SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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ANGELENA LUCHEUX and BENJAMIN LUCHEUX,

Plaintiffs,

-against- Index No.: 160641/2013

WILLIAM MACKLOWE COMPANY, LLC, MACKLOWE MANAGEMENT, LLC, 386 PAS OWNER, LLC, LEND LEASE (US) CONSTRUCTION LMB, INC., SYNERGY CONSTRUCTION, INC., EASTERN CONCRETE MATERIAL, INC., and ELITE TERRAZZO FLOORING, INC., DECISION AND ORDER

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this negligence action, the plaintiff Angelena Lucheux (Lucheux) alleges that, on the morning of October 25, 2013, she slipped and fell on dust, debris, or slippery construction substances on the floor of the lobby in a building located at 386 Park Avenue South in Manhattan (the building) owned by the defendant 386 PAS Owner, LLC (PAS). The defendant Macklowe Management Company, LLC (Macklowe), is the building's management company, the defendant Synergy Construction, Inc. (Synergy), was the general contractor retained in connection with a lobby renovation project that was ongoing at the building when the plaintiff fell, and the defendant Elite Terrazzo Flooring, Inc. (Elite), was the flooring subcontractor for the lobby renovation. The defendant Lend Lease (US) Construction LMB, Inc. (Lend Lease), was a tenant in the building, as well as the construction manager for a separate construction project at 400 Park Avenue South, which is adjacent to the building, while the defendant Eastern Concrete

Materials, Inc. (Eastern), was the concrete subcontractor for that construction project.

In motion sequence number 004, Lend Lease moves for summary judgment dismissing the cross claims asserted against it by PAS, Macklowe, and Elite, and for the imposition of sanctions against them for frivolous litigation conduct, and Elite purports to cross-move for summary judgment dismissing the complaint against it. In motion sequence number 005, PAS and Macklowe (together the PAS defendants) move for summary judgment on their cross claims against Synergy and Elite for conditional contractual indemnification and to recover damages for failure to procure insurance. In motion sequence number 006, Synergy moves for summary judgment on its cross claims against Elite for conditional contractual indemnification and to recover damages for failure to procure insurance. In motion sequence number 007, the plaintiff moves for the imposition of sanctions against Elite for making a late summary judgment motion and improperly denominating the request for that relief as a cross motion.

In support of and in opposition to the various motions, the parties rely on the pleadings, transcripts of the parties' deposition testimony, attorney's affirmations, stipulations, contracts, subcontracts, correspondence and various notices served upon each other.

On January 23, 2014, the plaintiffs executed a stipulation discontinuing the action without prejudice against Lend Lease. On February 12, 2014, the plaintiff executed a stipulation discontinuing the action against Macklowe. On September 1, 2014, the plaintiff commenced a new action against Lend Lease, Eastern, and Elite. In an order dated October 29, 2014, this court consolidated the new action with the instant action. On October 13, 2015, the plaintiffs and Lend Lease executed a stipulation discontinuing the consolidated action against Lend Lease, which was also executed by Eastern and Synergy, but not by any other party.

II. BACKGROUND

There is no dispute that PAS entered into a contract with Synergy to renovate the lobby of the building, nor is there a dispute that Synergy entered into a subcontract with Elite, pursuant to which Elite performed work in connection with the renovation of the lobby floor. According to Lucheux, Elite worked into the early morning hours on the date of her accident, and Elite's work generated debris in the lobby, which prompted security and building staff to undertake maintenance work with respect to the floor prior to her fall. Lucheux testified at her deposition that, after entering the building on her way to work, she fell in the lobby as a consequence of slipping on dust and debris that had accumulated on the floor. She also testified that there was ongoing construction outside of the building, from 27th through 28th Street, which generated dust, and that after her fall, upon exiting the building, she noticed white, sandy dust outside.

III. DISCUSSION

A. Lend Lease's Motion and Elite's "Cross Motion" for Summary Judgment (SEQ 004)

1. Lend Lease's Motion—Contribution

Lend Lease moves for summary judgment dismissing the cross claims for contribution asserted against it by the PAS defendants and Elite. Lend Lease contends that it merely rented a temporary office on the fifth floor of the building, that the plaintiff testified that she slipped on white dust or powder in the building's lobby, and that witnesses, including Macklowe's employees, testified that they observed white dust on the floor in the morning, just before the plaintiffs' accident. Lend Lease argues that the contribution causes of action asserted against it are barred by General Obligations Law § 15-108(b) since the plaintiffs released Lend Lease by

signing a stipulation of discontinuance, and that statute precludes a joint tortfeasor from seeking contribution from a settling tortfeasor. The PAS defendants and Elite counter that (1) the stipulation of discontinuance dated October 13, 2015, is not a release; (2) General Obligations Law § 15-108 does not mandate dismissal of the contribution claims and preserves a nonsettling tortfeasor's right to a damages allocation assessment against a settling tortfeasor; and (3) they were under no obligation to sign the stipulation, a stipulation of discontinuance is only effective when signed by all parties, and they did not sign the stipulation precisely in order to preserve their right to allocation and equitable set-off at trial.

Lend Lease, as the movant on this summary judgment motion, is required to demonstrate that there are no material issues of fact that would preclude a grant of the relief it seeks. See Alvarez v Prospect Hosp., 68 NY2d 324 (1986). Thus, to obtain relief under a statute, Lend Lease must demonstrate that all relevant statutory requirements have been satisfied. General Obligations Law § 15-108(b) relieves an alleged tortfeasor from liability for contribution to other parties where it obtains a release from the plaintiff in good faith, permitting the released defendant "to settle a claim . . . without fear of being brought back into the action by a nonsettling defendant seeking contribution." Mitchell v New York Hosp., 61 NY2d 208, 216 (1984). In 2007, General Obligations Law § 15-108 was amended to add section "d," entitled "Releases and covenants within the scope of this section," which provides that:

> "A release or a covenant not to sue between a plaintiff . . . and a person who is liable or claimed to be liable in tort shall be deemed a release or covenant for the purposes of this section only if:
>
> "(1) the plaintiff or claimant receives, as part of the agreement, monetary consideration greater than one dollar[.]"

Generally, a stipulation of discontinuance must be signed by all parties to an action to be effective. See CPLR 3217(a)(2); Phillips v Trommel Constr., 101 AD3d 1097 (2nd Dept. 2012); C. W. Brown, Inc. v HCE, Inc., 8 AD3d 520 (2nd Dept. 2004). While a stipulation of discontinuance may nonetheless function as a release even where it does not include the signatures of all of the parties to the action (see Hanna v Ford Motor Co., 252 AD2d 478 [2nd Dept. 1998]), Lend Lease cannot avail itself of that rule where, as here, it has not demonstrated that it gave consideration to the plaintiffs in return for their execution of the stipulation. See General Obligations Law § 15-108(d)(1); cf. Giglio v NTIMP, Inc., 86 AD3d 301 (2nd Dept. 2011) (tortfeasor may not seek contribution from joint tortfeasor where plaintiff releases joint tortfeasor and accepts consideration for the release, regardless of source of that consideration). Consequently, Lend Lease has not demonstrated that the stipulation of discontinuance was a "release" within the meaning of General Obligations Law § 15-108(d)(1), or that it thus bars claims for contribution asserted by joint tortfeasors. See General Obligations Law § 15-108(b). Since Lend Lease has not established its prima facie entitlement to judgment as a matter of law dismissing the cross claims for contribution asserted against it, that branch of its motion must be denied, without regard to the sufficiency of any opposition papers.

2. Lend Lease's Motion—Common-Law Indemnification

Lend Lease also moves for summary judgment dismissing the cross claims for common-law indemnification asserted against it.

Where a party is legally compelled to pay damages to an injured party for the wrongful conduct of another, a cause of action arises in favor of the paying party against the actual

wrongdoer for indemnification. See Margolin v New York Life Ins. Co., 32 NY2d 149 (1973). "Common-law indemnification is generally available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer." McCarthy v Turner Constr., Inc., 17 NY3d 369, 375 (2011) (internal quotation marks and citation omitted).

Consequently, common-law indemnification is available from a party whose negligence caused the plaintiff's injuries, but the claim may only be asserted by a party whose role in causing the plaintiff's injury is solely passive, and thus is only vicariously liable (see Hawthorne v South Bronx Community Corp., 78 NY2d 433 [1991]); Structure Tone, Inc. v Universal Servs. Group, Ltd., 87 AD3d 909, 911-912 [1st Dept. 2011]; Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc., 59 AD3d 311 [1st Dept. 2009]; Balladares v Southgate Owners Corp., 40 AD3d 667, 671 [2nd Dept. 2007]), or whose liability is predicated solely on a statutory obligation (see Bell v Bengomo Realty, Inc., 36 AD3d 479, 481 [1st Dept. 2007]; Buccini v 1568 Broadway Assoc., 250 AD2d 466, 468 [1st Dept. 1998]). Conversely, "a party which has actually participated in the wrongdoing is not entitled to indemnification." Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc., 45 AD3d 792, 796 (2nd Dept. 2007). A party must demonstrate the absence of negligence on its part to establish a prima facie claim for common-law indemnification. See Balladares v Southgate Owners Corp., supra.

"The key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is a separate duty owed the indemnitee by the indemnitor." Raquet v Braun, 90 NY2d 177, 183 (1997), quoting Mas v Two Bridges Assoc., 75 NY2d 680, 690 (1990); see Balkheimer v Spanton, 103 AD3d 603 (2nd Dept. 201); Lovino, Inc. v Lavallee Law Offs., 96 AD3d 909 (2nd Dept. 2012). "[W]here a party is held

liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy." Glaser v Fortunoff of Westbury Corp., 71 NY2d 643, 646 (1988).

Lend Lease argues that cross claims of the PAS defendants and Elite that seek common-law indemnification fail to state a cause of action, and should be summarily dismissed because there is no basis upon which those defendants could be held vicariously liable for Lend Lease's alleged negligence, and no possibility that those defendants may be held liable to the plaintiffs for breach of a statutorily imposed duty that does not require a showing of negligence. Lend Lease further asserts that the PAS defendants and Elite were themselves negligent, while there is no evidence that it was negligent or had supervisory responsibilities. Specifically, Lend Lease asserts that it did not exercise supervision or control over the lobby, played no role in its renovation, only rented an office in the building, and was the construction manager for a different project at a different building. It further contends that Macklowe's employees, Shawn Ingle and Claudio Cordero, were informed of and failed to remedy the dangerous condition prior to the Lucheux's accident.

The PAS defendants contend that certain "nondelegable duties" were indeed imposed upon them by virtue of their ownership and possession of the building, and that common-law indemnification is available from another tortfeasor, such as Lend Lease, that is primarily responsible for the negligence. They specifically argue that there are triable issues of fact as to whether Lend Lease may be at fault for tracking in the dust upon which Lucheux fell. Elite adopts the arguments made by the PAS defendants, and challenges Lend Lease's "assertion that there is no evidence on their behalf." Elite points to Lucheux's testimony that there was outside

construction that caused dust to accumulate in front of the building, and that she was caused to slip upon white, sandy dust spread across the lobby floor. Elite argues that Lucheux's testimony indicates that the dust that caused her to fall was that which she noticed outside on the sidewalk, when she exited the building after the accident.

Lend Lease was a tenant in the building. There is no contention that it was involved in the maintenance or renovation of the building's lobby, by contract or otherwise. Nor is there a contention that its obligations under its lease with PAS, if any, are implicated here, or that the PAS defendants might be held vicariously liable for Lend Lease's alleged negligence under the lease or by virtue of their relationship as landlord and tenant. Moreover, Lucheux was not a worker involved in a demolition or construction project, but a simple pedestrian, and thus cannot seek to hold the PAS defendants statutorily liable under the Labor Law.

