SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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THOMAS M. MCCANN,

Plaintiff,

- v -

HMC TIMES SQUARE HOTEL, L.P., MARRIOTT INTERNATIONAL, INC.,

Defendant.

INDEX NO. 151068/2019

MOTION DATE 05/26/2023, 06/02/2023, 06/05/2023

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

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HMC TIMES SQUARE HOTEL, L.P., MARRIOTT INTERNATIONAL, INC.

Plaintiff,

-against-

PREMIER EXPOSITION SERVICES, M. SHANKEN COMMUNICATIONS, INC. D/B/A WHISKY ADVOCATE

Defendant.

Third-Party
Index No. 595420/2021

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 118, 121, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 175, 176, 178, 179, 180, 184, 187, 188, 191, 194, 195, 196

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 120, 122, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 177, 185, 189, 192, 197

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 123, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 173, 174, 181, 182, 183, 186, 190, 193, 198

were read on this motion to/for JUDGMENT - SUMMARY.

In this Labor Law action, defendants HMC Times Square Hotel, L.P. and Marriott International, Inc. (collectively "Defendants") move in Motion Sequence 001 for an order granting summary judgment dismissing the entirety of plaintiff Thomas McCann's ("Plaintiff") Complaint. In the alternative, Defendants move for summary judgment on their contractual indemnification cause of action against third-party defendant Premier Exposition Services ("Premier") or for summary judgment on their common law indemnification causes of action against Premier and third-party defendant M. Shanken Communications, Inc. d/b/a Whisky Advocate ("Shanken"). In Motion Sequence 002, Shanken moves for summary judgment dismissing Defendants' Third-Party Complaint against it. In Motion Sequence 003, Premier moves for summary judgment dismissing Defendants' Third-Party Complaint, Shanken's cross claims, and Plaintiff's Labor Law causes of action against Defendants. All of the motions are opposed and are consolidated herein for disposition.

Plaintiff alleges that he was injured while working at the Marriott Marquis Hotel at 1535 Broadway ("Marriott Marquis") on December 4, 2018. As a laborer with nonparty CSI Worldwide ("CSI"), he had been tasked with moving crates in and out of the Marriott Marquis' sixth floor ballroom incidental to the assembling and dismantling of temporary structures as part of an event run by Shanken, "Whisky Fest." Defendants are the owners and managers of the Marriott Marquis. Shanken had contracted with the Marriott Marquis to use the sixth floor ballroom for Whisky Fest. Premier was a general contractor and event planner employed by Shanken to operate the event that subcontracted with Plaintiff's employer, CSI, for labor.

Shortly after 10:00 p.m., Plaintiff and another coworker were moving a wheeled crate out of the ballroom through a set of double doors that led to a kitchen and then the freight elevator. Plaintiff was holding the front of the crate and walking backwards to steer it while the coworker

pushed it from behind. He alleges that there were other large carts and crates that had been placed haphazardly in the foyer immediately outside of the double doors and forced the crate to be wheeled at an awkward angle towards the door.

The double doors were usually held open by plastic "chocks" that were wedged in designated slots on the bottom. However, Plaintiff testified that he was unsure if the doors had been held open this way at the time of his accident. He testified that someone might have pressed a button to open the doors while he was steering the crate towards them and that they began to close at the time of his accident: "When the door closed – the door's open. When it closed and the crate's coming through, the only thing there is my fingers. That's the only thing that stopped the crate" (NYSCEF Doc. No. 67, Plaintiff EBT part 2 at 81). As Plaintiff entered the door, his left middle and ring fingers were crushed between the edge of the crate and the edge of the door and nearly amputated.

Plaintiff commenced this action on January 31, 2019 asserting violations of Labor Law §§ 200, 240(1), and 241(6) against Defendants. On May 7, 2021, Defendants commenced a third-party action against Premier and Shanken asserting claims of contractual indemnification, common law indemnification, and breach of contract for failure to procure insurance. In its Answer, Premier asserts counterclaims against Defendants for common law indemnification and contribution against Defendants and cross-claims against Shanken for common law indemnification and contribution. Shanken likewise asserts counterclaims against Defendants and crossclaims against Premier for common law indemnification, contractual indemnification, and breach of contract for failure to procure insurance.

