Xiuzhen Chen v Kings Kitchen E Inc.
2024 NY Slip Op 32309(U)
June 3, 2024
Supreme Court, New York County
Docket Number: Index No. 161462/2017
Judge: Louis L. Nock

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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XIUZHEN CHEN and ZHENTUAN CHEN,

Plaintiffs,

- v -

KINGS KITCHEN E INC., KINGS KITCHEN D INC., 92 EAST LLC, 47 DIVISION STREET TRADING INC., d/b/a LEE'S MARKET, and JOHN DOE,

Defendants.

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INDEX NO. 161462/2017

MOTION DATE 08/09/2022, 08/08/2022

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

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KINGS KITCHEN D INC.,

Third-Party Plaintiff,

-against-

47 DIVISION STREET TRADING INC., d/b/a LEE'S MARKET,

Third-Party Defendant.

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Third-Party
Index No. 595673/2018

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 149, 150, 153, 154, 157, 158, 159, 160, 161, 163, and 165

were read on this motion by defendant/third-party-plaintiff Kings Kitchen D Inc. for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 146, 147, 151, 152, 155, 156, 162, 164, and 166

were read on this motion by defendant 92 East LLC for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

In this negligence and personal injury action, Defendant/Third-Party Plaintiff Kings Kitchen D Inc. (hereinafter "KKD") moves pursuant to CPLR 3212 for an order granting it summary judgment and dismissing the amended complaint and all cross-claims against it (Motion

Sequence 003); and Defendant 92 East LLC moves pursuant to CPLR 3212 for an order granting it summary judgment in its favor on the issues of liability and contractual indemnification and dismissing all cross-claims against it (Motion Sequence 004).[1] KKD further moves for an order granting it summary judgment on its third-party claims and cross-claims for common-law indemnification and contribution against Defendant/Third-Party Defendant 47 Division Street Trading Inc. d/b/a Lee's Market (hereinafter "Lee's Market") and for an order permitting KKD to enter judgment with the Clerk of Court and against the plaintiffs with statutory costs and disbursements.

Background

Plaintiffs commenced this action by filing a Summons and Verified Complaint on December 28, 2017.[2] Plaintiffs allege that at approximately 11:20 a.m. on September 12, 2017, Plaintiff Xiuzhen Chen sustained injuries as a result of a fall through a sidewalk cellar opening adjacent to the premises located at 92 East Broadway, New York, New York. Plaintiff Zhentuan Chen is Plaintiff's husband and is suing for loss of consortium. At the time of the alleged incident, co-defendant 92 East LLC owned the subject premises, co-defendant KKD leased the subject premises and operated a restaurant there, and co-defendant Lee's Market was making a delivery

[1] Motion Sequence 003 was filed ten minutes subsequent to the deadline for summary judgment motions in this case. "The Supreme Court is afforded wide latitude with respect to determining whether good cause exists for permitting late motions. It may, as here, entertain belated motions in the interest of judicial economy where the opposing party fails to demonstrate prejudice." (*Boehme v A.P.P.L.E., A Program for Life Enrichment*, 298 A.D.2d 540, 541-542 [2d Dept 2002].) Here, no prejudice has been demonstrated by the *de minimis* lateness of this motion and the court elects to permit it.

[2] KKD filed a Verified Answer on March 12, 2018. Defendant 92 East LLC filed a Verified Answer on April 10, 2018. Plaintiffs subsequently discontinued their action as against Kings Kitchen E Inc., and 92 East LLC discontinued cross-claims as against Kings Kitchen E Inc. Plaintiffs served the Verified Bill of Particulars on May 3, 2019.

at the premises and one of its delivery persons stated that he was the one who opened the cellar door shortly prior to the alleged fall.[3]

Standards

A motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212[b]). "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. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). Once the movant has made a prima facie showing of entitlement to summary judgment, "[t]he party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests" (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]). "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions" do not create issues of fact and are inadequate in opposition to a motion for summary judgment (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980] [citations and quotation marks omitted]).

