on January 16, 2020 at 11 a.m. at 80 Centre Street, Room 106; and it is further;

ORDERED that this constitutes the decision and order of the court.

11/4/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE