At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of July 2022.

PRESENT: HON. INGRID JOSEPH, J.S.C
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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LOWELL FRANCIS,

Plaintiff,

-against-

BARD AND LEVINSOHN LLC and
METRO BEAUTY OUTLET INC.,

Defendants.

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METRO BEAUTY OUTLET INC.,

Third-Party Plaintiff,

-against-

SUPER STOP & SHOP #0506, THE STOP & SHOP SUPERMARKET COMPANY LLC, and BLOOMFIELD PARKING LOT MAINTENANCE, INC.,

Third-Party Defendants.

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METRO BEAUTY OUTLET INC.,

Second Third-Party Plaintiff,

-against-

FLATBUSH DELAWARE HOLDING LLC and
ACHS MANAGEMENT CORP.,

Second Third-Party Defendants.

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Index No.: 508262/2017
DECISION & ORDER

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Defendant and Second Third-Party Defendants' motion.

Papers	NYSCEF Nos.
Notice of Motion/Cross-Motion and Affidavits/Affirmations Annexed.....	113–137; 138–149
Affirmation in Opposition Papers.....	151–153; 154–156
Reply to Opposition Papers.....	158; 160–161; 162–164

I

Upon the foregoing papers, Second Third-Party Defendants, Flatbush Delaware Holding LLC ("FDH") and ACHS Management Corp. ("ACHS"), move (MS#5) for an order pursuant to CPLR § 3212 granting summary judgment to FDH and ACHS on their cross-claims against Third-Party Defendant, Bloomfield Parking Lot Maintenance, Inc. ("Bloomfield Parking") for contractual indemnification and on all of their claims against all other defendants for common-law indemnification; and Defendant, Bard and Levinsohn LLC ("B&L"), moves (MS#6) for an order, pursuant to CPLR § 3212 granting summary judgment to B&L dismissing plaintiff's complaint and all crossclaims against B&L and granting summary judgment to B&L on its crossclaims against Defendant/Third-Party Plaintiff/Second Third Party Plaintiff, Metro Beauty Outlet, Inc. ("Metro Beauty") for contractual indemnification and against Bloomfield Parking for common-law indemnification.

Plaintiff, Lowell Francis ("Plaintiff"), commenced this action to recover damages for personal injuries he sustained on February 8, 2017 after he allegedly tripped and fell at the cellar doors abutting Mero Beauty ("cellar doors"), located at 1003 Flatbush Avenue, in Brooklyn, New York. It is uncontested that Bloomfield Parking was a snow removal company that entered into a written contract with FDH and ACHS to provide snow removal work at 2401 Bedford Avenue and 1007-1011 Flatbush Avenue. However, it is FDH and ACHS's position that they were not negligent, since it was Bloomfield Parking's employee that drove the truck which veered off course and went onto the cellar doors.

In support of their motion, Second Third-Party Defendants, FDH and ACHS submitted among other items the deposition testimony of Mr. K. Bloomfield, the owner of Bloomfield Parking. During his testimony, he confirmed that footage from the security camera captured by

Mr. Hong, the owner of Metro Beauty, showed a truck going over the cellar doors and confirmed that the truck was in fact a Bloomfield Parking vehicle. In addition, Mr. K. Bloomfield testified that he does not have any reason to believe ACHS or FDH had anything to do with the truck going over the cellar doors. In addition, FDH and ACHS submitted a copy of the Insurance/Indemnification Agreement between Bloomfield Parking and FDH and ACHS ("Indemnification Agreement") that contained a Hold Harmless provision which stated in pertinent part that Bloomfield Parking will indemnify FDH and ACHS against any and all claims arising in whole or in part and in any manner from injury resulting from the acts, omissions, breach or default of Bloomfield Parking.

In opposition to FDH and ACHS's motion, Bloomfield Parking referenced the exhibits contained in FDH and ACHS's motion. Specifically among the exhibits referenced, Bloomfield Parking contends that since Mr. Hong testified that one of his employees tried to hammer down the cellar doors, it is the hammering that created the hazardous, trap-like condition that caused Plaintiff to allegedly trip and fall. In addition, Bloomfield Parking alleges that with regards to the indemnification provision, Bloomfield Parking is only required to contractually indemnify FDH and ACHS in an action that results from Bloomfield's negligence, and since FDH and ACHS have not established that the Bloomfield Parking truck which traversed the cellar doors created the condition that caused Plaintiff's accident, they are not entitled to contractual indemnification, at this time.

In support of its cross motion, Defendant, B&L submitted a copy of the Store Lease Agreement between B&L and Metro Beauty. B&L alleges that based on the Store Lease Agreement, Metro Beauty was required to make all repairs and that because B&L was an

out-of-possession landlord, it cannot be held liable for injuries that occured on its premises. Further, B&L alleges that since it had no responsibility for the cellar doors and that the Store Lease Agreement required Metro Beauty to indemnify B&L for any and all claims arising out of Metro Beauty's occupancy, Metro Beauty should be required to indemnity B&L.

In opposition to B&L's cross-motion, Plaintiff referenced Paragraph 13 of the Store Lease Agreement, which states that the owner, B&L, has the right to enter the demised premises at any time, and without notice, for the purposes of making repairs, replacements and/or improvements to any portion of the premises as B&L deems necessary and reasonably desirable to perform. Plaintiff contends that since B&L maintained a right to re-enter the premises to perform repairs, it maintains control over the building and thus an issue of notice arises, thus B&L is not entitled to summary judgment as a matter of law on its indemnification claim. Additionally, Plaintiff contends that B&L is not entitled to summary judgment as New York City Administrative Code Section 7-210 unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition and provides that said owners are liable for personal injury that is proximately caused by such failure.