Defendants now move in Motion Sequence 001 for an order granting summary judgment dismissing Plaintiff's Complaint in its entirety. On a motion for summary judgment, the moving

party "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. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). Should the movant make its prima facie showing, the burden shifts to the opposing party, who must then produce admissible evidentiary proof to establish that material issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Motion Sequence 001

Defendants first argue that Plaintiff's Labor Law § 240(1) cause of action must be dismissed as there is no issue of fact as to whether his injury resulted from a gravity-related incident. Plaintiff does not offer any argument in opposition to this branch of the motion. It is well-established that Section 240(1) "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [emphasis omitted]). Here, it is undisputed that Plaintiff's fingers were crushed between the side of a crate and a door edge. There was no height differential involved in the cause of Plaintiff's injury nor was there any allegedly defective safety device of the sort contemplated in Section 240(1). Consequently, the Court grants this branch of Motion Sequence 001 and dismisses the Labor Law § 240(1) cause of action.

Next, Defendants contend that they are entitled to dismissal of Plaintiff's Labor Law § 241(6) cause of action because Plaintiff was not engaged in work involving the assembling or

disassembling of a structure and otherwise fails to show a violation of any applicable portion of the Industrial Code. Plaintiff argues in opposition that this branch of the motion should be denied as his moving of crates containing materials for temporary structures was a Labor Law activity and that there is evidence that Defendants violated 12 NYCRR § 23-1.7(e)(1) and (2).

Labor Law § 241(6) "imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection to persons employed in . . . all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348-349 [1998]). Section 241 specifies that "[a]ll contractors and owners and their agents . . . when constructing or demolishing *buildings* . . . shall comply" (emphasis added). In this case, it is undisputed that Plaintiff's work was incidental to the assembly and disassembly of temporary structures in a hotel ballroom. There is no indication that Plaintiff's work was related to construction or demolition of a *building* – "a usually roofed and walled structure built for permanent use (as for a dwelling)" (Merriam-Webster.com dictionary, building [https://www.merriam-webster.com/dictionary/building]). This branch of Defendants' motion is accordingly granted and Plaintiff's Labor Law § 241(6) cause of action is dismissed.

With respect to the Labor Law § 200 cause of action, Defendants claim that it should be dismissed as they neither had notice of any dangerous condition nor exercised any control or supervision over Plaintiff's work. They argue that there is no record of disputes having been made to the Marriott Marquis about conditions on the premises.

Labor Law § 200 codifies the common law duty of owners and general contractors to provide a safe workplace to construction site workers (*Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). An owner may be held liable for injuries caused by a dangerous

premises condition for which it had actual or constructive notice (*DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 625 [1st Dept 2015]). Alternatively, where the alleged injury was "caused by the manner and means of the work, including the equipment used, the owner . . . is liable if it actually exercised supervisory control over the injury-producing work" (*Cappabianca v Skanska US Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

The Court finds that there are issues of fact as to Defendants' notice of a dangerous condition in the area in which Plaintiff was injured. Plaintiff testified that the crate he was moving had to be angled to get through the door because of the cluttered hallway and that the door was closing (NYSCEF Doc. No. 65, Plaintiff EBT part 1 at 52; Plaintiff EBT part 2 at 68-69). Greg Snider, Premier's owner, testified that he had complained to Defendants about the crowded state of the back hallways during prior Whisky Fest events and that the hallway was similarly crowded on December 4, 2018, although he could not recall whether he or anyone else lodged complaints about the workspace with the Marriott Marquis on that date (NYSCEF Doc. No. 68, Snider EBT at 20-24, 31). The presence of large carts and containers in the back hallways leading to the freight elevator during the event breakdown was attested to by a freelancer working with Premier (NYSCEF Doc. No. 71, DeLoughrey EBT at 84). Plaintiff also testified that there was a gray padded cover on the doors when the event was being set up but could not remember if it remained on for the disassembly (Plaintiff EBT part 2 at 47). Marriott's loss prevention manager, Jerome Wandrope, testified that he did not observe individuals putting the padding on the doors on the day of Plaintiff's accident (NYSCEF Doc. No. 73, Wandrope EBT at 59-60).

