At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of March 2023.

PRESENT:
CARL J. LANDICINO, J.S.C.

MILEDYS ORTIZ,

Plaintiff,

-against-

VERIZON NEW YORK INC. and CUSHMAN & WAKEFIELD, INC.

Defendants.

VERIZON NEW YORK INC.,

Third-Party Plaintiffs,

-against-

CUSHMAN & WAKEFIELD, INC.,

Third-Party Defendants.

Index No.: 515859/2019

DECISION AND ORDER

Motion Sequence #1, #2

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	72-82, 92-109,
Opposing Affidavits (Affirmatio	83, 84, 86-89, 111,
Reply Affidavits (Affirmations)	120-122,
Memorandum of Law	110, 118, 119, 125,

After a review of the papers and oral argument the Court finds as follows:[1]

[1] Defendant/Third Party Defendant contends that Defendant/Third Party Plaintiff's failure to include a statement of material facts pursuant to 22 NYCRR § 202.8-g(c) is fatal to this motion. This rule, of recent modification, requires a statement of material facts to be included at the Court's discretion. Part 81 Rules presently do not require the statement to be provided. Moreover, many of the purported facts constitute legal conclusions. Additionally, the Court will excuse this failure under CPLR 2001. *See Disarli v TEFAF NY, LLC*, 2022 NY Slip Op 30029 [U] [Sup Ct, Kings County 2022].

Defendant, Third Party Plaintiff, Verizon New York, Inc. ("Verizon") moves (motion sequence #1) for summary judgment pursuant to CPLR 3212 finding that 1) Verizon is entitled to contractual and/or common law indemnification from Co-Defendant, Third Party Plaintiff, Cushman & Wakefield ("Cushman"), and, 2) Cushman breached its contract with Verizon (the "Contract" or "Agreement") in that it failed to procure insurance in accordance with the terms of the Contract. Cushman moves (motion sequence #2) for summary judgment pursuant to CPLR 3212, dismissing all claims against it.

This action concerns alleged injuries suffered by the Plaintiff, Miledys Ortiz (the "Plaintiff") on or about January 13, 2019 due to a fall on a sidewalk abutting the premises known as 121 Milford Street, Brooklyn, New York (the "Premises"). Plaintiff contends that the condition of the sidewalk was defective and dangerous on the date of the accident.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v. Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

As to motion sequence #1 by Verizon, Verizon contends that the Contract provided that Cushman would defend, indemnify and hold harmless Verizon. Verizon further contends that the Plaintiff's claims against Verizon fall within the coverage of that indemnity provision. Verizon refers the Court to Provision 18.1.1. That provision reads, in pertinent part, as follows:

> 18.1.1 **Service Provider General Indemnifications**. Service Provider [Cushman] shall indemnify, defend and hold harmless the Verizon Indemnitees from and against, and shall pay any and all Losses sustained or incurred by any of the Verizon Indemnitees, based upon, relating to or arising from, any and all Third Party claims, suits or proceedings in connection with any of the following:
>
> (a) Any actual or alleged bodily injury or death, damage to tangible personal or real property, including theft, notwithstanding the form in which any such action is brought (e.g., contract, tort or otherwise), to the extent such injuries or damages arise directly or indirectly from negligent (or allegedly negligent) or willful acts, errors or omissions of the Service Provider [Cushman] and/or any Service Provider Personnel.

Verizon also directs the Court to Contract Provision 19.1 in relation to insurance coverage. Provision 19.1 of the Contract reads, in pertinent part, as follows:

> 10. **Certificates of Insurance**. Service Provider shall, prior to rendering services, and annually upon expiration of the policies on the current certificate, furnish a certificate of insurance on which Verizon, its Subsidiaries, and Affiliates and their respective directors, officers and employees are included as additional insureds with respect to the commercial general, automobile and umbrella liability insurance policies.

Verizon argues that it demanded from Cushman its right to indemnification under the Contract and sought coverage as an additional insured under Cushman's policy of insurance. Indemnification and coverage was not provided and in light thereof Verizon brings this motion (motion sequence #1). Verizon also provides documentation in support of its position.

