SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT R. REED **PART 43**

Justice

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SUSAN BRANDNER,

Plaintiff,

- v -

BORICUA COLLEGE DEVELOPMENT CORP., INDIVIDUALLY AND D/B/A BORICUA COLLEGE, BORICUA COLLEGE, THE HISPANIC SOCIETY OF AMERICA, JAIME PATXOT, NEW YORK CITY LANDMARKS PRESERVATION COMMISSION,

Defendant.

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INDEX NO. 151166/2016

MOTION DATE 08/24/2020

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

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THE HISPANIC SOCIETY OF AMERICA

Plaintiff,

-against-

URBAN ARBORISTS, INC., NEW YORK CITY DEPARTMENT OF PARKS & RECREATION

Defendant.

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Third-Party
Index No. 595076/2017

The following e-filed documents, listed by NYSCEF document number (Motion 006) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 132, 133, 134, 135, 136, 137, 138, 139, 140

were read on this motion for JUDGMENT - SUMMARY.

ROBERT R. REED, J.:

In this action, plaintiff Susan Brandner (plaintiff) alleges personal injuries as a result of a trip and fall on a sidewalk which took place on December 20, 2014, in front of the premises located at 608 West 156th Street in Manhattan, New York. In motion sequence 006, third-party defendant Urban Arborists, Inc. (Urban), moves, pursuant to CPLR 3212, for an order granting

summary judgment and dismissing the third-party complaint of defendant/third-party plaintiff, The Hispanic Society of America (The Hispanic Society).

FACTUAL ALLEGATIONS

Plaintiff Susan Brandner's deposition

Plaintiff testified that she was injured on December 20, 2014, at 11:00 a.m. while she was walking her two dogs on 156th Street, between Riverside Drive and Broadway. Plaintiff maintains that she was in front of Boricua College when she fell. She testified that the sidewalk in front of 156th Street was made of bricks in a herringbone pattern. Plaintiff recalls that she was walking on the sidewalk, slightly towards the street side, when she tripped in an area to the left of a tree. Plaintiff maintains that the toe of her boot caught on an uneven surface which caused her to fall forward. Plaintiff reached out her right hand to break the fall, but continued to fall and then to strike her face on the bricks.

Plaintiff testified that the bricks which caused her to fall did not lay flat and that there was a difference of about two to three inches between the top brick and the level of the sidewalk. Plaintiff maintains that the sidewalk was a reddish color and that a grayish, rectangular shape of cement or stones created a border around the tree well. Plaintiff testified that at the time of her accident, she was looking forward. She was aware, moreover, that, on other occasions, complaints had been made to "311" by her neighbor and by an elevator worker regarding the poor condition of the subject sidewalk.

William Logan's deposition

William Logan (Logan) testified that he is the owner of Urban. Urban's work involves tree maintenance and services, including planting, removing, diagnosing, and pruning trees.

Logan testified that The Hispanic Society had requested Urban to visit its premises to assist with an issue regarding trees.

Logan testified that, after visiting the site, Urban proposed to expand tree pits at the site to a larger size for the health and stability of the trees. Logan testified that the standard size of tree pits had changed from a size of 5 by 5, to 5 by 10. Logan testified that "Belgian blocks" were to be placed around the edges of the subject tree pit. He recalled that the sidewalk was made of brick. Logan testified that it was a one-day project.

At his deposition, Logan reviewed an estimate and proposal form, as well as the permit from the Parks Department which states that the work was for the job location at 608 West 156th Street. Logan maintained that the work invoice states that he was to expand three brick-edged tree pits adjacent to The Hispanic Society, and cut bricks as needed to make smooth, level paving lifted by roots and cement in place, using Belgian block-paving edging.

Logan testified that the work invoice states that that there was a need for a concrete cutter, which is generally utilized to cut bricks in shorter lengths to keep them level. He testified that Urban was required to make the pit as level as possible given the conditions and to ensure that the tree had sufficient room to grow.

Logan testified:

> "Our job wasn't to work on the sidewalk, the job was to work on the tree. The tree, with the smaller pit. The tree, itself, was lifting the pavement. Part of what would happen and make the pit larger would eliminate that and if not, if the roots were small enough, we would cut the roots and if the roots were not small enough, we would try to further adjust the paving. The Parks gave us leeway. We wanted them to be 5 by 10, and they said we can adjust, if need be."