The record demonstrates that there are questions of fact as to the presence of a dangerous condition in Plaintiff's work area – namely a cluttered hallway and doors that were not covered

with padding or propped open. There is also a question of fact as to whether Defendants had actual or constructive notice of any of these conditions at the time of Plaintiff's accident. This branch of Defendants' motion is accordingly denied.

Finally, Defendants move for summary judgment on their common law indemnification cause of action against both third-party defendants, Shanken and Premier, and on their contractual indemnification cause of action as against third-party defendant Premier only. Shanken had leased the Marriott Marquis sixth floor ballroom for its Whisky Fest event and retained Premier as the general contractor and event planner. Shanken and Premier oppose these branches of Defendants' motion and move for summary judgment dismissing these claims in Motion Sequence 002 and 003, respectively. Premier also moves to dismiss Defendant's third-party claim for contractual indemnification against it.

Defendants argue that they are entitled to common law indemnification because there is no evidence that they directed or controlled Plaintiff's work and that any negligence that Plaintiff might prove "will be through the allegation that the crate so provided was improper for transportation of materials to this temporary sales event" (NYSCEF Doc. No. 76 at 14). Shanken and Premier argue that this branch of the motion should be denied on the grounds that Defendants may have breached a duty to Plaintiff to keep the Marriott Marquis premises in a safe condition and are therefore not entitled to common law indemnification. They further argue that they neither supervised Plaintiff's work nor created a dangerous condition.

A party is entitled to common law indemnification where it shows "(1) that it has been held vicariously liable without proof of negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD 3d 1, 11 [1st Dept 2012], citing

McCarthy v Turner Constr., Inc., 17 NY 3d 369, 377-378 [2011]). As the Court has dismissed the Labor Law §§ 240(1) and 241(6) causes of action, Defendants cannot be held vicariously liable. They are therefore unable to seek common law indemnification against Shanken or Premier, and accordingly the branch of their motion seeking summary judgment on these causes of action is denied.

As to the branch of their motion seeking summary judgment on their contractual indemnification cause of action against Premier, Defendants cite to an agreement between Shanken, Premier, and the Defendants (NYSCEF Doc. No. 70, "Release"). They argue that "the language of the contract between PREMIER and the hotel is clear, that, PREMIER agreed to indemnify, defend and hold the hotel harmless from all liability based upon, arising out of, in connection, or otherwise, irrespective of the performance of the services contemplated in the contract" (NYSCEF Doc. No. 76 at 13). In opposition, Premier argues that the Release does not describe what services it will provide and that Defendants are unable to seek indemnification under this agreement if they are found negligent under Labor Law § 200.

This branch of the motion is denied as there are questions of fact regarding Defendants' liability. Although an owner may seek indemnification from a contractor where the owner is only held vicariously liable for a plaintiff's injury, it may not seek indemnification for injuries resulting from its own sole negligence (*cf. Cackett v Gladden Props., LLC*, 183 AD3d 419, 422 [1st Dept 2020] ["an agreement by a subcontractor to indemnify an owner or general contractor for the latter's own negligence is 'against public policy and is void and unenforceable'', citing General Obligations Law § 5-322.1[1]). Accordingly, it is inappropriate to grant summary judgment on Defendants' contractual indemnification claim against Premier as an issue of fact

exists as to whether Defendants' negligence was the sole proximate cause of Plaintiff's injury (*see Cackett*, 183 AD3d at 422 [citations omitted]).

Motion Sequence 002

In Motion Sequence 002, third-party defendant Shanken moves for summary judgment dismissing Defendants' third-party complaint against it or, in the alternative, granting summary judgment on its contractual indemnification cross-claim against third-party defendant Premier. Shanken argues that Defendants' claims for breach of contract for failure to procure insurance and contractual indemnification must be dismissed as against it because the contract does not provide for either. It further contends that Defendants' claims and Premier's cross-claim for common law indemnification must be dismissed.

Shanken argues that Defendants' contractual indemnification cause of action against it must be dismissed as the relevant contract purportedly does not contain language requiring Shanken to indemnify Defendants (NYSCEF Doc. No. 94, "Rental Agreement"). However, the Rental Agreement expressly provides that "[t]he exhibitor assumes the entire responsibility and liability for losses, damages, and claims arising out of exhibitor's activities on the hotel premises and will indemnify, defend, and hold harmless the Hotel . . . ." (*id.* at 13). This provision appears to incorporate by reference the Release between Defendants, Shanken, and Premier (NYSCEF Doc. No. 70). Accordingly, this branch of the motion is denied as Shanken fails to satisfy its prima facie burden of demonstrating the lack of an indemnification provision in its contract with Defendants.

The Court grants the branch of Shanken's motion seeking summary judgment dismissing Defendants' common law indemnification cause of action against it. The Court has dismissed Plaintiff's Labor Law §§ 240(1) and 241(6) causes of action against Defendants, leaving only the

Labor Law § 200 cause of action. As Defendants cannot be held vicariously liable for Plaintiff's injuries, they cannot seek common law indemnification against Shanken (*see Naughton*, 94 AD 3d at 11). The Court therefore dismisses Defendants' common law indemnification cause of action as against Shanken.

Shanken next argues that it is entitled to summary judgment on its contractual indemnification cross claim against Premier as their contract specifically requires Premier to indemnify for losses it caused. Premier contends that this branch of the motion should be denied as there is no dispute of fact regarding its lack of responsibility for Plaintiff's injuries and that the language of the contract expressly excludes indemnification for damages caused by other parties.

The contract between Shanken and Premier provides:

> Premier Exposition Services, Inc. will indemnify and hold harmless Whisky Advocate [Shanken], its officers, directors, and employees from and against any bodily injury . . . judgments, damage, cost or expense, including reasonable attorneys' fees arising out of occasioned by [sic] the operations performed by Premier Exposition Services, Inc., except for occurrences or accidents caused by the sole negligence of Whisky Advocate, or for occurrence or accidents caused by any other party.

(NYSCEF Doc. No. 93, "WhiskyFest Agreement"). The plain language of the agreement indicates that the parties contemplated that Premier would indemnify Shanken for any damages caused by its activities. To the extent that Premier should be found liable for Plaintiff's injuries, it would be required to indemnify Shanken for any liability incurred by Shanken due to Premier's actions. This branch of Shanken's motion is granted to the extent that Premier is found liable for Plaintiff's injury.

Finally, Shanken argues that it is entitled to summary judgment on its breach of contract cross claim against Premier, claiming that Premier failed to procure insurance in accordance with the WhiskyFest Agreement. Specifically, Shanken claims that Premier failed to procure

commercial general liability insurance naming it as an additional insured on a contributory and non-contributory basis.

This branch of the motion is denied. Premier submits a copy of its Commercial General Liability Declarations that demonstrates that it had insurance as required by the WhiskyFest agreement (NYSCEF Doc. No. 117; WhiskyFest Agreement at 6). The plain language of the WhiskyFest Agreement does not require Premier to name Shanken as an additional insured, and Shanken does not annex any other evidence that Premier was required to name it as an additional insured.

Motion Sequence 003

Premier moves for summary judgment dismissing Plaintiff's Labor Law causes of action against Defendants, Defendants' third-party claims against it, and third-party co-defendant Shanken's contractual indemnification and breach of contract cross claims. The branch of the motion seeking dismissal of Plaintiff's Labor Law claims against Defendants is resolved in accordance with the Court's foregoing determination of Defendants' request for the same relief in Motion Sequence 001.