Bloomfield Parking also opposes B&L's cross motion, arguing that B&L is not entitled to common law indemnification from Bloomfield Parking as it has failed to establish that the Bloomfield truck which traversed the cellar doors created the condition that caused Plaintiff's accident. In support of its position, Bloomfield Parking made reference to the deposition testimony of Mr. Hong, who testified that the cellar doors were severely damaged after the truck drove over it, causing the doors to bend upward, but his employee attempted to fix the doors by hammering it down.

Generally, an out-of-possession landlord is not liable for injuries sustained at the leased premises unless it is contractually obligated to maintain or repair the premises (*see Putnam v Stout*, 38 NY2d 607, 618 [1976]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 11 [2d Dept 2011]). While, a landlord's mere reservation of a right to enter leased premises to make repairs is insufficient to give rise to liability for a subsequently-arising dangerous condition, an out-of-possession landlord will be responsible for injuries if the landlord has a duty imposed by statute or assumed by contract or a course of conduct (*see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559 [1987]); *Wenzel v 16301 Jamaica Ave., LLC*, 115 AD3d 852 [2d Dept 2014]) .

"[T]he right to contractual indemnification depends upon the specific language of the contract," and "[t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Shaughnessy v Hutington Hosp. Assn.*, 147 AD3d 994, 999-1000 [2d Dept 2017])."[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]). However, "'[a] court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed'" (*Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 930-931 [2d Dept 2016]; *Arriola v City of New York*, 128 AD3d 747, 748-749 [2d Dept 2015], quoting *Jamindar v Uniondale Free School Dist.*, 90 AD3d 612, 616 [2d Dept 2011]).

"The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" (*Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507). In order to establish a claim for common-law indemnification, a party must prove not only that it was not negligent, but also that the proposed indemnitor's actual negligence contributed to the accident, or in the absence of any negligence, that the indemnitor had the authority to direct, supervise, and control the work giving rise to the injury (*Mohan v Atlantic Ct., LLC*, 134 AD3d 1075, 1078-1079 [2d Dept 2015]; *Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118-1119 [2d Dept 2011]). "Where a defendant's alleged liability is purely statutory and vicarious, conditional summary judgment in that defendant's favor on the basis of common-law indemnification is premature absent proof, as a matter of law, that [the party from whom indemnification is sought] was negligent or had authority to direct, supervise, and control the work giving rise to the plaintiff's injury" (*McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1097-1098 [2d Dept 2018]; *Shaughnessy v Hutington Hosp. Assn.*, 147 AD3d 994, 999 [2d Dept 2017]).

Here, B&L has failed to satisfy its *prima facie* burden in demonstrating that it was an out-of-possession landlord. Assuming, *arguendo*, B&L could satisfy its *prima facie* burden, in opposition, Plaintiff has raised triable issues of fact as to whether B&L, by reserving its right to enter the leased premises to, inter alia, make repairs, had a duty imposed by statute to be held liable for injuries sustained as a result of subsequently-arising dangerous conditions. Therefore, the court hereby denies that branch of B&L's motion for summary judgment dismissing the complaint.

The record indicates that Bloomingdale Parking's insurance/indemnification agreement with FDH and ACHS contains a broad indemnity provisions that provides, inter alia, that

Bloomingdale Parking will indemnify and hold harmless, to the fullest extent permitted by law FDH and ACHS "from and against any and all claims . . . arising in whole or in part and in any manner from injury . . . resulting from the acts, omissions, breach or default of" Bloomingdale Parking. However, FDH and ACHS has established that it was free from any negligence in the happening of the accident and that it may be held liable solely by virtue of statutory or vicarious liability. Hence, the court finds that FDH and ACHS are entitled to a conditional order of summary judgment on their respective cross claims for contractual indemnification against Bloomingdale Parking if Bloomingdale Parking is found liable.

Neither FDH, ACHS nor B&L are entitled to summary judgment on their respective claims for common-law indemnification, because there are issues of fact as to whose negligence, if any, caused Plaintiff's accident. In order to establish a claim for common law indemnification, a party must prove not only that it was not negligent, but also that the proposed indemnitor's actual negligence contributed to the accident. FDH and ACHS and B&L have failed to establish, *prima facie*, that the proposed indemnitors, Bloomingdale Parking and Metro Beauty, were "responsible for the negligence that contributed to the accident" (*see George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]; Benedetto v Carrera Realty Corp., 32 AD3d 874, 875 [2d Dept 2006]). Under such circumstances it would be premature to award FDH and ACHS and B&L's summary judgment on that claim. In light of the movants' respective failures to meet their *prima facie* burdens, the court need not consider the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853, [1985]).

Accordingly, after oral argument and review of the submitted documents, the Court finds that with respect to MS #5, FDH and ACHS are entitled to a conditional order of summary judgment on their cross claims for contractual indemnification against Bloomingdale Parking,

however as FDH and ACHS have failed to demonstrate the absence of issues of fact for trial on their common-law indemnification claim, that branch of their motion is denied. Moreover, with respect to MS#6, B&L's motion to dismiss Plaintiff's complaint and for contractual and common law indemnification, is also denied as there are issues of fact present warranting a trial.

Issues not addressed are either moot or without merit.

This constitutes the Decision and Order of the Court.

ENTER

HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice