Delgaudio v Townhouse Co. LLC
2019 NY Slip Op 32505(U)
August 22, 2019
Supreme Court, New York County
Docket Number: 160445/2013
Judge: Julio Rodriguez III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JULIO RODRIGUEZ III** **PART**

Justice

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ANTHONY DELGAUDIO,

Plaintiffs,

- v -

TOWNHOUSE COMPANY LLC,SOLOW REALTY & DEVELOPMENT CO LLC,BEEKMAN THEATER COMPANY LLC,THE CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT, NEW YORK CITY BUREAU OF EMERGENCY MEDICAL SERVICES, CITY CINEMAS LLC,ARISTA AIR CONDITIONING CORP.,

Defendant.

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INDEX NO. 160445/2013

MOTION DATE 06/20/2019, 06/20/2019

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

TOWNHOUSE COMPANY LLC, SOLOW REALTY & DEVELOPMENT CO LLC, BEEKMAN THEATER COMPANY LLC

Third-Party Plaintiffs,

-against-

CITY CINEMAS, LLC,

Third-Party Defendant.

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Third-Party
Index No. 590913/2013

TOWNHOUSE COMPANY LLC, SOLOW REALTY & DEVELOPMENT CO LLC

Second Third-Party Plaintiffs,

-against-

ARIST AIR CONDITIONING CORP.

Second Third-Party Defendant.

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Second Third-Party
Index No. 595054/2015

The following e-filed documents, listed by NYSCEF document number (Motion 003) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 129, 130, 131, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125

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

Plaintiff commenced this action seeking damages allegedly sustained in an accident on July 23, 2013, in an HVAC machine room located in the basement movie theater of 265 East 66th Street, New York, New York (also known as 1271 Second Avenue). Plaintiff was employed as a plumbing mechanic for non-party Evergreen Mechanical on the date of the accident. Defendant Townhouse Company LLC ("Townhouse") owned the property at issue; defendant Solow Realty & Development Co. LLC ("Solow") managed the property; and defendant City Cinemas LLC ("City Cinemas") operated the movie theater in the basement area of the building.

Plaintiff was injured while performing plumbing work in one of the building's machine rooms to address a clogged pipe, clogged drain, and leak. After completing the work and as he was exiting the tight space in the machine room, plaintiff allegedly fell and injured his hand when it came into contact with the belts and pulleys of an HVAC unit motor.

On motion sequence three, defendants Townhouse, Solow, and Beekman Theater Company LLC ("Beekman") (collectively "Townhouse Defendants") move for summary judgment to dismiss the complaint and all cross-claims as well as for summary judgment on its cross-claim for contractual indemnification from defendant City Cinemas. Townhouse Defendants' motion is opposed by plaintiff and defendant City Cinemas.

Townhouse Defendants argue their motion should be granted because, they contend, plaintiff failed to identify the cause of his fall.

In addition, on motion sequence three, defendant City Cinemas cross-moves for summary judgment on its cross-claim for contractual indemnification from defendants Townhouse and Solow and for summary judgment dismissing defendant Beekman's cross-claim for contractual indemnification. Townhouse Defendants oppose the cross-motion.

Defendant City Cinemas contends that its cross-motion should be granted because plaintiff's accident was "a result of [an] act or omission of Landlord [defined as Townhouse and Solow]" (Lewbel aff. in supp., Ex L, lease agreement at 2, 8-9). Additionally, defendant City Cinemas argues that defendant Beekman is not entitled to indemnification under the lease agreement as Beekman neither falls under the definition of "Landlord" under the lease nor is required to be named as an additional insured.

On motion sequence four, defendants City of New York, New York City Fire Department, and New York City Bureau of Emergency Medical Services (collectively "City defendants") move to dismiss the complaint pursuant to CPLR 3211 for failure to plead a special duty and for summary judgment pursuant to CPLR 3212 because 1) the record shows there is no special duty and 2) City defendants were engaged in a discretionary governmental function. City defendants' motion is unopposed. City defendants' motion is therefore granted as unopposed.

Parties' Positions

Townhouse Defendants argue that they are entitled to summary judgment because plaintiff failed to identify the cause of his fall.

Plaintiff opposes the motion based on certain portions of plaintiff's testimony and a corresponding inference that plaintiff's fall was caused by a garbage and debris condition on the floor of the mechanical room.

Defendant City Cinemas also opposes the motion, arguing that plaintiff identified the context and cause of his fall with sufficient detail that the cause of the injury is not speculative. Accordingly, defendant City Cinemas contends that the caselaw cited by Townhouse Defendants—in support of the proposition that summary judgment is warranted where a plaintiff fails to identify the cause of their fall—is distinguishable to the record here.

In reply, Townhouse Defendants maintain that the record does not contain evidence sufficient to hold Townhouse Defendants liable because plaintiff failed to identify exactly what caused him to fall. Therefore, they argue, it is just as likely that garbage or debris caused plaintiff to fall as some other cause, including plaintiff's awkward stance in the tight space of the mechanical room.

Additionally, defendant City Cinemas cross-moves for 1) summary judgment dismissing defendant Beekman's contractual defense and indemnity claims as against defendant City Cinemas, 2) a conditional order in favor of defendant City Cinemas for contractual indemnity as against defendants Townhouse and Solow, and 3) a conditional declaration of defense cost reimbursement with statutory interest. As to the second point, defendant City Cinemas argues that the record establishes the accident occurred "a result of [an] act or omission of Landlord [defined as Townhouse and Solow]" (Lewbel aff. in supp., Ex L, lease agreement at 2, 8-9)—that is, through Townhouse and Solow's hiring of plaintiff's employer to perform the work at issue, failing to clean the floor in the mechanical room, and failing to cut the power to the AC unit at issue during plaintiff's work.

Townhouse Defendants oppose defendant City Cinemas' cross-motion on the bases that 1) the cross-motion is improper because it seeks relief that is not "nearly identical" to that relief for which Townhouse Defendants applied, 2) defendant City Cinemas failed to demonstrate entitlement to contractual indemnification because, under the lease, City Cinemas was responsible for maintenance and routine repairs of the HVAC system, 3) defendant City Cinemas is not entitled to indemnification because City Cinemas violated its obligation under the lease to cooperate in the defense of this claim, and 4) defendant City Cinemas is not entitled to attorneys' fees because fault has not yet been established in this action.

In reply, defendant City Cinemas insists that the cross-motion is proper because Townhouse Defendants requested judgment on all claims and cross-claims including indemnification from defendant City Cinemas. Moreover, defendant City Cinemas maintains that it is entitled to 1) summary judgment dismissing the contractual indemnity claim by Beekman Theater due to lack of opposition, 2) a conditional order on its contractual indemnity claim under the lease as a result of defendants Townhouse and Solow's acts.

Procedural Posture of Defendant City Cinemas' Cross-Motion

Townhouse Defendants' prayer for relief on their motion for summary judgment requests "summary judgment as to all claims and cross-claims interposed against it, as well as on [their] cross-claim for indemnification from City Cinemas" (Nelson mem of law at 8). Townhouse Defendants asserted cross-claims dated November 26, 2013, for contribution and indemnification. Additionally, Townhouse Defendants, in their third-party complaint, asserted *inter alia* a third-party claim for contractual indemnification as against defendant City Cinemas.

A party's cross-motion for summary judgment "made after the expiration of the [deadline for making dispositive motions] may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion" (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013] *citing Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006]).

Here, defendant City Cinemas seeks summary judgment by cross-motion on its cross-claims for indemnification as asserted in its responsive pleading dated February 3, 2015. Additionally, defendant City Cinemas asserted a counter-claim for indemnification in its answer to the third-party complaint dated February 21, 2014.

Insofar as Townhouse Defendants explicitly seek judgment on their claim for indemnification as against defendant City Cinemas (Nelson mem of law in support at 8 ["as well as on [their] cross-claim for indemnification from City Cinemas"]), this court finds that defendant City Cinemas' corresponding prayer for summary judgment on its indemnification claim against Townhouse Defendants can be properly addressed by this court. Defendant City Cinemas' cross-motion indeed seeks 'nearly identical' relief (*see Alonzo*); it is an indemnification cross-application upon an original indemnification application. The substance of these applications is addressed *infra* (at 9-11).

Facts and Testimony

Plaintiff Delgaudio alleges that on July 23, 2013, at approximately 11:00 a.m., he was injured in the machine room in the basement movie theater of 265 East 66th Street when he fell into an HVAC unit. As he fell, pulleys and belts which run the motor of the HVAC unit at issue were exposed because a motor cover was not in place. The motor was powered and running, and the moving parts caused injury to plaintiff's finger. The parties do not dispute that the motor cover was not in place at the time of the alleged accident nor that the operating HVAC unit caused plaintiff's injuries.

Plaintiff testified that he went to the building on July 22, 2013 (the day before the repair work and accident) to determine what supplies and tools were needed to repair a clogged pipe, clogged drain, and leak in the mechanical room. Mr. Marc Ramos, a handyman for defendant Solow, took plaintiff to the mechanical room at issue for this purpose. Plaintiff and Mr. Ramos were in the mechanical room for between twenty and thirty minutes. Plaintiff determined what he

needed, and he also observed that there was garbage covering the floor of the mechanical room. Plaintiff testified that he told Mr. Ramos that he could not work with all the garbage on the floor.

The next day, July 23, 2013, plaintiff Delgaudio returned to the building, arriving at approximately 9:00 a.m., to perform the work of repairing the clogged pipe, clogged drain, and leak. Upon arriving, he noticed that the garbage had been pushed to the side of the room, away from the work area. Plaintiff performed the work and finished up at approximately 11:00 a.m. As he was exiting the mechanical room by crouching under some overhanging duct work, plaintiff "slipped on some garbage, something that was in that room that wasn't cleaned up" and fell into the HVAC unit at issue. His injuries allegedly occurred because his hand came into contact with the uncovered pulleys and belts of the now operating unit. Plaintiff did not notice that the unit was operating until he suffered his injury.

At his deposition, Mr. Marc Ramos testified that he was a handyman for Solow at the property at issue. Mr. Ramos performed daily inspections of the mechanical room at issue and filled out daily logs recording said inspections. Mr. Ramos stated that he would have indicated on his logs if he observed that the motor cover was not on the unit at issue; the logs from July 11, 2013, to July 23, 2013, do not note the absence of the motor cover. Mr. Ramos also testified that if the motor cover was not on the unit at issue, he would have shut off the unit and reported the uncovered unit to his boss. Moreover, Mr. Ramos testified that on July 22, 2013, and on July 23, 2013, he observed that the motor cover was in fact on the unit at issue. Both these inspections, according to Mr. Ramos' logs, occurred between 8:30 a.m. and 9:30 a.m. According to his testimony, the inspections may have occurred five or ten minutes earlier than 8:30 a.m.

Mr. Ramos testified that the HVAC units had a timer that would automatically operate the units on a given schedule. Mr. Ramos would set the timer upon a schedule approved by the cinema manager. Mr. Ramos testified that the timer is an electrical panel and that he did not know of anyone else who knew how to operate it. The timer would be changed upon a change in season, from winter to summer and vice versa. In the summer, the timer was set to turn the units on at approximately 10:00 a.m. The automatic power system also included a thermostat. Mr. Ramos stated that the manager of cinema was not aware of the location of the thermostat and that no one had ever asked him to adjust the temperature.

Mr. Ramos also testified that, the day before the accident, he showed the timer and lever for disconnecting power to the HVAC units to the employees of Evergreen Mechanical.

Scott Rosemann, division manager for the eastern division of Reading International, testified that he oversees five locations of City Cinemas. One of these City Cinemas locations, as of July 23, 2013, was the Beekman Theater at 1271 Second Avenue (also known as 265 East 66th Street). The cinema had a heating and air conditioning system, units for which were located in the mechanical rooms off the staircases leading to the projection booths. In 2013, City Cinemas had a contract with Arista Air Conditioning Corp. ("Arista") to perform HVAC maintenance. Mr. Rosemann's expectation was that Arista would inspect and change the filters and belts on the units as needed. The City Cinemas' general managers or other employees were not expected or qualified to inspect the units. Mr. Rosemann testified that City Cinemas did not have an obligation to maintain the mechanical room at issue. Moreover, he testified that the building would set the

temperature for City Cinemas' space, that the building controlled the thermostat, and that the building controlled the timer for the heating and cooling units.

A representative for Arista, Mr. Vincent Eckerson, testified that Arista performed quarterly maintenance on the HVAC units at issue. He stated that Arista technicians always remove the motor cover when performing quarterly preventative maintenance because the technicians must inspect the fan belts under the cover. Without removing the cover, the technicians would not know whether the belts require, for example, repair or replacement. Mr. Eckerson did not have personal knowledge as to the April 9, 2013, maintenance visit (which was the last quarterly maintenance visit before plaintiff's accident on July 23, 2019); however, Mr. Eckerson testified that the practice of Arista technicians is to always replace the motor cover. Mr. Eckerson stated that the tools used by Arista are standard tools, and that the motor cover is affixed to the unit with ordinary hardware.

Lease Agreement

Defendant City Cinemas was a tenant of the premises pursuant to a lease agreement (Lewbel aff. in supp., Ex L, lease agreement) ("the Lease") with defendants Townhouse and Solow. The Lease defines the "Landlord" as "Solow Management Corp. as Agent for Townhouse Company, L.L.C.", and defines the "Tenant" as "City Cinemas, LLC".

Section 5 of the Lease, entitled "Repairs, Maintenance and Alterations", provides that "Landlord, at its own cost and expense…shall make all repairs and replacements reasonably required with respect to all structural portions and any common areas of the Building, the roof and roof membrane, exterior walls, glass doors and partitions, sidewalks, elevators, escalators, HVAC, plumbing, electrical and all other systems and components of systems servicing the Premises and all signage with respect to the theater, provided that Tenant, rather than Landlord, shall be responsible for maintenance and routine, non-capital repairs of the portions of such systems and components of systems located within the Demised Premises" (*id.* at 4-5)

Section 8 of the Lease, entitled "Insurance", provides *inter alia* a list of individuals and entities which must be named as additional insureds in the City Cinemas' required insurance (*id.* at 6-8). The list of additional insureds does not include Beekman Theater Company LLC (*id.*).

Section 9 of the Lease, entitled "Indemnity", provides identical[1] and reciprocal indemnification provisions between the Landlord and Tenant. The first sentence provides a duty of indemnity from City Cinemas to Townhouse and Solow as follows: "Tenant agrees to indemnify and save Landlord free and harmless and against any and all liability, damages or expenses arising from injury or death to person or property occurring in the Premises as a result of any act or omission of Tenant, Tenant's agents or employees, provided that Landlord (a) provides Tenant with prompt notice of any claim that could be covered by such indemnity, (b) cooperates as may be reasonably required in the defense of any such claim and (c) does not settle or compromise any such claim without Tenant's prior written consent and the prior written consent of any Tenant's insurance carrier providing insurance with respect to such claim" (*id.* at 8-9). The second and final

[1] The provisions are identical for all relevant purposes here. The differences are a scrivener's error writing "indemnity" for "indemnify" and the addition of the phrase "or about" preceding "the Premises" in describing the Landlord's duty to indemnify, contemplating claims physically outside the building.

sentence of Section 9 provides the opposite and reciprocal agreement to indemnify from Townhouse and Solow to City Cinemas.[2]

Section 20 of the Lease, entitled "Dispute Resolution" provides that "any dispute arising under or related to this Lease will be resolved in the state or federal courts located in the City of Manhattan exclusively and not in any other court in any other jurisdiction, and the parties agree to the jurisdiction of such court. The prevailing party in any litigation or proceeding will be entitled to recover its prevailing attorneys fees" (*id.* at 12).