Consequently, this is not a case where the PAS defendants will be held vicariously liable for work that Lend Lease contracted to perform for PAS. Moreover, owners may not be held strictly liable for slip-and-fall incidents on their premises that do not involve persons protected by Labor Law § 240(1); indeed, proof of negligence, which is defined as an owner's failure to act reasonably under the circumstances, is required to establish liability here. see generally McCarthy v Turner Constr., Inc., 17 NY3d 369 (2011) (addressing owner's liability under Labor Law § 240[1]). Even if dust from Lend Lease's construction activities were tracked in from outside of the building by Lend Lease's employee or others, the PAS defendants' liability would rest solely upon its actual or constructive notice of a dangerous condition at the premises, and its failure to adequately remedy the situation. A finding of such fault would preclude common-law indemnification. Thus, the PAS defendants' claim that they are entitled to recover from another

tortfeasor for that other's proportionate fault would constitute only a contribution claim, and not a common-law indemnification claim. As such, they failed to state a cause of action to recover for common-law indemnification.

Elite does not explain how Lend Lease's conduct could be imputed to it, whether it could be held liable for that conduct by virtue of a statute or contract, or whether it could be held liable for that conduct vicariously or otherwise. Thus, Elite has failed to state a cause of action for common-law indemnification against Lend Lease.

Consequently, those branches of Land Lease's motion which are for summary judgment dismissing the cross claims asserted against it by the PAS defendants and Elite for common- law indemnification must be granted.

3. Lend Lease's Motion—Sanctions

That branch of Lend Lease's motion which is for the imposition of sanctions against the PAS defendants and Elite must be denied because those defendants did not engage in frivolous litigation conduct in refusing to discontinue their cross claims. In the first instance, Lend Lease did not prevail on that branch of its motion which was for summary judgment dismissing the cross claims for contribution; consequently, the assertion of those cross claims cannot be deemed frivolous. Even had Lend Lease established that it gave the plaintiffs consideration for the execution of the stipulation of discontinuance, and that the stipulation was thus a proper release, there is no basis for concluding that the arguments raised by the PAS defendants and Elite were frivolous. Those defendants did not execute the stipulation, and they relied on appellate precedent holding that a "stipulation [i]s ineffective in the absence of it being 'signed by the

attorneys of record for all parties.'" Phillips v Trommel Constr., supra, at 1098, quoting CPLR 3217(a)(2).

4. Elite's "Cross Motion"—Summary Judgment Dismissing Complaint

In a preliminary conference order, the court directed that all dispositive motions must be made no later than 60 days after the filing of the note of issue. Elite moved for summary judgment dismissing the complaint as against it 90 days after the filing of the note of issue. The plaintiffs oppose the motion on the grounds that it was made after the court's deadline for dispositive motions had lapsed (see CPLR 3212[a]) and was improperly denominated as a cross motion when it was in actuality a separate motion. See CPLR 2215. After Elite's motion was made, however, the note of issue was vacated since there was significant discovery that remained outstanding. Elite thus established good cause for making a late summary judgment motion, and, when the note of issue was vacated during the pendency of the motion, the motion was no longer untimely. Moreover, although the motion was not a proper cross motion because it did not seek relief against a moving party (see Gaines v Shell-Mar Foods, Inc., 21 AD3d 986 [2nd Dept. 2005]; Sheehan v Marshall, 9 AD3d 403 [2nd Dept. 2004]), Elite nonetheless made the motion on 10 days notice and, thus, it provided the plaintiffs with sufficient notice and did not prejudice them. See CPLR 2214(b). Since the motion was rendered timely when the note of issue was vacated, there would be no prejudice to the plaintiffs if the court considered the motion on the merits. Cf. Kershaw v Hospital for Special Surgery, 114 AD3d 75 (1st Dept. 2013) (court should not have entertained a motion mislabeled as a cross motion since movant mislabeled the motion in order to improperly piggy-back a late summary judgment motion upon another party's timely summary

judgment motion).