[3] On August 2, 2018, KKD filed a third-party complaint against Lee's Market alleging negligence and common-law indemnification and contribution. By so-ordered stipulation dated June 12, 2019, Lee's Market was added as a direct defendant and the caption was amended accordingly. Plaintiffs filed a supplemental summons and amended complaint which added Lee's Market as a direct defendant on August 5, 2019. Concurrently, The Third Dynasty Realty Corp. was removed from the action and caption. Lee's Market filed a Verified Answer on August 15, 2019. KKD filed a Verified Answer with Cross-Claims on August 23, 2019. Lee's Market filed a Third-Party Answer on August 28, 2018.

Discussion

92 East LLC's Motion (Structural Defect or Other Non-Delegable Duty):

The Complaint alleges that Defendant 92 East LLC was the owner and lessor of the premises, operated the premises, managed the premises, maintained the premises, controlled the premises, occupied the premises, and had a duty to keep the premises in a reasonably safe condition (*see,* NYSCEF Doc. No. 1, Complaint, ¶¶ 4-9). However, 92 East LLC argues that it was not responsible for the maintenance, operation, repair, or control of the cellar doors due to the terms of the lease agreement with KKD dated May 22, 2014.

Although an owner may ordinarily transfer to a commercial tenant its liability to third parties if the landlord is out of possession and the lease between the parties does not contain a right of reentry, this does not apply to nondelegable duties imposed on the owner by statute or ordinance which requires the owner to properly maintain the premises (*e.g., James v Blackmon*, 58 AD3d 808 [2d Dept 2009]). As observed in *Langston v Gonzalez* (39 Misc 3d 371, 377 [Sup Ct Kings County 2013]):

> Administrative Code § 7-210, combined with section 19-152, imposes a nondelegable duty upon property owners to maintain and repair the sidewalk abutting their property, and specifically imposes liability upon property owners for injuries resulting from a violation of the statute. . . .
>
> * * *
>
> The Administrative Code does not impose any duty on a commercial tenant, leaving that issue to the property owner and his contract (lease) with the tenant.
>
> * * *
>
> With regard to the duty to repair, section 19-152 (a) provides that a property owner is required to repair . . . "(ii) cellar doors that deflect greater than one inch when walked on, are not skid resistant or are otherwise in a dangerous or unsafe condition" . . . .
>
> * * *

Cellar doors are therefore part of the property owner's obligation under section 7-210. . . . (*See also Cucinotta v City of N.Y.*, 68 AD3d 682 [1st Dept 2009]; *Leitch-Henry v Doe Fund, Inc.*, 179 AD3d 655, 656 [2d Dept 2020].)

Here, however, the uncontested deposition testimony suggests that plaintiff fell through the cellar doors because they were open – not because the cellar doors were structurally unsound or otherwise non-compliant with relevant codes (*see, e.g., Langston, supra* ["Commercial tenants leasing all or part of the ground floor of a building have been held liable to third parties, for example, when they were found to have left the cellar doors open, and the plaintiff fell into the cellar"]). Furthermore, an expert affidavit from David E. Behnken, P.E., opines that the cellar doors were compliant with all relevant codes, contained no broken, damaged, or unsafe parts, and were reasonably safe and well maintained within a reasonable degree of engineering certainty. Plaintiff has provided nothing that rebuts this assertion.

"A properly functioning trapdoor that is left open by someone under the tenant's control is not a structural defect, either pursuant to the lease or under case law" (*Baez v Barnard Coll.*, 71 AD3d 585, 586 [1st Dept 2010], citing *Dexter v Horowitz Mgt.*, 267 AD2d 21, 22 [1st Dept 1999] ["there is no evidence that the trap door itself was defective or that it created an unsafe condition. The trap door 'could only become unsafe by an improper use, i.e., left in an open position.'"]; *see also Harrington v Azogues Corp.*, 191 AD3d 529 [1st Dept 2021]; *Yuying Qiu v J&J Grocery & Deli Corp.*, 115 AD3d 627 [1st Dept 2014]; *Raffa v Verni*, 139 AD3d 441 [1st Dept 2016]).

Even viewed in the light most favorable to the non-movant, this case implicates the well-established rule that owners do not possess a duty to warn where a condition is "readily observable by the reasonable use of one's senses" (*see, e.g., Orlando v Audax Const. Corp.*, 14 AD3d 500, 501 [2d Dept 2005]; *see also Reuscher v Pergament Home Ctrs.*, 247 AD2d 603, 603 [2d Dept

1998] ["since the display and its legs were readily observable by a reasonable use of one's senses, the defendant had no duty to warn the infant plaintiff of this condition."]).

