SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. Justice PART 52

FOX, GAIL

- v -

NEW SCHOOL

INDEX NO. 112521/09

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision. This case is hereby transferred to a non-city part as the City is no longer a defendant in this action

FILED

JUN 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/10/11

CK

CYNTHIA S. KERN J.S.C.

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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GAIL FOX,

Plaintiff,

-against-

DECISION AND ORDER

THE NEW SCHOOL, S.E.A. CONSTRUCTION, INC., and PAL GENERAL CONSTRUCTION CORP.,

Index No. 112521/09

Defendants.

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THE NEW SCHOOL,

Third-party Plaintiff,

-against-

Third-party Index No. 590120/10

THE CITY OF NEW YORK,

Third-party Defendant.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	

Plaintiff commenced this action against defendants to recover for injuries she incurred when she fell on a sidewalk. Defendant The New School then commenced a third-party action

against the City of New York (the "City") seeking indemnification and contribution. The City has now brought a motion for summary judgment to dismiss the third-party claim against it on the ground that it has no liability pursuant to Section 7-210 of the Administrative Code because the accident occurred on a sidewalk for which it has no responsibility. The third-party plaintiffs argue that summary judgment should be denied because, although it is undisputed that plaintiff fell on the sidewalk, tree roots extending from a tree in a tree well caused the sidewalk to become uneven and therefore caused the accident. For the reasons stated below, the third-party action against the City is hereby dismissed.

The City of New York is not liable for injuries arising from defective sidewalk conditions pursuant to §7-210 of the Administrative Code, which shifted liability for sidewalk defects from the City to the adjacent landowner except where the adjacent property is an owner-occupied one-, two- or three-family dwelling. Section 7-210 provides in pertinent part:

> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk... shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.
>
> c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (I) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition.

In the instant case, it is undisputed that the abutting property did not fall into one of the exceptions enumerated by §7-210.

However, the City can still be held liable for injuries resulting from a defective sidewalk condition that it "caused or created" or if the sidewalk was used for a "special use" which

conferred a benefit upon the City. *See Scavuzzo v City of New York*, 47 A.D.3d 793 (2nd Dept 2008); *Fernandez v City of New York*, 19 Misc.3d 1135(A) (Sup Ct, Kings Cty 2008). If plaintiff claims that the City caused or created the condition, it is the plaintiff's burden to submit evidence to that effect. *See Roman v City of New York*, 38 A.D.3d 442 (1st Dept 2007); *Koehler v Incorporated Village of Lindenhurst*, 42 A.D.3d 438 (2nd Dept 2007); *Shannon v Village of Rockville Centre*, 39 A.D.3d 528 (2nd Dept 2007).

In the instant case, the court must first determine whether the City could be liable for a defective sidewalk condition created by the roots of a City-owned tree before deciding the issues regarding indemnification and contribution. There are a number of cases which have addressed this issue and have held that the abutting landowner is responsible for any dangerous conditions on the sidewalk, even if those conditions are caused by City-owned tree roots. *Seplow v Solil Mgmt Corp.*, 15 Misc.3d 1138(A) (Sup Ct., N.Y. Cty, 2007); *Satram v City of New York*, 24 Misc.3d 1233(A) (Sup Ct, Kings Cty 2009); *Falco v Jennings Hall Sr. Citizen Housing Development Fund, Inc.*, 19 Misc.3d 1007(A) (Sup Ct, Kings Cty 2008); *Goss v Park Briar Owners, Inc.*, 14 Misc.3d 1239A (Sup Ct., Kings Cty 2007). "[W]here the sidewalk may have been damaged by the tree roots of the curbside tree, it is clear that under the law, the owners are responsible for remedying the condition and are liable for damages that may occur because of the defect." *Seplow*, 15 Misc.3d 1138(A). The court further explained that "[t]he City assumes no duty by the mere fact of planting the tree, and does not acquire a duty of care when the tree's roots cause the sidewalk flags to break or become uneven." *Id.* In *Satram, Falco* and *Goss*, the courts held that the abutting landowner was liable and the City was not for a sidewalk defect caused by City-owned tree roots. *See Satram*, 24 Misc.3d 1233(A); *Falco*, 19 Misc.3d 1107(A);

Goss, 14 Misc.3d 1239(A).