As to the merits, Elite fails to establish that it was not responsible for creating all or part of the condition upon which Lucheux slipped and fell. The court also rejects Elite's contention that the efforts of the PAS defendants to clean up the area prior to the accident constituted an unforeseeable or extraordinary act sufficient, as a matter of law, to relieve it of liability. See Dediarian v Felix Contr. Corp., 51 NY2d 308 (1980). Elite also fails to demonstrate, prima facie, that the sole source of the dust upon which Lucheux claims to have slipped was construction debris from outside the building that was generated by Lend Lease, and this argument is improperly raised for the first time in reply in any event. See Alrobaia v Park Lane Mosholu Corp., 74 AD3d 403 (1st Dept. 2010). Thus, Elite's motion must be denied.

B. The PAS Defendants' Motion for Summary Judgment (SEQ 005)

1. Contractual Indemnification

Summary judgment may be warranted on a claim for conditional contractual indemnification where an indemnification provision in a contract does not violate the General Obligations Law, and there has not yet been a determination as to the indemnitor's negligence. See Johnson v Chelsea Grand E., LLC, 124 AD3d 542 (1st Dept. 2015). Since the PAS defendants demonstrated, prima facie, that the contractual provisions are not violative of the General Obligations Law, and there has been no finding of fact as to their own negligence, they are entitled to summary judgment on their claims for contractual indemnification against Synergy and Elite on the condition that they are found free from negligence or, if found partially at fault, to the proportionate extent that Synergy and Elite are found negligent.

Contractual indemnification clauses must be "construed as to achieve the apparent purpose of the parties" (Hooper Associates, Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989]; see Arrendal v Trizechahn Corp., 98 AD3d 701 [2nd Dept. 2010]), and are enforced only where "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances." Campos v 68 E. 86th St. Owners Corp., 117 AD3d 593, 595 (1st Dept. 2014), quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153 (1973); see Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774 (1987).

Section 3.18 of the contract between the PAS defendants and Synergy provides that Synergy will indemnify the PAS defendants for claims by third parties "arising out of or resulting from performance of the Work." Paragraph 5 of the subcontract between Synergy and Elite provides that Elite will indemnify Synergy against liability "arising from, or in any way incidental to the performance of the work hereinunder which may be asserted by subcontractor . . . or any third-party (including but not limited to [Synergy]), the owner of the building in which the work is performed, their employees and agents," and, in paragraph 24, articulates a "Hold Harmless and Indemnification in favor of [Synergy] and Owner." Inasmuch as PAS is expressly named as an indemnitee, it is a third-party beneficiary of the subcontract between Synergy and Elite. See generally Nazario v 222 Broadway, LLC, 135 AD3d 506 (1st Dept. 2016).

Since neither the contract nor the subcontract purports to indemnify the PAS defendants for their own negligence, and both the contract and subcontract permit indemnification only to the "full extent permitted by law," the agreements do not violate the General Obligations Law. See Brooks v Judlau Contr., Inc., 11 NY3d 204 (2008). In opposition to the PAS defendants' prima facie showing of entitlement to judgment as a matter of law, Synergy failed to raise a

triable issue of fact, since its papers do not refute the contents of the contract. Elite did not oppose that branch of the PAS defendants' motion. Thus, the PAS defendants are entitled to summary judgment on their cross claims for contractual indemnification against Synergy and Elite, on condition that the PAS defendants are ultimately found completely free from negligence or, if the PAS defendants are found partially at fault, to the extent that they seek to recover solely for Synergy's and Elite's negligence. See General Obligations Law § 5-322.1(1); Rodriguez v Heritage Hills Socy., Ltd., 141 AD3d 482 (1st Dept. 2016); Cuomo v 53rd & 2nd Assoc., LLC, 111 AD3d 548 (1st Dept. 2013).