The "Demised Premises" are defined as "the premises located in the building known as 1271 Second Avenue, New York, New York, known as the Beekman Theater, as shown cross-lined on the plan annexed hereto as Exhibit A (the "Demises Premises"), together with all equipment, fixtures, seating and other personal property located therein as described on Exhibit B annexed hereto" (*id.* at 2). The Lease's Exhibit A is illegible (*id.* at 20-22).[3]

Summary Judgment Standard

The proponent of a motion for summary judgment must tender sufficient evidence to show its entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The moving party must make a *prima facie* showing of entitlement to judgment by demonstrating the absence of any material issues of fact (*Pullman v. Silverman*, 28 NY3d 1060 [2016]). The papers will be scrutinized in a light most favorable to the non-moving party (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). Once the proponent of a summary judgment motion makes such a *prima facie* showing, "the burden shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so" (*Friedman v Pesach*, 160 AD2d 460 [1st Dept 1990]).

Townhouse Defendants' Motion for Summary Judgment on Plaintiff's Claims

Townhouse Defendants move for summary judgment on the basis, they contend, that plaintiff failed to identify the cause of his fall.

"It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury" (*Siegel v City of New York*, 86 AD3d 452, 454 [1st Dept 2011]). However, a plaintiff is not obligated to identify with exact precision the cause of his fall where a "jury can reasonably infer" that an earlier identified condition remained unchanged (*Giambrone v New York Yankees*

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[2] "Landlord agrees to *indemnity* [sic] and save Tenant free and harmless and against any and all liability, damage or expenses arising from injury or death to person or property occurring in *or about* the Premises as a result of any act or omission of the Landlord, Landlord's agents or employees, provided that Tenant (a) provides Landlord with prompt notice of any claim that could be covered by such indemnity, (b) cooperates as may be reasonably requires in the defense of any such claim and (c) does not settle or compromise any such claim without Landlord's prior written consent and the prior written consent of any Landlord's insurance carrier providing insurance with respect to such claim" (Lewbel aff. in supp., Ex L, lease agreement, at 8-9 [differences italicized]).

[3] The mechanical room at issue cannot be identified with any certainty. Moreover, the "cross-lining" is faint, and there are areas where it is not altogether clear whether "cross-lining" is or is not present.

by Steinbrenner, 181 AD2d 547, 548 [1st Dept 1992] [where plaintiff observed litter on walkway several innings before accident] *citing Kelsey v Port Auth. of New York and New Jersey*, 52 AD2d 801 [1st Dept 1976]).

Here, plaintiff Delgaudio testified that on July 22, 2013, the day before the accident, at approximately 10:30 a.m., he went to the machine room at issue with Mr. Ramos for the purpose of determining what tools he would need for the repair job. When Mr. Ramos opened the door to the machine room, plaintiff observed "[a] lot of pipe, a lot of duct work, wiring hanging everywhere, the lights didn't work in there. We had a bulb for one light. The other light switch didn't even work, so we used a flashlight just to look in. There was stuff all over the floor. It was a very, very unorganized, dirty, tight room" (Nelson aff. in supp., Ex M, plaintiff dep. at 49). Plaintiff observed "[j]ust how messy [the room was] and garbage piled around...[and] how tight it would be [for a work space]. Like I said, garbage laying around" (*id.*, at 64), including "old construction garbage, old wiring thrown in the corner, old piping thrown on one side, pieces of wood, broken light bulbs" (*id.* at 65) and "pieces of BX cabling" (*id.* at 75). Plaintiff testified that he told Mr. Ramos, "This room is disgusting. It's one of the worse [*sic*] I have been in" (*id.* at 77). Additionally, plaintiff testified he told Mr. Ramos that he "needed proper lighting, [he] needed the garbage out of the way" (*id.*). Furthermore, plaintiff testified that on July 22, 2013, "the units were on" (*id.*).

Plaintiff testified that on July 23, 2013, the day of the accident, garbage had been pushed to the side of the room away from the work area (*id.* at 106), but that there was still garbage and debris between the door and plaintiff's work area (*id.* at 107). After plaintiff finished with the work, and while returning to the door, he slipped and fell: "I know I didn't slip on water. I didn't slip on a pipe. I slipped on some garbage, something that was in that room that wasn't cleaned up, I know I slipped on that" (*id.* at 229).

Under the circumstances, a jury could reasonably find without speculation that the garbage and debris plaintiff observed on the floor of the mechanical room was the cause of his injury (Nelson aff. in supp., Ex M, plaintiff dep. at 107 ["pipe, insulation...just pieces of cardboard" in between mechanical room door and plaintiff's workspace]; *see Giambrone v New York Yankees by Steinbrenner*, 181 AD2d 547, 548 [1st Dept 1992]).

