

**Pagan v Brixmor Prop. Group, Inc.**

2025 NY Slip Op 34747(U)

January 14, 2025

Supreme Court, Bronx County

Docket Number: Index No. 32047/2019E

Judge: Bianka Perez

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 8**

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VIONA L. PAGAN,  
Plaintiff,

Index No. 32047/2019E

-against-

**Hon. Bianka Perez**

BRIXMOR PROPERTY GROUP, INC.

Justice Supreme Court

Defendant.

-----X

BRIXMOR PROPERTY GROUP, INC.,  
Third-Party Plaintiff,

-against-

NEW YORK MAINTENANCE GROUP, INC.

Third-Party Defendant.

-----X

The following documents were read on these motions (**Seq. 2, 3, 4**) for **PREFERENCE** and **SUMMARY JUDGMENT** submitted on **August 19, 2024** and **October 16, 2024**.

Mot. Seq. 2: Notice of Motion - Exhibits and Affidavits Annexed	NYSCEF No(s). 37-42
Answering Affidavit and Exhibits	NYSCEF No(s). N/A
Mot. Seq. 3: Notice of Motion - Exhibits and Affidavits Annexed	NYSCEF No(s). 43-57
Answering Affidavit and Exhibits	NYSCEF No(s). 74
Mot. Seq. 4: Notice of Motion - Exhibits and Affidavits Annexed	NYSCEF No(s). 58-71
Answering Affidavit and Exhibits	NYSCEF No(s). 72-73
Affirmation in Reply	NYSCEF No(s). 76

Upon the foregoing papers, Plaintiff moves under motion seq. 2 for an Order pursuant to CPLR §3403 for trial preference based on her age. Defendants do not oppose.

Defendant and Third-Party Plaintiff BRIXMOR PROPERTY GROUP, INC. (“Brixmor”) moves under motion seq. 3 for an Order pursuant to CPLR §3212 granting defendant Brixmor judgment over and against Third-Party Defendant New York Maintenance Group, Inc (“NYM”) on its contractual indemnification cross-claims. Third-Party Defendant NYM opposes.

Third-Party Defendant NYM moves under motion seq. 4 for an Order pursuant to CPLR §3212, granting summary Third-Party Defendant NYM summary judgment and dismissing

Defendant/Third-Party Plaintiff Brixmor's Third-Party Complaint in its entirety. Defendant/Third-Party Plaintiff Brixmor opposes.

Plaintiff commenced the instant action to recover for injuries allegedly sustained on August 10, 2019, when she was caused to trip and fall after she stepped in a pothole and fell in the parking lot of the premises owned by Defendant/Third-Party Plaintiff Brixmor, located at Highridge Plaza on Central Park Avenue in Yonkers New York. Plaintiff testified at her deposition that she was walking behind her parked car to go to the driver's side, when she stepped in a hole and fell (*see* NYSCEF Doc. #50, Exh. E, Pg. 23-24). Defendant/Third-Party Brixmor maintains that it has a contract with Third-Party Defendant NYM for NYM to perform maintenance and to report any unsafe conditions on the premises. Defendant/Third-Party Brixmor argues that the instant matter triggers the indemnity clause in its contract with Third-Party Defendant NYM. Third-Party Defendant NYM argues that it was contracted to perform sweeping and porter services, not pothole repair, and that the indemnification clause of the contract with Brixmor is not applicable.

Motion Seq. 2: Trial Preference

In support of her motion, Plaintiff submits her NYC Driver's License, which indicates that she was born in 1950, making her 74 years of age (NYSCEF # 40, Exh. B). The mandatory language of CPLR 3403(a)(4) provides for a trial preference in any action where, as here, a party has reached the age of 70 (*see Tylel v. Battery Beer Distributors, Inc.*, 194 AD2d 330, 330 [1st Dept 1993]). Accordingly, Plaintiff's motion for trial preference is granted, unopposed, as she has reached 74 years of age.

Motions Seq. 3 & 4: Summary Judgment

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept. 2006]). When deciding a summary judgment motion, the court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d

395, 404 [1957]). The court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v. Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223, 231 [1978]).

Summary judgment is the procedural equivalent of a trial (*Mendoza v. Highpoint Associates, IX, LLC*, 83 AD3d 1 [1st Dept. 2011]). It is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Rotuba Extruders Inc., supra*, 231]). The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence, in admissible form, to eliminate any material issues of fact from the case (*Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad, supra* at 853).

In support of Defendant/Third-Party Plaintiff Brixmor's motion, seq. 3, for summary judgment, Brixmor submits Plaintiff's deposition transcript, the deposition transcript of Nicole Cicillini ("Cicillini"), a Vice President of NYM at the time of the alleged accident; and the deposition transcript of John Saladino ("Saladino"), the Senior Property Manager of Brixmor. In addition, Defendant/Third-Party Plaintiff Brixmor annexed photographs of the alleged pothole, an inspection report dated June 10, 2019. Brixmor also annexed the Master Services Agreement between Brixmor and NYM and Schedule A to the Master Services Agreement.

Third-Party Defendant NYM opposes arguing that Brixmor failed to meet their prima facie burden as their submissions create issues of fact as to the nature and notice of the defect and whether the indemnification provision of the contract would have been triggered.

In support of Third-Party Defendant NYM's motion, seq. 4, for summary judgment, movant submits Plaintiff's deposition transcript, the deposition transcript of Cicillini, a Vice President of NYM at the time of the alleged accident; and the deposition transcript of Saladino, the Senior Property Manager of Brixmor. Additionally, movant annexed the Master Services Agreement between Brixmor and NYM and Schedule A to the Master Services Agreement.

In opposition, Defendant/Third-Party Plaintiff Brixmor argues that NYM failed to meet their prima facie burden, arguing that the indemnity provision in the contract is triggered as Brixmor only needs to show that Plaintiff's claim arises or in some way relates to NYM's services on the premises. Brixmor further argues that there does not need to be a finding of negligence on

the part of NYM, rather, plaintiff's claim of negligence is sufficient to trigger the indemnity provision in the contract. Finally, Brixmor annexes a 2024 decision by Justice Tinari in which the Master Services Agreement and Scope of Services between Brixmor and NYM was examined, though the annexed 2024 decision is not binding on this Court.

"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 N.Y.2d 774, 777 [1987]); quoting *Margolin v. New York Life Ins. Co.*, 32 N.Y.2d 149, 153 [1973]; see also *Karwowski v. 1407 Broadway Real Estate LLC*, 160 A.D.3d 82 [1st Dept 2018]; *Torres v. Morse Diesel Intl., Inc.*, 14 A.D.3d 401, 403 [1st Dept. 2005]). "The right to contractual indemnification depends upon the specific language of the contract," (*Trawally v. City of New York*, 137 A.D.3d 492, 492-93 [1st Dept 2016], quoting *Alfaro v. 65 W. 13<sup>th</sup> Acquisition, LLC*, 74 A.D.3d 1255, 1255 [2d Dept 2010]) and indemnity contracts "must be strictly construed so as to avoid reading unintended duties into them," (*905 5<sup>th</sup> Assoc., Inc. v. Weintraub*, 85 A.D.3d 667, 668 [1st Dept. 2011]).

Section 17 of the Master Services Agreement contains the following provision, in relevant part:

To the fullest extent permitted by law, Vendor shall defend, indemnify, and hold harmless Owner and its respective agents, officers, servants, employees, shareholders, successors, and assigns from and against any and all claims, demands, suits, proceedings, liabilities, judgments, awards losses, damages, costs and expenses...on account of bodily injury ... sustained by any person or persons, personal injury sustained by any person or persons ... directly or indirectly arising out of or resulting from or in any way connected with or related to the work or failure to perform the work by Vendor or the work of any subcontractor, whether or not due or claimed to be due in whole or in part to the active, passive or concurrent negligence of fault of a party indemnified hereunder or any other person or persons and whether or not the performance of the work or failure to perform work shall be in accordance with or in violation of the provisions of this Agreement and whether or not such claims, demands, suits or proceedings are just, unjust, groundless, false or fraudulent; and Vendor shall and does hereby assume and agrees to pay for the defense of all such claims, demands, suits, and proceedings.

Section 17 of the Master Services Agreement further provides, “If Vendor fails to perform its obligations under this Agreement, Vendor shall be liable to Owner for the loss or damage that Owner suffers or incurs as a result of such failure.” (NYSCEF Doc. 54 and 69).

Brixmor contends plaintiff’s claims arose out of NYM’s alleged duty pursuant to Part 3(B) of Schedule A of the Master Services Agreement to immediately report, “Any unsafe conditions such as potholes in the parking lot, uneven sidewalks or ice conditions” (NYSCEF Doc. 55 and 70). After reviewing the agreement herein, this Court finds that the pertinent provisions are not “comprehensive and exclusive, so as to entirely displace the owner’s duty to maintain the premises” (*Clark v. Kaplan*, 47 A.D.3d 462, 462 [1st Dept 2008]).

Schedule A of the agreement states that the vendor must report “any unsafe conditions such as potholes in the parking lot ... immediately to the proper Brixmor Property Manager,” (NYSCEF Doc. 70, Exh. K, Part 3[B]). Schedule A details specific maintenance tasks to be performed by vendor, none of which includes pothole repair. However, another clause of the agreement tasks vendor with maintaining the premises in good condition (*Id.* at Part 1[A]), and another requires vendor to provide hourly rates to apply to jobs requested outside of the contract (*Id.* At Part 5[A]). As such, the provisions of the agreement are ambiguous as to the responsibility of the vendor to repair. Moreover, pursuant to the testimony in this matter, NYM performed repairs for which the Brixmor Property Manager issued work orders (NYSCEF Doc. 67, Exh. H, Pg. 35). Testimony indicated that, historically, repairs to the premises performed by NYM included pothole repairs, if such repairs were requested (*Id.* at 31 and NYSCEF Doc. 68, Exh. I, Pg. 72).

Here, as Defendant/Third-Party Plaintiff Brixmor’s negligence in the underlying action is yet to be determined, the Brixmor’s motion, under motion seq. 3, is denied as premature (*see Harleysville Insurance Company v. United Fire Protection, Inc.*, 227 A.D. 3d 499 [1st Dept. 2024]). In addition, the issue of contractual indemnification cannot be decided as a matter of law as it is not clearly implied from the language of the agreement who is ultimately responsible to maintain the premises. Accordingly, Third-Party Defendant NYM’s motion, under motion seq. 4, to dismiss the third-party Complaint is also denied.

The court has considered the parties remaining arguments and finds them unavailing.

Accordingly, it is hereby

**ORDERED** that Plaintiff’s motion for a trial preference is granted, as unopposed, on the ground that she has reached the age of 70 years; and it is further

**ORDERED** that counsel for plaintiff shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office, who is hereby directed to place this case on the trial calendar at the head of said calendar except for actions in which a preference was previously granted; it is further

**ORDERED**, that Defendant/Third-Party Plaintiff Brixmor’s motion under motion seq. 3 for summary judgment is denied; it is further

**ORDERED**, that Third-Party Defendant NYM’s motion under motion seq. 4 for summary judgment is denied.

This constitutes the decision and order of the Court.

**Dated: January 14, 2025**

HON.  \_\_\_\_\_  
**BIANKA PEREZ, J.S.C.**

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- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY     CASE STILL ACTIVE
  - 2. MOTION IS.....  GRANTED    DENIED     GRANTED IN PART     OTHER
  - 3. CHECK IF APPROPRIATE.....  SETTLE ORDER     SUBMIT ORDER     TRANSFER  
 FIDUCIARY APPOINTMENT     REFEREE APPOINTMENT