Accordingly, defendant has successfully made out a *prima facie* case that the accident did not occur due to a structural defect or any other non-delegable duty. Defendant 92 East LLC's motion for an order granting it a judgment in its favor on the issues of liability and dismissing all cross-claims against it is, therefore, granted.

92 East LLC's Motion (Contractual Indemnification):

Defendant 92 East LLC also moves for summary judgment on the issue of contractual indemnification. Defendant 92 East LLC argues that it is not liable and is contractually indemnified due to the lease and accompanying rider signed by 92 East LLC and KKD. KKD opposes. The subject lease and its accompanying rider states, in relevant part, that:

> Tenant specifically agrees and confirms that Landlord shall be under no obligation to safeguard or secure the basement area licensed to tenant and shall be under no obligation to make any repairs to same of whatever nature, all such repairs to be borne by Tenant.

(Lease Rider art 41[B] [NYSCEF Doc. No. 82 at 8 of 51].)

> The Tenant further agrees to indemnify and hold the Landlord harmless from all claims for personal injuries…which occur as a result of the operation of the Tenant's business in and about the Premises, or which result from any work done in and about the Premises by the Tenant or any contractor selected by or for the tenant ….

(Lease Rider art 49[A] [titled "INSURANCE, LIABILITY, ETC."] [NYSCEF Doc. No. 82 at 19 of 51].)

> [A]ll liabilities, obligations, damages, fines, penalties, claims by third parties, costs and expenses, including reasonable attorneys' fees, paid, suffered or incurred as a result of…
>
> > (iii) by any misconduct or negligent act or omission of Tenant, its employees, agents, contractors, or invitees….

* * *

> (v) any use, non-use, possession, occupation, condition, operation, maintenance or management by Tenant of the Demised Premises, the licensed areas, or any part thereof,
>
> (vi) all fines, suits, proceedings, claims, demands and actions of any kind or nature whatsoever brought by anyone whomsoever arising or growing out of or in any wise connected with the Tenant's use, operation and maintenance of the Demised Premises and/or the licenses areas, or
>
> (vii) any accident, injury, or damage to any person…occurring in or about the Demised premises, the licensed areas, or any part thereof.

(Lease Rider art 64 [titled "INDEMNIFICATION"] [NYSCEF Doc. No. 82 at 31 of 51].) The lease also contains an insurance procurement provision, directing the tenant to name the landlord as an additional insured on the tenant's liability insurance policy but does not limit indemnification to the insurance policy (*see* Lease Rider art 49[A] [titled "INSURANCE, LIABILITY, ETC."] [NYSCEF Doc. No. 82 at 19 of 51]). Pursuant to the obligations in the Lease, KKD secured a Certificate of Insurance issued on September 13, 2017, with HDI Global Insurance which listed 92 East LLC as an additional insured.

"[T]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and surrounding circumstances" (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2d Dept 2010] [internal quotation marks and citations omitted]). Here, the plain language of the lease – most notably the language in the "INDEMNIFICATION" portion of the lease – clearly implies the promise to indemnify. However, KKD argues that these indemnification provisions are unenforceable because insufficient evidence has been provided that the parties to the lease were sophisticated and because the lease is void pursuant to General Obligations Law ("GOL") § 5-321 as it fails to limit the indemnification to damages caused by the tenant and fails to limit recovery by 92 East LLC to the insurance proceeds.

As a threshold matter, the court finds no reason to hold that the parties to this lease were insufficiently sophisticated. KKD has not provided anything to suggest that the owner is unsophisticated and instead only asserted that there is not enough evidence to suggest otherwise. However, the owner of KKD owns multiple other restaurants and the lease itself states that "Tenant warrants and represents that it has been represented by counsel of its choice, a licensed New York attorney, in connection with this Lease" (Lease, General Terms, Q). The court does not find sufficient reason to void the lease on the ground that the owner of KKD was insufficiently sophisticated to negotiate this lease.