Notwithstanding Townhouse Defendants' reliance on the passage of plaintiff's testimony where he stated that he "slipped out on something" (Nelson aff. in supp., Ex M, plaintiff dep. at 155), and assuming *arguendo* that Townhouse Defendants met their *prima facie* burden on the issue of the fall through citation to that testimony in isolation, this court finds that plaintiff and defendant City Cinemas, in opposition, created a triable issue of fact as to the cause of plaintiff's fall by their reliance and citation to plaintiff's more complete testimony. Plaintiff's more complete testimony includes, after having described in detail the nature of the garbage and debris on the room's floor he had earlier observed (*id.* at 65, 106-107), his specific identification that he "slipped on some garbage, something that was in that room that wasn't cleaned up" (*id.* at 229).

Furthermore, this court finds that Townhouse Defendants did not make out their *prima facie* case as to two other issues. First, Townhouse Defendants did not address the HVAC unit timer. It is undisputed that Townhouse Defendants were responsible for the at-issue HVAC unit's

timer and thermostat (Nelson aff. in supp., Ex N, Ramos dep. at 125-126; Ex P, Rosemann dep. at 138). Here, the record suggests that the HVAC unit turned on during the period between the commencement of plaintiff's work (when the unit was off [Nelson aff. in supp., Ex M, plaintiff dep. at 110]) and the time of plaintiff's accident (when the unit was on [*id.* at 178; Ex N, Ramos dep. at 280]). The court finds that Townhouse Defendants' failure to address this issue also precludes summary judgment.

Second, Townhouse Defendants failed to address the issue of the motor cover's absence from the HVAC unit at issue despite Mr. Ramos' testimony that he 1) inspected the mechanical room every day (Nelson aff. in supp., Ex N, Ramos dep. at 260); 2) would have noted the absence of the motor cover if it was not in place (*id.* at 247-248), and 3) would have completely shut down the unit if the motor cover was not in place (*id.*). As a result of the foregoing, this court finds that Townhouse Defendants' have failed to establish their entitlement to judgment as a matter of law, and Townhouse Defendants' motion for summary judgment is denied as to plaintiff's complaint.

<u>Cross-Claims for Indemnification – Motion and Cross-Motion</u>

As noted *supra*, Townhouse Defendants indeed explicitly seek judgment, in their motion for summary judgment, on their cross-claims for indemnification as against defendant City Cinemas. Consequently, this decision will address both Townhouse Defendants' motion and defendant City Cinemas' cross-motion on these indemnification cross-claims under the Lease.

"A party is entitled to full contractual indemnification [for damages incurred in a personal injury suit] 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'" (*Masciotta v Morse Diesel Int'l, Inc.*, 303 AD2 309, 310 [1st Dept 2003] *quoting Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774, 777 [1987]).

As a starting point, this court finds that defendant Beekman is not a party to the Lease and that defendant Beekman is not required to be indemnified under the Lease. Defendant Beekman is therefore not entitled to contractual defense or indemnification. Accordingly, to the extent that defendant City Cinemas seeks judgment dismissing defendant Beekman's cross-claims for contractual defense and indemnification, defendant City Cinemas' cross-motion is granted (*see Pacheco v Kushner Companies*, 88 AD3d 550 [1st Dept 2011]).

As to the other two Townhouse Defendants—that is, Townhouse and Solow—a determination of indemnification requires analysis of the Lease.