Verizon also proffers the deposition of Anthony Antoldi, held on September 21, 2021 (See Verizon's Motion, Exhibit "A"). Mr. Antoldi stated that at the time of his deposition he was employed by Verizon as "First Level Real Estate Manager for Nassau County" since April of 2019. (Page 8). He also stated that he had previously been employed by Cushman and that his employment with Cushman had commenced in January of 2016. He stated that when he commenced his employment with Cushman his title was "Portfolio Manager for the Brooklyn area." (Pages 9-10). He testified that his role as Portfolio Manager was to "...work hand-in-hand with Verizon. Anytime I was asked to participate in meetings, anything related to the property and/or the site itself. If I needed a vendor to do work, that would be my job." As to whether he managed Verizon's property, he stated, "I wouldn't say directly managed. I would assist. Cushman and Wakefield is more of a second responder particularly with this location, Liberty Avenue." (Page 10). He stated that his office was located at "862 Liberty Avenue" and confirmed that the building where his office was located was at the corner of Liberty Avenue and Milford Street in Brooklyn. (Pages 14-15). As to whether he was aware of entities that were responsible for maintenance of the exterior of the Premises, he stated, "[a]gain, it would be more so who highlights the problem, the issue at hand. Cushman and Verizon work hand-in-hand in identifying certain situations and then take action." (Page 21). As to whether there was anyone at Cushman who had responsibility for inspection or cleaning of the sidewalks surrounding the Premises, the witness stated, "no" but there was a vendor that could be called to address such issues. He also stated that there was no set schedule for cleaning the sidewalks. "Only as needed." (Pages 23-24). He stated that he would "walk the Premises and check things out",

"[p]robably once a month." He stated that he would take a photograph "if there was an imperfection." (Pages 25-26).

Upon a review of a photograph of the area of the alleged defect presented to him during the deposition, Mr. Antoldi was asked whether, if he had seen the alleged condition, he would have reported it. He responded, "[b]ased off of the photos, I probably would make a note of it, but it would not be, in terms of as captured as an emergency service to do. And my personal opinion, that does not look like a safety issue." (Pages 29-30) As to whether records would have been generated if work had been performed in relation to a sidewalk, Mr. Antoldi stated, "[t]here is a system that is used to generate service tickets. You basically upload a scope of work detail, assign a vendor or multiple to that ticket and they would bid on providing service." "It is a shared system actually between the two. But there is a fine line of Verizon really knowing and engaging vendors and knowing price." (Pages 32-33). He also stated that he examined records in relation to the subject sidewalk area and stated, "[n]othing was found dating back to the prior three years." (Page 33).

In opposition, Cushman raises the statutory duty of Verizon, as the property owner, to maintain an abutting sidewalk in reasonably safe condition pursuant to §7-210 of Administrative Code of City of New York, the Sidewalk Law.

The Sidewalk Law provides in pertinent part that:

> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

> c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

In general, the Court has held that "a landowner's duty under section 7-210 is an affirmative, nondelegable obligation." *Xiang Fu He v. Troon Mgmt., Inc.*, 34 N.Y.3d 167, 174, 137 N.E.3d 469 [2019; see also *Gambino v. 475 Park Ave. S., LLC*, 197 AD3d 621, 150 N.Y.S.3d 235 [2d Dept 2021]. As the Court stated in *Xiang Fu He v. Troon Mgmt., Inc,* "the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section 7–210." *Id.*

As such, Cushman contends that it did not displace Verizon's duty and that the Contract clearly indicates, as referenced by Mr. Antoldi, that Verizon is defined as the "First Responder" and Cushman is defined as the "Second Responder." Cushman argues that this places its role as one of assistant to Verizon. Cushman also provides documentation reflecting that the required insurance coverage was in place, and argues that denial of coverage does not constitute a failure to procure same. Verizon in reply, contends that Cushman had a responsibility to provide oversight and reporting to Verizon. Verizon contends that the Contract, as supported by Mr. Antoldi's testimony, makes clear that Cushman maintained such a role.

Cushman maintains that it had no duty to the Plaintiff. Cushman raises the fact that it was not the owner of the property. Cushman further argues that it has not launched an instrument of harm, Plaintiff did not rely on Cushman's performance to address the condition, and Cushman did not wholly displace the owner, Verizon's, role as property owner.