KKD next argues that the indemnification provisions of the lease are void pursuant to the protections of GOL § 5-321, which states:

> Agreements exempting lessors from liability for negligence are void and unenforceable. Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

As seen in the relevant portions quoted above, the lease at issue here repeatedly limits the kinds of actions that are indemnified to those "connected with the Tenant's use" or "by Tenant." However, one clause of the agreement seems to be an outlier in this regard. Article 64(B)(vii) (NYSCEF Doc. No. 82 at 31 of 51) states that:

> (B) Tenant shall indemnify and save Landlord harmless from and against all liabilities, obligations, damages, fines, penalties, claims by third parties, costs and expenses, including reasonable attorneys' fees, paid, suffered or incurred as a result of…
>
> ***(vii) any accident, injury, or damage to any person or property occurring in or about the Demised Premises, the licensed areas, or any part thereof.***

(Emphasis added.)

This provision, unlike numerous other parts of the lease, does not expressly differentiate between negligence on the part of the lessor or lessee and, by its plain language, appears to exempt the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor. This exception would seem to swallow up the policy stated repeatedly in Article 64 (B), as well as the express provision in Article 49 (A) of the lease, titled "INSURANCE, LIABILITY, ETC.," which clearly and unequivocally limits indemnification to "claims for personal injuries . . . which occur as the result of the operation of the Tenant's business in and about the Premises . . . ." (Article 49 [A].)

The scribal anomaly of the one solitary clause that presents as inconsistent with no less than five other clauses within the same article (Article 64 [B]), and, significantly, with a broadly stated clause in Article 49 (A), which all limit indemnification to tenant action – in complete accord with GOL § 5-321 – brings into relevance the mandate of the Court of Appeals requiring courts to "read a contract 'as a harmonious and integrated whole' to determine and give effect to its purpose and intent" (*Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, N.A. v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017]; *see also, W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990] [a contract must be "read as a whole to determine its purpose and intent"]). To interpret the anomalous clause as allowing a result that openly conflicts with the rest of the parties' multiple articulations; to wit, that indemnification reaches even to the lessor's negligence, and as such, in direct conflict with the dictates of GOL § 5-321, would be to ignore the Court of Appeals' aforesaid mandate to apply an interpretation that is "harmonious" and "integrated" with the overall policy of limited indemnification openly manifest in the rest of the clauses governing the extent of the indemnification articulated by the parties in their contract. Thus, this court adopts an interpretation of subdivision vii of lease article 64 (B) as intending to

refer only to "any accident, injury, or damage to any person or property" ***caused by Tenant.*** The absence of that express qualifier – caused by Tenant – while lacking in scrivener's care, does not affect this court's reasonable understanding of the parties' intent to limit indemnification to negligence of KKD (the lessee), and not reaching to any negligence of 92 East LLC (the lessor) (*see also, Donohoe v Cuomo*, 38 NY3d 1, 13 [2022] ["A contract's silence on an issue does not 'create an ambiguity which opens the door to the admissibility of extrinsic evidence to determine the intent of the parties'"]; *id.* ["Determining whether a contract is ambiguous 'is an issue of law for the courts to decide'"]). The court reads that qualifier (caused by Tenant) into subdivision vii of lease article 64 (B) as "harmonious" and "integrated" with all the rest of the clauses in the lease addressing the aspect of indemnification (*Nomura, supra*).

Accordingly, the court finds the contractual indemnification provisions of the lease to be valid and enforceable and, therefore, grants 92 East LLC's motion for summary judgment on its assertion of contractual indemnification by KKD.

In regard to the foregoing, this court is fully aware of the holding in *Great Northern Ins. Co. v Interior Constr. Corp.* (7 NY3d 412 [2006]), which, in construing what appears to be an indemnification clause anomaly similar to the one in this case, was poised to void it under GOL 5-321 absent other considerations.[4] There is no indication in the record of that case that a completely free-standing indemnification article, totally extrinsic to the lease article in which the anomaly was found, existed, which made it abundantly clear that indemnification only applied in the limited circumstance of "personal injuries . . . which occur as the result of the operation of the Tenant's business," as lease article 49 (A) does in this case.

[4] Namely, the existence of demonstrably ample insurance coverage for lessor negligence (*see*, 7 NY3d at 419 & n 4).

KKD's Motion:

The court next turns to defendant KKD's motion for an order granting it summary judgment and dismissing the amended complaint and all cross-claims against it. "[I]t is for the court . . . to determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society [in general]. The scope of any such duty of care varies with the foreseeability of . . . possible harm. 'Generally, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property.' 'Thus, a tenant's common-law duty to maintain premises in a reasonably safe condition is limited to those areas which it occupies and controls, or makes a special use.'" (*Montalvo v Texas Roadhouse Holdings, LLC*, 200 AD3d 986, 987 [2d Dept 2021] [citations and quotation marks omitted; brackets in original].)

