SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** 32
Justice

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KATHLEEN SAVAS, ANDREW SAVAS,

Plaintiff,

- v -

557 8TH AVE. CORP., ABRAHAM NIR, ST. MARKS 2 BROS PIZZA, INC.,2BP1 LLC,

Defendant.

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557 8TH AVE. CORP., ABRAHAM NIR

Plaintiff,

-against-

FOUR BOROUGH CONSTRUCTION CORP.

Defendant.

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INDEX NO. 160619/2017

MOTION DATE

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

Third-Party
Index No. 596067/2019

The following e-filed documents, listed by NYSCEF document number (Motion 005) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131

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

Upon the foregoing documents, the motion is determined as follows:

Plaintiff commenced this action to recover for injuries allegedly sustained on April 16, 2017, when she tripped and fell on a sidewalk adjacent to property located at 557 8th Avenue, New York, New York. At that time, the property was owned by Defendants 557 8th Ave. Corp. and Abraham Nir ("Owners") which it leased to Defendant 2BP1 LLC ("Lessee"). Apparently, Owners contracted with Third-Party Defendant Four Borough Construction Corp. ("Four Borough") to perform construction repairs on the sidewalk in 2015.

Owner Defendants answered and pled a crossclaim against all the other Defendants for common-law indemnification and contribution. Defendant Lessee answered and pled crossclaims against all the other Defendants for common-law indemnification and contribution, contractual indemnification and for breach of contract for failure to obtain insurance. Thereafter, Owner Defendants commenced a third-party action against Four Borough for common-law indemnification and contribution, contractual indemnification and for breach of contract for failure to obtain insurance. Four Borough answered and pled counterclaims against all the Defendants for common-law indemnification and contribution.

Now, Four Borough moves for summary judgment dismissing Plaintiff's complaint, crossclaims and third-party claims pled against it pursuant to CPLR §3212. Owner and Lessee Defendants opposed the motion. Plaintiff did not submit opposition.

Generally, a party moving for summary judgment must establish, in the first instance, entitlement to judgment as a matter of law by tendering sufficient evidence in evidentiary form which eliminates any material issues of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make a *prima facie* case requires denial of the motion regardless of the sufficiency of the opposition papers (*see Alvarez v Prospect Hospital*, supra at 324; *see also Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). If the movant meets its requirement, the burden shifts to the opposing party to establish the existence of a triable issue of fact (*see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra*).

To sustain a negligence cause of action arising out of the ownership or control of real property "there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it" (*Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.*, 61 AD3d 629 [2d Dept 2009]; *see also Basso v Miller*, 40 NY2d 233 [1976]; *Tatom v Andrews Intl., Inc.*, 178 AD3d 981 [2nd Dept 2019]; *Davis v Commack Hotel, LLC*, supra at 502). Therefore, on the branch of the motion to dismiss Plaintiff's complaint Movant was required to demonstrate, *prima facie,* that one or more of these essential elements are negated as a matter of law (*see eg Poon v Nisanov*, 162 AD3d 804 [2d Dept 2018]; *Nunez v Chase Manhattan Bank*, 155 AD3d 641 [2d Dept 2017]). Here, Plaintiff has not pled any cause of action against Four Borough nor has Movant demonstrated that any of the direct Defendants are not negligent as a matter of law. As such, this branch of the motion is denied.

A claim for common-law indemnity can only be sustained by a non-negligent party whose liability is purely vicarious (*see Broyhill Furniture Indus., Inc. v Hudson Furniture Galleries, LLC,* 61 AD3d 554, 556 [1st Dept 2009]). Contribution is an apportionment of rights among wrongdoers who share responsibility for an injury (*see* CPLR §1401; *Garrett v Holiday Inns, Inc.*, 58 NY2d 253, 258 [1983]). Therefore, a *prima facie* case for dismissal of common-law indemnification and contribution claims requires the moving party to establish it was not negligent or that the claims are otherwise not viable as a matter of law (*see Higgins v TST 375 Hudson, L.L.C.*, 179 AD3d 508, 511 [1st Dept 2020]; *CONRAIL v Hunts Point Terminal Produce Coop. Ass'n*, 11 AD3d 341, 342 [1st Dept 2004]).

There is no allegation in the complaint, nor to any of the parties allege in the moving papers that Four Borough's liability is predicated upon occupancy, ownership, control or a special use the premises where Plaintiff's accident occurred (*see generally Balsam v Delma Engineering Corp.*, 139 AD2d 292, 296 [1st Dept 1988]; *see also Moonstone Judge, LLC v Shainwald*, 38 AD3d 215 [1st Dept 2007]). Moreover, under the circumstances Four Borough can only be liable to a noncontracting third-party like Plaintiff will only arise if, *inter alia*, it negligently created or exacerbated a dangerous condition (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141-142 [2002]). Ergo, Movant was only compelled to demonstrate that it did not create the condition Plaintiff alleges caused her to trip and fall. Four Borough acknowledges that it installed the sidewalk at issue in 2015. However, it demonstrated *prima facie* that it did not create the condition at issue with the production of an affidavit of its owner and documents related to the work performed, including the contract, construction plans, permits and progress photographs. Among these documents was a letter from the New York City Department of Transportation to Owners indicating that a "SIDEWALK DISMISSAL INSPECTION" was conducted on March 18, 2016 and stated that "[t]he inspection found that the sidewalk repairs are satisfactory and