The Plaintiff argues that Cushman's motion is premature, and that the Agreement proffered has not been authenticated, and therefore is inadmissible. Verizon argues, similarly to the position Verizon

has taken in its own motion, that Cushman is responsible and did have a duty to the Plaintiff as a consequence of its role at the Premises in accordance with the terms of the Contract. Concerning the relationship and obligations of the Co-Defendants, the Contract (the authenticity of which has not been disputed by Cushman), together with the testimony of Mr. Antoldi, is sufficient for the Court to determine Verizon's motion for indemnity and breach.

Initially, as to the breach claim, Verizon has failed to make a *prima facie* showing. Verizon provides nothing to support the contention that Cushman did not procure the insurance required by the Agreement. In fact, the denial letter from Cushman's insurer, Constitution State Services, LLC, ("Travelers"), speaks against the notion that insurance was not procured. The denial of coverage is not based on a position that there is no coverage, it is based on the contention that Verizon is not entitled to a defense or indemnification. Even assuming Verizon had made a *prima facie* showing, Cushman has raised an issue of fact by providing a copy of the policy. As such, Verizon's motion for summary judgment on breach of contract for failure to procure insurance is denied.

Although Cushman may not have a duty to the Plaintiff, as will be addressed further herein below, Plaintiff's direct claim against Cushman calls into question whether Cushman's indemnitee obligation was triggered, pursuant to the terms of the Contract. As an initial matter, Cushman has no duty to tender a defense unless Cushman's obligation to indemnify has been established. See *Brasch v. Yonkers Const. Co.*, 306 AD2d 508, 762 N.Y.S.2d 626 [2d Dept 2003] and *Cannavale v. Cnty. of Westchester*, 158 AD2d 645, 646, 551 N.Y.S.2d 948 [2d Dept 1990]. There is no indication that Verizon has sought a direct claim against Travelers, and Cushman is not an insurer.

Common Law Indemnification

> "The key element of a cause of action for common-law 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." *Metadijia Atanasoki v. Braha Indus.*, Inc., 124 AD3d 705, 706, 2 N.Y.S.3d 524, 525 [2d Dept 2015]. However, to establish common law

> indemnification, a party must show not only that it was not negligent, but that the other party was responsible. *See Bellefleur v. Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808, 888 N.Y.S.2d 81, 83 [2d Dept 2009]. Moreover, "...the predicate of common law indemnity is vicarious liability without actual fault..."

-*Dreyfus v. MPCC Corp.*, 124 AD3d 830, 3 N.Y.S.3d 365 [2d Dept 2015].

Verizon does not have a common law indemnity claim against Cushman. Issues of vicarious liability have not been raised. The Contract serves to govern the issue of indemnification. Accordingly, Cushman's motion to dismiss Verizon's third party claim for common law indemnity is granted.

Contractual Indemnification

> Generally, "[a] party's right to contractual indemnification depends upon the specific language of the relevant contract." *Desena v. N. Shore Hebrew Acad.*, 119 AD3d 631, 636, 989 N.Y.S.2d 505 [2d Dept 2014]. "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 548 N.E.2d 903 [1989]. What is more, "[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."

-*Reisman v. Bay Shore Union Free Sch. Dist.*, 74 A.D.3d 772, 773, 902 N.Y.S.2d 167, 169 [2nd Dept, 2010].

As indicated below, Cushman was not negligent. However, the indemnity provision of the Contract is referenced above. The term "(or allegedly negligent)" requires Cushman to indemnify Verizon even if Cushman is without fault.

> "This action arises out of DiFazio's "actual or alleged acts or omissions," and the plain and unambiguous terms of the contract do not condition DiFazio's obligation to indemnify Verizon for attorneys' fees and costs incurred in the defense of this action on a finding of fault (*see Sand v City of New York*, 83 AD3d 923, 921 NYS2d 312 [2011]; *McCleary v City of Glens Falls*, 32 AD3d 605, 609, 819 NYS2d 607 [2006]; *Pope v Supreme-K.R.W. Constr. Corp.*, 261 AD2d 523, 524-525, 690 NYS2d 632 [1999]; [****2] *DiPerna v American Broadcasting Cos.*, 200 AD2d 267, 269-270, 612 NYS2d 564 [1994]; [***3] *Vamvkaris v City of New York*, 21 Misc 3d 1148[A], 875 NYS2d 824, 2008 NY Slip Op 52555[U] [2008])."

-*Diudone v City of New York*, 87 AD3d 608, 609 [2d Dept 2011].