NYSCEF DOC. NO. 124, at 59.

Logan testified that, if he observed that the tree roots had lifted something that was beyond the one or two bricks area, Urban would have pruned the root or contacted the Parks Department to ask them how to proceed. Logan maintained that Urban's work was not guaranteed or warrantied.

At his deposition, Logan read a document in which he stated that the trees were doing well, but that they were making hash out of the stones, meaning they were lifting stones. He did not recall seeing any missing bricks or bricks that were unlevel when he finished the work. He maintains that the area in the photograph that he reviewed at the deposition with unlevel bricks and missing bricks would have been an area beyond his scope of repair under the subject contract.

Isaac Gdanski's deposition

Isaac Gdanski (Gdanski), supervisor of maintenance at The Hispanic Society at 155th Street in New York, testified that he oversaw five maintenance workers in December of 2014. Gdanski testified that the workers he supervised were responsible for maintaining the sidewalk surrounding the premises. Gdanski testified that the workers did not perform daily inspections. At his deposition, Gdanski reviewed photos of The Hispanic Society's premises, including a tree located in front of the building. He testified that the property behind the tree is the property of The Hispanic Society.

Gdanski testified that, between 1997 to December of 2014, repairs were made to the sidewalk in front of the Hispanic Society on 156th Street. He testified that, while he never received complaints about the condition of the subject sidewalk, Ramon Poyano (Poyano), a guard at the museum, told him of complaints. Gdanski remembers contacting "311" and making an appointment with the Parks Department regarding a complaint. After making the complaint,

the inspector from the Parks Department inspected the subject sidewalk. Gdanski recalled bricks were being lifted because of tree roots. At that time, Gdanski asked to have the roots of the tree shaved. However, the inspector responded that the Parks Department does not cut trees or shave roots. He provided Gdanski with the name of Urban and another company, and gave him specific measurements for widening the sidewalk.

Gdanski testified that, thereafter, Urban was contracted for the work. Gdanski testified that Urban's work took place in March of 2014. He maintains that Urban moved out bricks at the specification of the City and repaired the area around two trees. Gdanski testified that, following the work, the workers from Urban said that they could not repair the outside of the cobblestones or widen out the sidewalk anymore beyond the City's specifications. After Urban advised The Hispanic Society that it could not perform any work beyond the City's specifications, The Hispanic Society placed warning cones in the area.

Gdanski maintained that, after Urban completed the work, he did not follow up with the City or the Parks Department. Gdanski testified that, in December of 2014, he observed sidewalk bricks rising, and that the area was raised for about three years prior to Urban's work.

DISCUSSION

Urban contends that summary judgment must be granted as against The Hispanic Society dismissing the third-party complaint. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

The third-party complaint includes three causes of action against Urban. The first cause of action is for contractual indemnification. The Hispanic Society alleges that it entered into a contract with Urban and that, in the event of a recovery by plaintiff, Urban is liable to, and must indemnify, The Hispanic Society, holding it harmless. The Hispanic Society's second cause of action is for breach of contract. This cause of action alleges that, pursuant to the contract, Urban was to maintain insurance for liability arising from injury to persons or property, and that Urban breached its contract with The Hispanic Society by failing to provide indemnification and a defense.

Urban argues that it did not breach an agreement with The Hispanic Society and that it does not owe The Hispanic Society contractual indemnification. In support of its motion, Urban contends that the agreement it entered into with The Hispanic Society neither contains an indemnification provision, nor does it guarantee or warranty Urban's work. The Agreement provides, in part:

> "1. WORKMANSHIP AND INSURANCE
> All work to be performed by URBAN ARBORISTS, INC will be performed in a professional manner by experienced personnel and contractors with appropriate tools and equipment to properly complete all work contracted for in an expeditious and efficient manner. Unless otherwise indicated from the above and/or the front side of this form, URBAN ARBORISTS, INC. will remove all wood, brush and debris caused by the work performed. Stumps of the removed trees not contracted to be dug up will be cut to approximately twelve (12) inches above ground level. All employees of URBAN ARBORISTS, INC. are covered by Workers' Compensation Insurance and URBAN ARBORISTS, INC carries insurance for liability arising from injury to persons or property."