Premier argues in support of its motion seeking dismissal of Defendants' third-party claims for contractual indemnification that General Obligations Law § 5-322.1(1) precludes Defendants from obtaining indemnification under the Release for their own negligence. In opposition, Defendants contend that the plain language of the Release requires Premier to indemnify them for all injuries arising out of its services. This branch of the motion is denied as there remain questions of fact regarding the liability of Defendants under Labor Law § 200.

Premier further seeks dismissal of Defendants' common law indemnification cause of action against it, arguing that it cannot be found negligent because it did not exercise oversight or

control of Plaintiff's work. As Plaintiff's sole remaining cause of action against Defendants under Labor Law § 200 does not provide for vicarious liability, this branch of the motion is granted and Defendants' common law indemnification claim against Premier is dismissed (*see Naughton*, 94 AD 3d at 11).

Premier further maintains that it is entitled to summary judgment dismissing Shanken's contractual indemnification cross claim because the WhiskyFest Agreement only provides for indemnification for damages caused by Premier's own negligence. It argues that there is no dispute of fact as to its own negligence and that Shanken is therefore not entitled to indemnification. This branch of the motion must be denied as the Court has found that there is an issue of fact regarding Premier's possible negligence in causing Plaintiff's accident.

Lastly, Premier argues that it is entitled to dismissal of Shanken's breach of contract cross claim because it obtained insurance in accordance with the WhiskyFest Agreement. In opposition, Shanken claims that Premier violated the WhiskyFest Agreement by failing to name Shanken as an additional insured as purportedly required by the agreement. This branch of the motion is granted. The plain language of the WhiskyFest Agreement does not require Premier to name Shanken as an additional insured. Furthermore, Premier presents a copy of its general liability declarations indicating that it procured insurance as required by the agreement (NYSCEF Doc. No. 117). The Court therefore dismisses Shanken's breach of contract cross claim against Premier.

Accordingly, it is hereby:

ORDERED that Motion Sequence 001 is granted as to Plaintiff's causes of action under Sections 240(1) and 241(6) of the Labor Law, and said claims are dismissed; and it is further

ORDERED that the branch of Motion Sequence 001 seeking dismissal of Plaintiff's Labor Law § 200 cause of action is denied; and it is further

ORDERED that the branch of Motion Sequence 001 seeking summary judgment on Defendants' third-party causes of action for common law indemnification against Premier and Shanken is denied; and it is further

ORDERED that the branch of Motion Sequence 001 seeking summary judgment on Defendants' third-party claim for contractual indemnification against Premier is denied; and it is further

ORDERED that the branch of Motion Sequence 002 seeking summary judgment dismissing Defendants' third-party contractual indemnification claim against Shanken is denied; and it is further

ORDERED that the branch of Motion Sequence 002 seeking summary judgment dismissing Defendants' third-party common law indemnification cause of action against Shanken is granted; and it is further

ORDERED that the branch of Motion Sequence 002 seeking summary judgment on Shanken's cross claim for contractual indemnification against Premier is granted; and it is further

ORDERED that the branch of Motion Sequence 002 seeking summary judgment on Shanken's cross claim for breach of contract against Premier is denied; and it is further

ORDERED that the branch of Motion Sequence 003 seeking dismissal of Plaintiff's causes of action against Defendants decided in accordance with the foregoing; and it is further

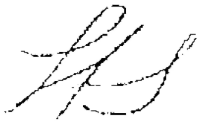
ORDERED that the branch of Motion Sequence 003 seeking summary judgment dismissing Defendants' third-party contractual indemnification cause of action against Premier is denied; and it is further

ORDERED that the branch of Motion Sequence 003 seeking summary judgment dismissing Shanken's contractual indemnification cross claim against Premier is denied; and it is further

ORDERED that the branch of Motion Sequence 003 seeking summary judgment dismissing Shanken's common law indemnification cross claim against Premier is granted.

All other relief sought herein and not granted is denied.

This constitutes the Decision and Order of the Court.



1/12/2024
DATE

LORI S. SATTLER, J.S.C.

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