"To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Solomon v City of N.Y.*, 66 NY2d 1026, 1027 (1985); *see also, J.E. v Beth Israel Hosp.*, 295 AD2d 281 [1st Dept 2002]). Moreover:

> 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. Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof.

(*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008] [citations omitted]; *see also, e.g., Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994] ["liability could be predicated only on failure of defendants to remedy the danger presented by the liquid after actual or constructive notice of the condition."].)

KKD argues that it did not create the condition, did not have actual notice of the condition, and did not have constructive notice of the condition. In support, KKD points to the deposition testimony of Jian Wei Wu, the person making a delivery at the time of the alleged incident. Mr. Wu indicates that he opened the cellar door alone; that he witnessed plaintiff Xiuzhen Chen fall through it; that he was aware of the cones that KKD had made available for him but chose not to use them; and that he did not notify any workers at the restaurant of his arrival or that he had opened the cellar doors, until after the accident had occurred (*see*, NYSCEF Doc. No. 114 [Wu Transcript] at 69:7-19; 73:6-10; 58:5-10; 67:25-68:5). Based upon these statements, KKD argues that the incident occurred due to Mr. Wu's actions; that it had no knowledge of his actions prior to the incident; and that Mr. Wu did not exercise the precautions made available to him by KKD.

As a threshold matter, it is clear from the uncontested deposition testimony that the opened cellar doors were not created by KKD and that KKD did not have actual notice of the condition. Neither plaintiff nor Lee's Market have submitted anything to rebut these conclusions. However, they have raised sufficient questions of fact to render premature any determination that KKD lacked constructive notice as a matter of law.

It is uncontested that KKD contracted for deliveries to be made every day, often multiple times per day, by opening the cellar doors and without notifying the restaurant. It was not common practice for KKD to have the delivery person indicate that he had arrived; rather, the restaurant simply left the cellar door unlocked for whenever the delivery person arrived (*see*, NYSCEF Doc. No. 134 [Dong Transcript] at 66:13-24). The restaurant removed a metal bar on the inside of the cellar door at the start of the business day which would allow the delivery person to use the cellar

door, and the delivery person would make the delivery without notifying the restaurant that he had arrived (*see,* Dong Transcript at 68:3-17).[5]

However, there is also deposition testimony that the specific delivery order at issue in this matter was requested for a specific time. The general manager of the restaurant managed by KKD stated that:

> Q. The notation on this order that says that the order was to be delivered after 11:00, is that an instruction that was given by Kings Kitchen to Lee's Meat Trading Company?"
> A. We notice them at the time when we place order.
> Q. So at the time that this order was giving information was given to Lee's Meat Trading Company to make that delivery at some time after 11:00?
> A. Yes.
> Q. So Kings Kitchen would know when placing this order that it would be delivered at some time after 11:00?
> A. Yeah, you may say so.
>
> * * *
>
> Q. In a typical situation, though, when an order is requested to be delivered at a certain time, or after a certain time, Lee's Meat Trading Company would make that delivery approximately near that time or shortly thereafter; is that right?
> A. Yes.

(Dong Transcript at 83:18-85:14.) A copy of the delivery invoice has also been provided (NYSCEF Doc. No. 135 at 58 of 59). Furthermore, the delivery in question was made approximately near the requested time (11:00 o'clock) (*see*, Wu Transcript [NYSCEF Doc. No. 114] at 67:6-8). This presents a question of fact as to whether KKD ought to have been aware that

[5] Plaintiff cites authority for the premise that it is possible to establish constructive notice by demonstrating that the tenant was aware that a dangerous condition was being created regularly (*see, Langston v Gonzalez*, 39 Misc 3d 371, 375-76 [Sup Ct Kings County 2013], citing *Colon v New York Eye Surgery Assocs., P.C.*, 77 AD3d 597 [1st Dept 2010]). However, such cases typically involve a tenant claiming to be unaware of a structural defect – which plaintiff has failed to establish in this case (*see generally, Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994] ["a 'general awareness' that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall."]; *see also, Phillip v Young Men's Christian Assn.*, 117 AD3d 413, 413 [1st Dept 2014]).

the delivery was being made per its request and a reasonable jury might conclude that KKD possessed constructive notice that the delivery was being made at that time.