NYSCEF DOC. NO. 127, at 2-3.

"The right to contractual indemnification depends upon the specific language of the contract." *Trawally v City of New York*, 137 AD3d 492, 492-493 (1st Dept 2016). (citation and internal quotations omitted). "[T]he intention to indemnify can be clearly implied from the

language and purposes of the entire agreement and the surrounding facts and circumstances." *Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 310 (1st Dept 2003) (citation and internal quotation marks omitted). Here, while there was an agreement between The Hispanic Society and Urban for the work to be completed, the agreement fails to include a specific section regarding indemnification or an insurance requirement for indemnification purposes. In opposition, The Hispanic Society fails to discuss whether an indemnification clause exists or whether it was breached. As The Hispanic Society fails to oppose those parts of Urban's motion, the causes of action for breach of contract and for contractual indemnification must be dismissed. *See Genovese v Gambino*, 309 AD2d 832, 833 (2d Dept 2003).

Urban contends that the third cause of action for contribution must be dismissed. Urban argues that the condition which caused the plaintiff's fall pre-dated Urban's work; that Urban did not perform work on the site where plaintiff tripped, as it was outside the scope of the agreement; that the raised brick condition existed in its same state when Urban completed its work eleven months prior to plaintiff's incident; and that Urban did not have an obligation to return to the property. Urban contends that The Hispanic Society admitted that it was aware that the injury-causing condition existed both prior to plaintiff's fall and well after Urban completed its tree pit work. Urban argues that its work did not expand the width of the tree pits, but expanded the length of the tree pits.

Urban contends that it performed the work pursuant to the Parks Department's specifications, and that it alerted The Hispanic Society that it could not work beyond the parameters prescribed by the Park's Department. Urban argues that The Hispanic Society admitted that it was its responsibility to inspect and maintain the sidewalk when Urban

completed its work. Urban contends that The Hispanic Society never complained to Urban about the completed work.

In opposition, The Hispanic Society argues that, because the accident occurred directly outside of the tree pit, any tripping hazard was within the scope of the work performed by Urban. The Hispanic Society contends that Urban breached its duty of care in the performance of its tasks by failing to properly treat the sidewalk conditions immediately abutting the tree pit. It further argues that the Hispanic Society detrimentally relied on Urban, inasmuch as Urban failed to eliminate the sidewalk inconsistencies. The Hispanic Society contends the raised brick acted as an instrument of harm to plaintiff, and that The Hispanic Society detrimentally relied upon Urban's expertise in the area.

The Hispanic Society contends that the September 17, 2013 correspondence sent by Logan, the work order, the invoice, and photograph of the condition *together* create an issue of material fact. It argues that Urban was prepared to cut bricks and level the sidewalk. The Hispanic Society argues that the invoice submitted by Urban states that the work it performed included the leveling of all paving lifted by roots. The Hispanic Society contends that, based upon Logan's statements, it is evident that Urban worked beyond the tree pit, as it cut and adjusted bricks that were farther from the trunk in order to not damage the roots.

"Contribution is generally available as a remedy when two or more tort-feasers share in responsibility for an injury, in violation of duties they respectively owe to the injured person." *Trump Vil. Section 3 v New York State Hous. Fin.* Agency, 307 AD2d 891, 896 (1st Dept 2003) (internal quotation marks and citations omitted). "Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party." *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 (2002).

"Unlike foreseeability and causation, which are issues generally and more suitably entrusted to fact finder adjudication, the definition of the existence and scope of an alleged tortfeasor's duty is usually a legal, policy-laden declaration reserved for Judges to make prior to submitting anything to fact-finding or jury consideration." *Palka v Servicemaster Mgt. Servs. Corp.,* 83 NY2d 579, 585 (1994).

While "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party," the Court of Appeals has recognized three exceptions to the general rule: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely." *Espinal v Melville Snow Contrs.*, 98 NY2d at 138, 140 (citations and internal quotation marks omitted).