2. Failure to Procure Insurance

The insurance procurement provisions in the PAS/Synergy contract required Synergy to procure a policy, with limits of $1,000,000 per occurrence, for bodily injury and commercial liability coverage, which named the PAS defendants as additional insureds in connection with claims arising from Synergy's negligent acts or omissions during its operations. The PAS defendants correctly note that the plaintiffs, in their complaint, allege that Lucheux's accident arose out of Synergy's negligence, and that a representative of Synergy testified at his deposition that he instructed one of its laborers to investigate the conditions of the lobby floor the accumulation of dust, and to sweep if necessary. They thus argue that coverage for them under the policy has been triggered, but that Synergy's insurer, Mt. Hawley, has yet to provide coverage and has not responded to their tender letter.

In opposition, Synergy, by submitting the policy and endorsements identifying the PAS defendants as additional insureds, raises a triable issue of as to whether it complied with the

insurance procurement provisions of the subject contract. Synergy refers to three endorsements in its policy, concerning additional insured coverage, including form CGL 20 33S (05/05), which states that it adds a property owner as an additional insured for acts caused in whole or part by Synergy's acts in the performance of its ongoing operations for the owner, if required by written contract. The endorsement also states that the insurance provided by the policy is to be deemed the primary insurance for the PAS defendants, and, if there is other insurance available to the PAS defendants, will be noncontributory. Form CG 20 37 07 04 of the policy recites that property owners are additional insureds where required by written contract executed prior to a loss. The policy provides coverage of up to $1 million per occurrence.

Synergy demonstrates that its insurer has not denied the PAS defendants' claim, but is waiting for additional information. Mt. Hawley's alleged failure to expeditiously process the PAS defendants' claim is not dispositive of whether or not Synergy met its contractual obligation to procure an appropriate policy. See Arner v RREEF Am., LLC, 121 AD3d 450 (1st Dept. 2014); Long v Tishman/Harris, 50 AD3d 356 (1st Dept. 2008).

As to Elite, the PAS defendants submit the subcontract between Elite and Synergy, which provides that Elite was to maintain comprehensive general liability (CGL) insurance with limits of liability of not less than $1,000,000, and was to obtain owners' and contractors' protective liability coverage naming the PAS defendants and Synergy as insureds, with the PAS defendants and its agents to be named as additional insureds on a primary and noncontributory basis on Elite's general liability policies. The PAS defendants also refer to the deposition transcript of Elite's witness, who testified that Elite was indeed obligated to procure insurance. Although Elite submits no opposition to the PAS defendants' motion, the relevant branch of the motion is

denied since they failed to establish their prima facie entitlement to judgment as a matter of law on their cross claim against Elite alleging failure to procure insurance.

The PAS defendants rely only on the insurer's disclaimer letter to demonstrate Elite's alleged failure to procure appropriate insurance. That letter states that the PAS defendants are indeed additional insureds under Elite's CGL policy, and that Elite also has an umbrella policy naming them as additional insureds. The disclaimer states that coverage is being denied since it is only available where the PAS defendants' liability arises from an act or omission of Elite, and that liability did not arise here from such an act or omission. The insurer further disclaimed coverage based on an exclusion for bodily injury caused by the sole negligence of the PAS defendants, and the disclaimer alleges that Lucheux's injuries were indeed caused by their sole negligence. The insurer noted in this regard that this action had been commenced against Synergy and the PAS defendants only, and not against Elite. The disclaimer under the umbrella policy was based on a provision therein limiting the scope of coverage to that in the underlying CGL policy.

Although the PAS defendants' submissions show that, prior to the insurer's issuance of the disclaimer letter, their attorney requested Elite to provide them with a full copy of the policy itself, the PAS defendants have not submitted such a full copy, and they have not established that the entire text of the relevant endorsement is included in the insurer's letter. They have thus not demonstrated, prima facie, that the terms of the policy that was actually procured were insufficient to satisfy the subcontract. Moreover, while the PAS defendants' submissions include an email message from their counsel, sent prior to the disclaimer, informing the insurer that Elite had been added as a defendant in this action, the disclaimer letter itself does not reflect whether

the insurer actually considered the email in making its determination. The PAS defendants offer no additional proof that, despite receiving that information, the insurer nonetheless adhered to its determination to disclaim coverage. Nor do they demonstrate that the insurer was given an opportunity to reconsider its determination to disclaim coverage.