If a reasonable jury concluded that KKD had constructive notice, there is also deposition testimony that could support a further conclusion that KKD did not fulfill its duties to the plaintiff:

> Q. In such situations, does Kings Kitchen did [*sic*] anything with respect to the delivery with respect to the cones that would be placed near the cellar when the delivery is made?
> A. No.
>
> * * *
>
> Q. When Kings Kitchen request Lee's Trading Company to make a delivery after a specific time or at a specific time, does Kings Kitchen have any employees go outside to meet whoever is delivering, or making the delivery for Lee's Meat Trading Company at approximately the time when the delivery is expected to be made?
> A. No.

(Dong Transcript at 85:15-86:10.) Furthermore, KKD was aware of this potential issue, as the owner of KKD – Jianzhi Li – had instructed the general manager and employees to place the cones every time the cellar door was opened:

> Q. Well, specifically, I am asking, when you first told the manager certain instructions about using the basement door, what did you tell them? What were those instructions?
> A. Yeah, when the – before they open, they have to put the cone. That's why I bought, you know, like a few cones for them to block the area before they open, yeah.
> Q. Is that something you expected the employees to do whenever the cellar doors were being used?
> A. Yes.
> Q. Why did you want them to do that?
> A. You know, for people to, you know, notify the door open, because, you know, it's a street. So, yeah, just let them know, you know, they were working on something. Like when they take out garbage, they also put something. And when they deliver something to downstairs, they put something, so, yeah.
>
> * * *
>
> Q. Was it also to prevent pedestrians from falling into the cellar?
> A. Yes, this one, yeah, the major concern to me.

* * *

Q. Was it your expectation that they would use the cones whenever the cellar door would be opened?
A. Yes.
Q. Was it your expectation that it would be the employees of Kings Kitchen that would be putting out these cones when the cellar door would be open?
A. Yes.

* * *

Q. Is that something that you told them should be done every time when those cellar doors are being used?
A. Yes.

* * *

Q. On the date of the accident, September 12th of 2017, was it still your expectation that employees would put out cones whenever the cellar door was in use?
A. Yes.

(NYSCEF Doc. No. 139 [Li Transcript] at 73:22-80:23.) There is also testimony indicating that such measures were impractical, such as testimony by the general manager of the restaurant:

Q. Did Kings Kitchen do anything to make sure vendors that were making deliveries would actually use the cones that were behind the door?
A. Well, there's no way we can do it because each time when they did the delivery, the time was not affixed.
Q. So vendors would be coming to make deliveries into the cellar door at various times throughout the day that weren't always the same from day to day?
A. Yes.
Q. Would Kings Kitchen have notice of what time a vendor would come make delivery to the cellar on a given date before they made the delivery?
A. No. We do not know in advance.

(Dong Transcript at 73:8-24.) Resolving these issues involves questions of fact that are best determined by a jury; not on a motion for summary judgment.

As such, KKD's motion for an order granting it summary judgment and dismissing the amended complaint and all cross-claims against it is denied.

KKD's further request – for an order granting it summary judgment on its third-party claims and cross-claims for common-law indemnification and contribution against Lee's Market and for an order permitting KKD to enter judgment with the Clerk of the Court and against the plaintiffs with statutory costs and disbursements – is also denied, as KKD has not established entitlement to judgment (*see, e.g., Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681 [2d Dept 2005] ["to establish a claim for common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence but must also prove that the proposed indemnitor was negligent."]).

Conclusion

Accordingly, it is hereby

ORDERED, that Motion Sequence No. 003 (motion by Defendant/Third-Party Plaintiff Kings Kitchen D Inc. pursuant to CPLR 3212 for an order granting it summary judgment and dismissing the amended complaint and all cross-claims against it) is denied; and it is further

ORDERED, that Motion Sequence No. 004 (motion by Defendant 92 East LLC pursuant to CPLR 3212 for an order granting it a judgment in its favor on the issues of liability and contractual indemnification and dismissing all cross-claims against it) is granted.

This constitutes the decision and order of the court.

ENTER:

6/3/2024
DATE

LOUIS L. NOCK, 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