within the NYC Department of Transportation's standards and guidelines" and that "[a]ny sidewalk violation issued on or prior to this inspection will be removed from the County Clerk's records". This evidence established, in the first instance, that Four Boroughs did not create the defective condition at issue (*see Izzo v Proto Constr. & Dev. Corp.*, 81 AD3d 898, 899 [2d Dept 2011]; *Acosta v City of New York*, 24 AD3d 291, 292 [1st Dept 2005]).

In opposition, Owner and Lessee Defendants failed to raise an issue of fact. That Four Borough constructed the sidewalk does not *ipso facto* mean it did so negligently. Nor was there evidence proffered that the defective condition Plaintiff claims caused her to fall was a consequence of Four Borough's work.

Owner and Lessee Defendants' assertion that summary judgment is premature based on the existence of outstanding discovery is unavailing. While a motion for summary judgment made by a party that has not been deposed is often found premature (*see Figueroa v City of New York*, 126 AD3d 438, 439, 5 N.Y.S.3d 62 [1st Dept 2015]), that precept is not absolute (*see eg Washington v New York City Bd. of Educ.*, 95 AD3d 739 [1st Dept 2012]). In this case, Movant exchanged the paper discovery underlying its motion nearly two and one-half years ago (*cf. Lyons v New York City Economic Dev. Corp.*, 182 AD3d 499 [1st Dept 2020]; *Reid v City of New York*, 168 AD3d 447, 448 [1st Dept 2019]), and Owner and Lessee failed to identify what potential information would be revealed at a deposition that would create an issue of fact (*see Stubenhaus v City of New York,* 170 AD3d 1064, 1066 [2d Dept 2019]; *Brown v City of New York*, 162 AD3d 733 [2d Dept 2018]; *see also Weiters v City of New York*, 103 AD3d 509 [1st Dept 2013]).

On the branch of Four Borough's motion to dismiss the contractual indemnification claims against it, this cause of action is dependent upon the specific language of the contract (*see Ging v F.J. Sciame Constr. Co., Inc.,* 193 AD3d 415, 418 [1st Dept 2021]; *Anderson v United Parcel* Service, 194 AD3d 675, 678 [2d Dept 2021]). "The 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 circumstances" (*George v Marshalls of MA, Inc.,* 61 AD3d 925, 930 [2d Dept 2009]; *see also Wai Cheung v 48 Tenants' Corp.*, 192 AD3d 503 [1st Dept 2021]). Movant demonstrated, and Owners and Lessee did not contradict, that no indemnification provision was contained in the contract between Defendant 557 8th Ave Corp. and Four Borough (*see A & E Stores, Inc. v U.S. Team, Inc.*, 63 AD3d 486 [1st Dept 2009]). Further, there was no contract between Movant and Defendants Abraham Nir or 2BPI LLC (*see eg Rivera v 203 Chestnut Realty Corp.*, 173 AD3d 1085, 1087 [2nd Dept 2019]).

Concerning the claims for failure to procure insurance, the contract provides that Four Borough was to provide "liability, workmen's compensation and Disability insurance" listing Defendant 557 8th Ave Corp. as an additional insured. As there is no agreement that exists between Four Borough and Defendants Abraham Nir or 2BPI LLC, any claim by these parties fails (*see Sicilia v City of New York*, 127 AD3d 628, 628 [1st Dept 2015]). However, Movant was required to demonstrate the required insurance was purchased as the contract specifically required Movant to obtain same naming 557 8th Ave Corp. as an additional insured (*cf. Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 967 [2d Dept 2012]). In support of the motion, Four Borough failed to demonstrate it obtained the required insurance. The policy proffered makes no reference to 557 8th Ave Corp. as an additional insured and the certificate of liability insurance states it is "a matter of information only and confers no rights upon the certificate holder" (*see Trapani v 10 Arial Way Assocs.*, 301 AD2d 644, 647 [2d Dept 2003]). The finding that Four Borough was not negligent does not render this issue moot (*see Brown v Shurgard*

Stor. Ctrs. LLC, 203 AD3d 453 [1st Dept 2022]; *Hajdari v 437 Madison Ave. Fee Assocs.*, 293 AD2d 360 [1st Dept 2002]).

Accordingly, it is

ORDERED that the motion by Third-Party Defendant Four Borough for summary judgment is granted to the extent that all claims in the third-party complaint are dismissed except the claims by Defendant 557 8th Ave Corp. for breach of contract for failure to procure insurance, and it is

ORDERED that all parties are to appear for a status conference on **March 21, 2023 @ 10:00am** in Courtroom 1127[b] in the Courthouse located at 111 Centre Street.

2/6/2023
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

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