The contractual indemnification context under the circumstances is that defendants Townhouse and Solow (as "Landlord") and defendant City Cinemas (as "Tenant") have arranged equal and opposite indemnification to flow for damages "arising...as a result of any act or omission" of the other.[4] The inclusion of the phrase "as a result of any act or omission" takes this

[4] As noted *supra* at footnote 1, the only differences between the mirrored indemnification provisions are that Townhouse and Solow's duty to indemnify includes 1) a scrivener's error writing "indemnity" for "indemnify" and 2) responsibility for damages arising not only "in" but also "about the Premises" as a result of Landlord's act or omission.

indemnification clause out of the universe of "arising out of" (*see Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 [2005] *citing Aetna Cas. & Sur. Co. v Liberty Mut. Ins. Co.*, 91 AD2d 317, 320-321 [4th Dept 1983] [reasoning that the phrase "arising out of" is "ordinarily understood to mean originating from, incident to, or having connection with"]). Rather, the indemnification provision at issue requires that covered damages occur "*as a result of* any act or omission" of the other party (Lewbel aff. in supp., Ex L, lease agreement at 8-9). The indemnification provision's "as a result of" language necessarily implies a cause.[5] Under the current posture of this case, no cause has yet been determined between defendants Townhouse, Solow, and City Cinemas. Consequently, the extent, if any, to which defendants Townhouse, Solow, or City Cinemas caused this accident will be determined at time of trial.

Given that Townhouse Defendants' motion for summary judgment must be denied as decided *supra*, it remains that a jury could reasonably find them at fault for plaintiff's alleged injury. Moreover, this court finds that defendant City Cinemas has failed to establish that plaintiff's alleged injury did not "aris[e]...as a result of any [of its] act[s] or omission[s]" (Lewbel aff. in supp., Ex L, lease agreement at 8-9). Accordingly, neither Townhouse Defendants nor defendant City Cinemas are entitled to contractual indemnification at this time.

Last is the issue of conditional declarations of contractual indemnity. "[A] court may render a conditional judgment on the issue of indemnity pending determination of the primary action in order that the indemnitee [may] obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed'" (*Masciotta v Morse Diesel International, Inc.*, 303 AD2d 309 [1st Dept 2003] *quoting State v Travelers Prop. Cas. Ins. Co.*, 280 AD2d 756, 757 [3d Dept 2001]). A conditional declaration of contractual indemnity may be appropriate where strict or statutory liability will impose liability against a defendant despite 1) evidence suggesting[6] that another party's acts, omissions, or negligence was the cause of plaintiff's damages and 2) evidence establishing as a matter of law that the defendant to be held strict or statutorily liable was not negligent or actively involved in the circumstances that gave rise to plaintiff's damages (*see e.g. Dinino v D.A.T. Construction Corp.*, 267 AD2d 148 [1st Dept 1999] ["Defendants are entitled to a conditional judgment on their claim for contractual indemnification...since there was no evidence of negligence on the part of the direct defendants"]; *Lopez v Markos*, 245 AD2d 54 [1st Dept 1997] [where "only questions of fact have nothing to do with defendant's involvement", "defendant is entitled to conditional judgment on the issue of indemnification should plaintiff prevail"]; *see also Martinez-Gonzalez v 56 West 75th Street, LLC*, 172 AD3d 616 [1st Dept 2019] [indemnification granted where defendants' "liability to plaintiff was strictly vicarious"]).

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[5] Although a "result" does not imply a *proximate* cause (*see Burlington Ins. Co. v NYC Transit Authority*, 29 NY3d 313 [2017] [applying proximate causation trigger to coverage contract by virtue of "in whole or in part" modification to "caused by" language]), it is difficult to conceive of an outcome in this matter wherein one party will bear a loss (because it is held liable to some degree, indeed as a proximate cause of plaintiff's accident) for which it is entitled to indemnification from the other party (as a mere but-for cause under the Lease). Under these circumstances, where plaintiff alleges that both Landlord and Tenant are proximate causes of his injury, the practical consequence of this type of mirrored indemnification provision is that they effectively cancel one another out (*cf. Sport Rock Intern. Inc. v American Cas. Co. of Reading, PA*, 65 AD3d 12, 19 [1st Dept 2009] *citing Federal Ins. Co. v Atlantic Natl. Ins. Co.*, 25 NY 71, 75-76 [1969]).

[6] The declaration is conditional precisely because the evidence suggests rather than establishes the obligations between the parties, including any liability to a plaintiff or other claiming party. In such circumstances, the indemnification is conditioned upon a finding of liability in the primary action such that the indemnitee bears a loss.

Here, defendants Townhouse, Solow, and City Cinemas have failed as to this second item.

