Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No.: 708432/2018
RUAIDHRI LYNE,

Plaintiff,

-against-

Motion
Date: January 8, 2020

Motion Cal. No.: 31, 32 and 33

Motion Sequence No.: 1, 2 and 3

GRAND AVENUE DACECA LLC,

Defendant.
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GRAND AVENUE DACECA LLC,

Third-Party Plaintiff,

-against-

PATRICK K, NEE AND SON CONTRACTING, INC. And CONNOLLY'S CORNER,

Third-Party Defendants.
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The following e-file papers numbered EF 47-53, 59-62 and 66-67 submitted and considered on this Motion Sequence 1 by plaintiff Ruaidhri Lyne (hereinafter referred to as "Plaintiff") for an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 603 and 1010 severing the Third-Party Action. The e-file papers numbered EF 14-22, 24-25, 27-35 and 40-45 submitted and considered on this Motion Sequence 2 by third-party defendant Patrick K, Nee and Son Contracting, Inc. (hereinafter referred to as "Defendant") seeking an Order pursuant to CPLR 3212 granting summary judgment dismissing the Third-Party Complaint and all cross claims as against Defendant, or in the alternative an Order pursuant to CPLR 603 and 1010 severing the Third-Party Action as against the Defendant. The e-file papers numbered EF55-56, 63-65 and 68 submitted and considered on this Motion Sequence 3 by defendant Connolly's Corner (hereinafter referred to as "Connolly's") seeking an Order pursuant to CPLR 3212 granting Connolly's summary judgment, dismissing the Third-Party Complaint and all cross- claims as against it, or alternatively pursuant to CPLR 603 and 1010 severing the Third-Party Action as against Connolly's and for such other and further relief as this Court deems just and proper.

Papers
Numbered

Motion Sequence #1

Notice of Motion..... EF 14-22
Affirmation in Further Support..... EF 24-25
Affirmation in Opposition..... EF 27-28
Notice of Cross Motion..... EF29-35
Reply..... EF 40
Affirmation in Opposition to Cross..... EF 41-45

Motion Sequence #2

Notice of Motion-Affidavits-Exhibits..... EF 47-53
Affirmation in Opposition..... EF 59-62
Reply- Affidavits..... EF 66-67

Motion Sequence #3

Notice of Motion- Memo of Law..... EF 55-56
Affirmation in Opposition..... EF 63-65
Reply..... EF 68

This premises liability action was commenced by Plaintiff on June 1, 2018 as a result of a trip and fall accident which occurred on May 1, 2018. Plaintiff alleges he fell due to an uneven sidewalk slab located on the Mazeau Street side of a sidewalk adjacent to the premises located at 72-02 and 72-04 Grand Avenue, Maspeth, NY (hereinafter referred to as the "Premises"). The Premises is owned by defendant/ third-party plaintiff Grand Avenue Daceca LLC, (hereinafter referred to as "Grand"). In support of an Order severing the Third-Party Action Defendant points to both the Preliminary Conference Order and Compliance Conference Order dated July 25, 2018 and February 4, 2019 respectively.

The Preliminary Conference Order states in relevant part, "All third-party actions shall be commenced on or before the Compliance Conference date. Joinder of a third-party action beyond this date without leave of Court may result in a severance."

The Compliance Conference Order states in relevant part, "ORDERED that any further third party actions shall be commenced promptly upon discovery of the identity of the third-party defendant(s), but not more than 30 days after the completion of depositions unless for good cause shown."

Chambers had a telephone conference with all the parties on January 14, 2020, concerning the submission of the e-filed papers numbered 59-62. The papers were timely e-filed and submitted, however, the e-filing website reflected that the papers were in opposition to motion sequence number three as opposed to motion sequence number two. All parties consented to the correction of the error. This Court notes despite the improper filing, the label on the papers indicated that it was in opposition to number two, furthermore, the movant had the opportunity to reply and did so. This Court finds minimal prejudice and will consider the papers.

First, this Court will consider Defendant's and Connolly's motions for summary judgment.

Law and Application

It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering admissible evidence to eliminate any material issues of fact from the case. (*Winegrad v New York Univeristy Medical Center*. 64 NY2d 851 [1985].) Summary judgment eliminates cases from the Court's trial calendar which can be properly resolved by the Court as a matter of law (*Andre v Pomeroy*, 35 NY2d 361 [1974]). As summary judgment is a drastic remedy, it should not be granted where there is doubt about the existence of any issues (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

"As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property." (*See Calabro v Harbour at Blue Point Home Owners Assn., Inc.*, 120 AD3d 462 [2d Dept 2014].) Defendant has the burden of demonstrating prima facie that it did not create the hazardous condition, and did not have actual or constructive knowledge of the condition for a sufficient length of time to remedy it (*see Levine v G.F. Holding, Inc.*, 139 AD3d 910 [2d Dept 2016]; *Amendola v City of New York*, 89 AD3d 775 [2d Dept 2011]). To meet its initial burden on the issue of constructive notice, defendant must offer evidence as to when the area in question was last cleaned or inspected in relation to the time that plaintiff fell. (*See Lauture v Board of Managers at Vista at Kingsgate, Section II*. 172 AD3d 1351 [2d Dept 2019]; *Ahmetaj v Mountainview Condominium*, 171 AD3d 683 [2d Dept 2019]; *Baez v Willow Wood Assocs., LP*, 159 AD3d 785 [2d Dept 2018].) "A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a length of time sufficient to afford the defendant a reasonable opportunity to discover and remedy it." (*See Williams v NYCHA*, 119 AD3d 857 [2d Dept 2017]; *see also Adamson v Radford Mgmt. Assocs.*, 151 AD3d 913 [2d Dept 2017]; *Amendola v City of New York*, 89 AD3d 775 [2d Dept 2011].)

Defendant

Grand contends Defendant worked on the sidewalk at the Premises prior to Plaintiff's incident. Defendant has neither ownership, occupancy, control nor special use of the property therefore, Defendant has demonstrated prima facie entitlement to summary judgment. The burden now shifts to the opposition to raise a triable issue of fact. Grand agues Defendant's motion is

premature because discovery is not complete. Grand argues there are issues of fact surrounding the full extent of Defendant's work at the Premises.

Grand testified as follows:

Q: Have you, Grand Avenue Daceca ever replaced any of the sidewalk flags along the Mazeau Street side of the property as depicted in any of the Exhibits A, B, C, and D?
A: I don't remember that, I'm sorry (page 37-38, lines 24-25 and 2-4).

Q: Did the contractor do any work on the Mazeau Street at the time that the front of the building was paved?
A: Yes, he did work.
Q: What work did he do along Mazeau Street?

> Mr. Leyden: Are you listening to the question? This picture shows Grand Avenue. Did he do work at that same time on Mazeau Street?
> The Witness: That's what I said. I don't remember,
> Mr. Leyden: Because you just said yes. You have to listen to what the question is and answer it (page 38-39 lines 22-25 and 2-11).

The above testimony does not raise a triable issue of fact. Grand further opines that Defendant's self serving affidavit is insufficient because it is pure speculation, assuming arguendo what Grand opines is true this Court considers the Permit issued by the New York City Department of Transportation on December 29, 2017. The Permit indicates that it only covers repairs to the sidewalk on 71-20 Grand Avenue to 72 street. This Permit corroborates Defendant's contention that they only did work on Grand Avenue.

Connolly

Here, Connolly does not own, occupy or control the Premises however, Plaintiff alleges Connolly has special use of the parking lot adjacent to the Premises. Connolly argues it neither entered into a written agreement nor contract to lease or perform repairs at the Premises.

Grand testified as follows:

Q: Connolly's uses that lot to park cars on?
A: They park cars there, yes.
Q: Do they do that with your permission?
A: Of course, of course.
Q: Do they pay you rent to do that?
A: No rent.
Q: Do you have any document with Connolly's that memorializes the agreement to allow Connolly's to park cars on the corner property?
A: Well, the agreement was parking and keep it clean. That was the agreement. Keep it clean and

in good shape.
Q: Was this a verbal agreement or written?
A: Verbal agreement.
Q: Who was the verbal agreement with?
A: With the owner of the restaurant (page 10, lines 8-24).

The pictures provided depicting the entrance of the parking lot and pictures depicting the area where Plaintiff fell indicate that Plaintiff did not fall at the entrance of or inside the parking lot. Even assuming arguendo Connolly was required to "Keep it clean and in good shape", it is not clear that any breach of such an agreement caused Plaintiff's injuries. Grand has not presented any evidence to indicate that Connolly performed repairs to the portion of the sidewalk at issue, had special use of the portion of the sidewalk at issue, or was responsible for maintenance and repairs to the portion of the sidewalk at issue. "The principle of special use, a narrow exception to the general rule, imposes an obligation on the abutting landowner, where he puts part of a public way to a special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others" (*Lisa Breland v Bayridge Air Rights, Inc.*, 65 AD3d 559, 560 [2d Dept 2009]).

Common Law Indemnification

To establish a claim for common-law indemnification, "the one 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 Enterprises, Ltd.*, 14 AD3d 681, 684-85 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; accord *Priestly v Montefiore Med. Ctr., Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]) or "in the absence of any negligence" that the proposed indemnitor "had the authority to direct, supervise, and control the work giving rise to the injury" (*Hernandez v Two E. End Ave. Apt. Corp.*, 303 AD2d 556, 557 [2d Dept 2003]).

Here, Grand has failed to establish that either Connolly or Defendant were negligent and that such negligence contributed to the injuries Plaintiff sustained. Also, Grand has failed to establish that either Connolly or Grand "had the authority to direct, supervise, and control the work giving rise to the injury" (*id*). Therefore it is,

ORDERED, that the branch of Connolly's motion for summary judgment dismissing the Third-Party Complaint and all cross-claims as against them is granted ; and it is further,

ORDERED, that the branch of Defendant's (Patrick K, Nee and Son Contracting, Inc.) motion for summary judgment dismissing the Third-Party Complaint and all cross-claims as against them is granted ; and it is further,

ORDERED, that the Third-Party Complaint is dismissed; and it is further,

ORDERED, that the Plaintiff's motion, the branch of Defendant's motion and the branch of Connoly's motion to sever the Third-Party Action pursuant to CPLR 603 and 1010 is denied as moot; and it is further,

ORDERED, that **Motion Sequence #1** is denied as moot; and it is further;

ORDERED, that **Motion Sequence #2** is granted in part and denied in part; and it is further,

ORDERED, that **Motion Sequence #3** is granted in part and denied in part.

The foregoing constitutes the decision and Order of this Court.

Dated: January 15, 2020

Hon. Chereé A. Buggs, JSC

FILED
JAN 28 2020
COUNTY CLERK
QUEENS COUNTY