SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **IAS MOTION 61EFM**

Justice

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STONE & BROAD INC.,

Plaintiff,

- v -

NEXTEL OF NEW YORK, INC.,SPRINT CORPORATION, 88 BROAD REALTY CORP., LANA 28 CORP., BENJAMIN-PARK, INC.,GULIANO-PARK 88 BROAD STREET INC.,GIULIANO GOURMET PIZZA & DELI, FRANK RENEO, PETER RENEO, VITO RENEO, ADA MIZUKOVSKI, ROBERT PARK, KUI SUN PARK, and TECH NEL ELECTRIC, INC.,

Defendants.

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INDEX NO. 156297/2018

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 59, 60, 61, 62, 63

were read on this motion to/for DISMISS.

OSTRAGER, BARRY R., J.S.C.:

Before the Court is the pre-answer motion by defendant Tech Nel Electric, Inc. ("Tech Nel") to dismiss the Complaint against it pursuant to CPLR §3211(a)(5) and (7) based on the statute of limitations and failure to state a cause of action. For the reasons stated below, the motion is granted pursuant to 3211(a)(7).[1]

The background facts are set forth at length in the March 1, 2019 decision of this Court granting the motion to dismiss by defendants Nextel of New York, Inc. ("Nextel") and Sprint Corporation (NYSEF Doc. No. 67). Briefly stated, plaintiff Stone & Broad, Inc. ("Stone") was the primary tenant of a triple-net lease of the building at 88 Broad Street in Manhattan from 1970 until the lease terminated in April 2013 and Stone vacated the premises. The landlord of the building and Lessor on Stone's Lease was non-party 88 Broad Street, LLC ("the Landlord").

[1] Were the Court to reach the statute of limitations issue, the result would be the same as in the Nextel decision.

After Stone vacated the premises, the Landlord commenced an action in Supreme Court, New York County, under Index Number 652833/14 to recover damages based on various alleged breaches of the Lease by Stone, including non-payment of rent and taxes, failure to maintain the building during the term of the Lease, and failure to surrender the building in good condition upon the termination of the Lease (NYSCEF Doc. No. 50) ("the Underlying Action"). The parties resolved the Underlying Action in 2017 by Stipulation So Ordered by Justice Shirley Kornreich pursuant to which Stone agreed to pay the Landlord $750,000 if full settlement of all claims, with no allocation of any portion of that sum to any particular claim. None of the defendants named in this action was named as a party in the Underlying Action or otherwise participated in any manner in the three-year litigation or the September 2017 settlement.

In July 2018, Stone commenced this action against its subtenant, the sub-subtenant, and numerous other parties who at some point over the past few decades had some connection to the premises, even if only remote. The Complaint alleges against all defendants the Second and Third Causes of Action for common law indemnification and restitution, respectively (NYSCEF Doc. No. 48). Stone's theory of the case is that the defendants, as the actual wrongdoers who caused the damage to the premises or as parties otherwise liable for those damages, should reimburse Stone for the $750,000 Stone paid the Landlord in the Underlying Action.

According to the affidavit of Joseph Moroz, the President and Chief Executive Officer of Tech Nel, in or about November 1, 2000 co-defendant Nextel hired Tech Nel to install telecommunications equipment on the roof of the premises. The work was completed in three to four weeks. At no point since 2000, until this action was commenced in 2018, did any party contact Tech Nel to complain that the equipment was causing any damage to the premises. Tech Nel had no dealings whatsoever with Stone before this suit (NYSCEF Doc. No. 49).

The same analysis that led to the dismissal of the claims against Nextel compels the dismissal of those very same claims against Tech Nel. The claim for common law indemnification cannot stand without proof of two critical elements: (1) vicarious liability by Stone for Tech Nel's conduct; and (2) lack of fault on Stone's part for the alleged damages. *Dormitory Auth. of State of N.Y. v Caudill Rowlett Scott,* 160 AD2d 179, 181 (1st Dep't 1999). No such proof exists here, as Stone was compelled to pay its Landlord $750,000 for its own wrongdoing under its Lease and not because it was vicariously liable for Tech Nel's conduct.

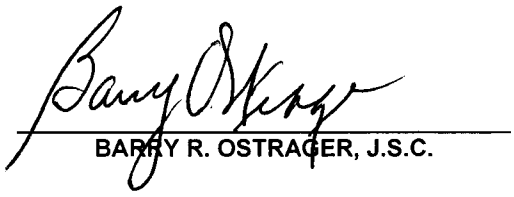
At oral argument, Stone vigorously argued that the Court was misapplying the applicable law, pointing, for example, to the decision by the Court of Appeals in *Raquet v Braun,* 90 NY2d 177 (1997). *Raquet* raised the question "whether a person properly held liable under former section 205-a [of the General Municipal Law, which authorized an injured firefighter to assert a claim against a party in control of the premises] may seek indemnification or contribution from parties who were not in possession or control of the premises but who were allegedly responsible, in whole or in part, for the accident." The *Raquet* Court does state the general principle for common law indemnification that "every one is responsible for the consequences of his own negligence, and if another person has been compelled … to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him …" *Id. at 183* (citations omitted). The discussion beyond that, however, is limited to the unique application of the General Municipal Law to the claims in that case. Thus, the case does not lend any support to Stone's position beyond the general rule for indemnification, which is not in dispute.

Equally unavailing is Stone's reliance on *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.,* 259 AD2d 75 (1st Dep't 1999). There, the seller of a building was obligated to pay certain funds to its buyer due to a defective smoke purge system. The Seller sought

indemnification from the engineer who had negligently designed the system because the seller itself was compelled to discharge a duty that it had delegated fully to, and that should have been discharged by, the engineer, whose negligence was the actual cause of the loss. The fact pattern presented was a classic case for indemnification and is readily distinguishable from the instant case in which Stone had no relationship whatsoever to Tech Nel and delegated no duties, let alone exclusive responsibility, to Tech Nel which would give rise to vicarious liability.

Turning to the restitution claim, Stone failed both in its papers and at oral argument to persuade that the Court's analysis in the March 1, 2019 Nextel decision was flawed. Simply put, none of the evidence even suggests that the settlement payment made by Stone to its Landlord years after Stone vacated the premises was not made to "satisfy the requirement of public decency, health or safety" as is required by law for a restitution claim. *City of New York v Lead Indus. Assn.*, 222 AD2d 119, 125 (1st Dep't 1996).

Accordingly, it is hereby ORDERED that the motion by defendant Tech Nel Electric, Inc. to dismiss the Second and Third Causes of Action against it is granted, but Tech Nel shall remain a party to this action based on cross-claims asserted against it.



3/26/2019
DATE

BARRY R. OSTRAGER, J.S.C.

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