Consequently, the PAS defendants failed to establish, prima facie, that Elite failed to procure the insurance policy required by the subcontract, and the branch of their motion which is for summary judgment on its cross claim against Elite based on failure to procure insurance must be denied even in the absence of opposition. The court notes that the remedy for an improper denial of coverage is the commencement of a declaratory judgment action against the insurer. See Sirius Am. Ins. Co. v Burlington Ins. Co., 81 AD3d 562 (1st Dept. 2011).

C. Synergy's Motion for Summary Judgment Against Elite (SEQ 006)

1. Contractual Indemnification

In seeking summary judgment on its cross claim against Elite for conditional contractual indemnification, Synergy relies on the subcontract provisions, set forth above, which obligate Elite to indemnify and hold Synergy harmless from all claims to the fullest extent permitted by law. Synergy is entitled to summary judgment on its cross claim for contractual indemnification against Elite, on the condition that it is ultimately found free from fault in the happening of the accident, or to the extent that Elite was negligent, for the same reasons as the PAS defendants were awarded summary judgment on their cross claims for conditional contractual indemnification against Synergy and Elite.

2. Failure to Procure Insurance

The court denies that branch of Synergy's motion which is for summary judgment on its cross claim against Elite alleging that Elite failed to procure insurance for the same reasons as it denied that branch of the PAS defendants' motion which was for the same relief.

D. The Plaintiffs' Motion for an Award of Sanctions (SEQ 007)

The plaintiffs' motion for an award of sanctions against Elite pursuant to 22 NYCRR 130-1.1 must be denied since the arguments raised by Elite in its summary judgment motion, although unpersuasive, were not frivolous. See Glenn v Annunziata, 53 AD3d 565 (2nd Dept. 2008). Moreover, the issues concerning the timeliness of the motion have been rendered academic and, in light of the vacatur of the note of issue during the pendency of the motion, the plaintiffs were not prejudiced by the motion.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the motion of Lend Lease (US) Construction LMB, Inc., for summary judgment dismissing the cross claims asserted against it and for an award of sanctions (Motion Seq. 004) is granted to the extent that the cross claims for common-law indemnification asserted against it by the defendants 386 PAS Owner, LLC, and Macklowe Management Company, LLC, are dismissed, and the motion is otherwise denied; and it is further,

ORDERED that the motion of Elite Terrazzo Flooring, Inc., for summary judgment dismissing the complaint insofar as asserted against it, denominated as a cross motion (Motion

Seq. 004), is denied; and it is further,

ORDERED that the motion of 386 PAS Owner, LLC, and Macklowe Management Company, LLC, for summary judgment (Motion Seq. 005) is granted to the extent that they are awarded summary judgment on their cross claims for contractual indemnification against Synergy Construction, Inc., and Elite Terrazzo Flooring, Inc., on condition that 386 PAS Owner, LLC, and Macklowe Management Company, LLC, are found to be free from fault in the happening of the accident or to the extent that either Synergy Construction, Inc., or Elite Terrazzo Flooring, Inc., or both of them, are found to be at fault in the happening of the accident, and the motion is otherwise denied; and it is further,

ORDERED that the motion of Synergy Construction, Inc., for summary judgment (Motion Seq. 006) is granted to the extent that it is awarded summary judgment on its cross claim for contractual indemnification against Elite Terrazzo Flooring, Inc., on condition that Synergy Construction, Inc., is found to be free from fault in the happening of the accident or to the extent that Elite Terrazzo Flooring, Inc., is found to be at fault in the happening of the accident; and it is further,

ORDERED that the plaintiffs' motion for an award of sanctions (Motion Seq. 007) is denied.

This constitutes the Decision and Order of the court.

Dated: May 11, 2017 ENTER:

J.S.C.

HON. NANCY M. BANNON