Here, The Hispanic Society fails to meet its burden to demonstrate that Urban breached a duty. First, The Hispanic Society fails to show that the work of Urban contributed to or caused the accident or launched a force or instrument of harm.

Logan testified:

> "Q. Would Urban Arborists have left the area and the sidewalk not have been level?
> A. No. I add to that, as I said before, we were only responsible for what was directly adjacent to the tree pit. The rest of the sidewalk was not level, we were not responsible for, and we didn't deal with that in any way.
> Q. To which I ask: How far away from the Belgian Block would you consider this area surrounding the tree pit?
> A. Directly adjacent to it (indicating).
> Q. Directly adjacent to it?
> A. The area is touching it (indicating).
> Q. One brick or two bricks out or five bricks out?

> A. Certainly not more than one or two. Our job with relation to the tree and to-what we were trying to level was the parts of the brick that had been lifted by tree roots or something in the tree (indicating).
> Q. And if you saw that the tree roots had lifted something, that was beyond the one or two brick area, what would you have done?
> A. We would have either pruned the root or we would have to contact Parks and ask them how to proceed (indicating)."

NYSCEF DOC. NO. 124, at 70-71.

Along with Logan's testimony that Urban was not responsible for the sidewalk outside of the tree pit that was not level and that was the location where plaintiff allegedly tripped, Gdanski testified that, at the time of the repairs, he was notified by workers from Urban that they could not repair outside of the cobblestones or widen the area beyond the City's specifications. While The Hispanic Society contends that the invoice submitted by Urban states that the work it performed included the leveling of all paving lifted by roots and cementing in place, the proposal fails to specify whether the paving included the area of sidewalk bricks on which plaintiff allegedly tripped.

Furthermore, The Hispanic Society fails to demonstrate that Urban had any comprehensive continuing responsibilities at the premises or owed a duty to plaintiff, since its work was completed at least nine months prior to plaintiff's accident. The agreement between The Hispanic Society and Urban did not require Urban to exclusively maintain the premises or displace the owner's duty to maintain the premises in a reasonably safe condition. *See DeCanio v Principal Bldg. Servs. Inc.,* 115 AD3d 579, 580 (1st Dept 2014).

The agreement specifically states:

> "Recommendations made by URBAN ARBORISTS, INC. ("Urban Arborists") are intended to minimize or reduce any hazardous conditions that may be present in a customer's trees. However, there is always a certain degree of inherent hazard and risk in all trees from breakage, failure or other causes or conditions. Some causes or conditions will be apparent, while others will require detailed inspection and

> evaluation. A detailed inspection and evaluation will normally detect potentially hazardous conditions, but there can be no guaranty or certainty that all hazardous conditions will be detected. While Urban Arborists is confident that its recommendations should reduce hazards and risks, they cannot be eliminated. There cannot be and there is no guaranty or certainly [sic] that efforts by Urban Arborists's to deal with hazardous conditions will always prevent breakage or failure of a tree."

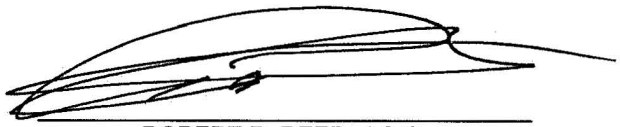
NYSCEF DOC. NO. 127, at 3. The agreement does not ensure that all hazards would be eliminated by Urban's work or provide for a continuing duty of maintenance.

Based upon the record, Urban meets its burden and demonstrates that it did not cause the subject accident or breach a duty to The Hispanic Society or to plaintiff. The Hispanic Society fails to meets its burden and does not demonstrate, other than by speculation, that Urban caused a defect in the sidewalk. Therefore, the cause of action for contribution must be dismissed.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that third-party defendant Urban Arborists, Inc.'s motion for summary judgment dismissing the third-party complaint of defendant/third-party plaintiff The Hispanic Society of America is granted as against it. The Clerk is directed, therefore, to enter judgment in favor of Urban Arborists, Inc., dismissing the third-party complaint as against third-party defendant Urban Arborists, Inc.



1/12/2021
DATE

ROBERT R. REED, J.S.C.

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