Townhouse Defendants failed to establish entitlement to summary judgment as a matter of law as to plaintiff's claims as against them (*supra* at 7-9).

Defendant City Cinemas has similarly failed to establish, as a matter of law, that it was not negligent. Moreover, defendant City Cinemas has failed to establish as a matter of law that the "Demised Premises" under the lease does not include the mechanical room at issue. The Lease refers to an exhibit A with "cross-lining" that is illegible in the parties' submissions (Lewbel aff. in supp., Ex L, lease agreement at 2, 20-22). Notwithstanding defendant City Cinemas' witness' testimony that defendant City Cinemas was not responsible for the mechanical room at issue (Nelson aff. in supp., Ex O, Rosemann dep. at 64 ["I understand that it is not us [that is responsible for the mechanical rooms]"), his testimony is not evidence of the content of the contract itself (*see e.g. Cole v Macklowe*, 40 AD3d 396 [1st Dept 2007] ["parol evidence rule bars admission of extrinsic evidence to contradict or vary the terms of a written contract intended to embody the agreement between the parties"]). Rather, the contract terms state that "Tenant [defendant City Cinemas], rather than Landlord, shall be responsible for maintenance and routine, non-capital repairs of the portions of such systems [including HVAC] and components of systems located within the Demised Premises" (Lewbel aff. in supp., Ex L, lease agreement at 4-5), and defendant City Cinemas retained Arista Air Conditioning Corp. for quarterly maintenance of the HVAC system (Lewbel aff. in supp. at ¶ 22; *see id.*, Ex N, City Cinemas-Arista contract), including the unit at issue (Nelson aff. in supp., Ex O, Rosemann dep. at 36-42). As a result of the foregoing, defendant City Cinemas has failed to establish that it was not responsible for the mechanical room and unit at issue, and therefore it has failed to establish that it was non-negligent as a matter of law. Accordingly, defendant City Cinemas' cross-motion must be denied to the extent that it seeks a conditional declaration of contractual indemnification.

Defendants Townhouse, Solow, and City Cinemas have not established their entitlement to judgment as a matter of law as to plaintiff's claims against them, and therefore respective potential fault is yet to be determined. Because these three defendants remain as direct defendants, the court finds that the granting of a conditional declaration of contractual indemnity is not warranted.

Since Townhouse Defendants and defendant City Cinemas have failed to establish their entitlement to judgment as a matter of law, this court finds that their motion and cross-motion for contractual indemnification and conditional declarations of contractual indemnification must be denied. Similarly, because the prime obligations and fault have yet to be determined, the court finds that the parties' sought relief for common law indemnification, contribution, defense cost reimbursements, and attorneys' fees must also be denied (*Martins v Little 40 Worth Associates, Inc.*, 72 AD3d 483 [1st Dept 2010] ["Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence"]; *see Raquet v Braun*, 90 NY2d 177 [1997]; *Vigilant Ins. Co. v Federal Ins. Co.*, 163 AD2d 202 [1st Dept 1990]).

Accordingly, and upon the parties' respective papers and exhibits, it is ORDERED that defendants Townhouse Company LLC, Solow Realty & Development Co. LLC, and Beekman Theater Company LLC's motion for summary judgment is denied in its entirety; and it is further

ORDERED that defendant City Cinemas LLC's cross-motion is granted in part to the extent that defendant Beekman Theater Company LLC's cross-claim for contractual indemnification is dismissed; and it is further

ORDERED that defendant City Cinemas LLC's cross-motion is otherwise denied; and it is further

ORDERED that defendants City of New York, New York Fire Department, and New York City Bureau of Emergency Medical Services' motion to dismiss and for summary judgment is hereby granted, and the complaint and all cross-claims are severed and dismissed as to defendants City of New York, New York Fire Department, and New York City Bureau of Emergency Medical Services; and it is further

ORDERED that defendants City of New York, New York Fire Department, and New York City Bureau of Emergency Medical Services are to serve a copy of this order with notice of entry upon all parties and the General Clerk's Office within twenty days; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this matter be referred to a non-City part.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected. This constitutes the decision and order of the court.

August 22, 2019

HON. JULIO RODRIGUEZ III, JSC

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