These cases all base their holdings on earlier Appellate Division cases decided before §7-210 took effect, but whose reasoning is analogous and applicable. One such case is *Simmons v Guthrie*, 304 A.D.2d 819 (2nd Dept 2003), in which the court held that an abutting landowner is not liable for damage caused by tree roots unless a statute expressly imposes such liability. Similarly, in *Gitterman v City of New York*, also decided before §7-210 took effect, the First Department held that "a landowner is not responsible for damage caused to a sidewalk by the roots of a tree" and that the planting of the tree itself does not constitute an act of affirmative negligence. 300 A.D.2d 157 (1st Dept 2002) (citations omitted). The court further held that the fact of the tree roots affecting the sidewalk flags "does not, of itself, raise an issue of fact as to negligence and causation." *Id.*

This court agrees, finding that the adjacent landowner is liable for a sidewalk defect, even if the defect is caused by the roots of a tree planted by the City in a City-owned tree well. The New School's citation to *Vucetovic v Epsom Downs*, 10 N.Y.3d 517, 521 (2008), which held that the City is liable for accidents involving negligence regarding tree wells, is irrelevant unless the facts show that plaintiff actually tripped over or fell in the tree well, as was the case in *Vucetovic*. *See Satram*, 24 Misc.3d 1233(A) (finding citation to *Vucetovic* in this context misplaced); *Falco*, 19 Misc.3d 1107(A) (same).

Because the landowner is liable for negligence if it did not properly maintain the sidewalk and the City is not liable even if its tree's roots caused a defective condition on the sidewalk, defendant the New School's claims for indemnification or contribution against the City must be dismissed. A claim for "indemnity involves an attempt to shift the entire loss from one who is

compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for the loss because it was the actual wrongdoer. " *Trustees of Columbia University v Mitchell/Giurgola associates*, 109 A.D.2d 449 (1st Dept 1985). The right to indemnification can be created by an express contract or may be implied by law. *Id.* Implied indemnity allows one who "is held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer." *Id.* In the present case, the third-party plaintiff does not have any contractual claim for indemnification against the City as it has not been able to produce any contract despite the City's demands. It also will not have any common law indemnification claim against the City as it will only be held liable in the action brought by plaintiff if it is found to be affirmatively negligent. There will not be any vicarious liability imposed against it in the main action based on the negligence of the City. If it is found that plaintiff actually tripped and fell in or over the tree well, the City may be found to be responsible for the accident, but in that case, the New School will be found to not have any responsibility for the accident. If it is found that plaintiff tripped and fell over a sidewalk flag which was broken or uneven due to the roots of a City-owned tree, only the New School will be liable. Under these circumstances, the New School does not have a claim for common law claim indemnification against the City.

The New School also does not have any claim against the City for contribution. The "right to contribution and apportionment of liability among alleged multiple wrongdoers arises when they each owe a duty to plaintiff or to each other and by breaching their respective duties they contribute to plaintiff's ultimate injuries. This is so regardless of whether they are liable under different theories, so long as their wrongdoing contributes to the damage or injury

involved." *Id.* at 454. In the present case, the third-party plaintiff does not have any claim for contribution against the City as there is no alleged wrongdoing on each of their respective parts which would have contributed to plaintiff's injuries. Either the fact finder is going to find that the accident occurred on the sidewalk flag in which case the third-party plaintiff would potentially be responsible or the fact finder will find the accident occurred in the tree well in which case the City would potentially be held responsible. However, this is not a case where there is potential wrongdoing on the part of the third-party plaintiff and the City which would have both contributed to plaintiff's injuries. Although plaintiff argues that this not an either/or case and that both of these defendants could have contributed to plaintiff's accident, the case law holding that the landowner is responsible for sidewalk defects caused by City-owned tree roots of a tree planted in a tree well renders this a legal impossibility. Under these circumstances, there cannot be any valid claim of contribution by the third-party plaintiff against the City.

Finally, no further discovery is required on this issue. As the court held in *Seplow*, "no discovery undertaken by the third-party plaintiffs" will change the legal principle that the City is not liable for sidewalk defects caused by the roots of a City-owned tree planted in a tree well. 15 Misc.3d 1138(A).

Based on the foregoing, the City's motion for summary judgment dismissing the third-party complaint and any cross-claims against it is granted. This constitutes the decision and order of the court.

Dated: 6/10/11

J.S.C.