> "Pursuant to the contract between DiFazio and Verizon, DiFazio agreed to defend and indemnify Verizon for all claims arising out of DiFazio's "actual or alleged acts or omissions." The plain and unambiguous terms of the contract do not condition DiFazio's obligation for attorneys' fees and costs on a finding of fault (*see Barnes v New York City Hous. Auth.*, 43 AD3d 842, 845, 841 NYS2d 379 [2007])."

-*Sand v. City of New York*, 83 AD3d 923, 926 [2d Dept 2011].

Although Verizon contends that these holdings are dispositive of the indemnity issue before us, the court disagrees. Insofar as Verizon's liability has not yet been determined, the issue of contractual indemnity cannot be resolved. In both cases cited, Verizon was determined to be free from fault. That is not the case here. Therefore, Verizon's motion for indemnity and Cushman's motion to dismiss Verizon's claim for contractual indemnity is denied.

As to Cushman's motion to dismiss (motion sequence #2), the Plaintiff's direct claim against Cushman is dismissed. Plaintiff's contention that the motion is premature is without merit. Plaintiff has not indicated what further discovery would reveal. "A party contending that a motion for summary judgment is premature is required to demonstrate that additional discovery might lead to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of the movant." *Reynolds v. Avon Grove Properties*, 129 AD3d 932, 933, 12 N.Y.S.3d 199, 201 [2d Dept 2015]. "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" *Lopez v. WS Distribution, Inc.*, 34 A.D.3d 759, 760, 825 N.Y.S.2d 516, 517 [2d Dept 2006]. Even acknowledging that the Contract was not properly authenticated, Mr. Antoldi's testimony was sufficient to establish that Cushman had no duty to the Plaintiff. Clearly, Cushman was not the owner of the property.

> Under our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party (*see Eaves Brooks,* 76 NY2d at 226). Seventy-four years ago, in *H.R. Moch Co. v Rensselaer Water Co.* (247 NY 160 [1928]), Chief Judge Cardozo stated that imposing liability under such circumstances could render the contracting parties liable in tort to "an indefinite number of potential beneficiaries" (*id.* at

168).

-*Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 138–39, 773 N.E.2d 485 [2002].

> In sum, *Moch, Eaves Brooks* and *Palka* identify three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm" (*Moch,* 247 NY at 168); (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties (*see Eaves Brooks,* 76 NY2d at 226) and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*see Palka,* 83 NY2d at 589). These principles are firmly rooted in our case law, and have been generally recognized by other authorities (*see e.g.* Restatement [Second] of Torts § 324A).

-*Id.; see also Correa v. Town of Brookhaven*, 208 AD3d 455, 171 N.Y.S.3d 376 [2d Dept 2022]; *Pollock v. Cushman & Wakefield, Inc.*, 210 AD3d 446, 447, 177 N.Y.S.3d 45 [2d Dept 2022]; *Baran v. Port Auth. of New York & New Jersey,* 196 A.D.3d 674, 675, 148 N.Y.S.3d 685 [2d Dept, 2021].

There is no indication from Cushman, as stated by Antoldi, that the performance of Cushman's duties or the nature of the performance of those duties caused the alleged defect. Moreover, there is no indication that the Plaintiff relied on Cushman or that Cushman wholly displaced Verizon's role as owner of the Premises. As referenced above, as part of his deposition testimony, Mr Antoldi stated that his role was to "...work hand-in-hand with Verizon. Anytime I was asked to participate in meetings, anything related to the property and/or the site itself." As to whether he managed Verizon's property, he stated, "I wouldn't say directly managed. I would assist. Cushman and Wakefield is more of a second responder particularly with this location, Liberty Avenue." (Page 10). This testimony established that Cushman "did not assume a comprehensive and exclusive maintenance obligation at the premises." *Lattimore v. First Mineola Co.*, 60 AD3d 639, 643, 874 N.Y.S.2d 253, 256 [2d Dept 2009]. Accordingly, Cushman's motion is granted in that the Plaintiff's direct claim against Cushman is dismissed.

Based upon the foregoing, it is hereby ORDERED as follows:

Defendant/Third Party Plaintiff Verizon's motion (motion sequence #1) is denied.

Defendant/Third Party Defendant Cushman's motion (motion sequence #2) is granted solely to the extent that Plaintiff's direct claim against Cushman is dismissed and Verizon's third party claim for common law indemnification is dismissed.

The issue of contractual indemnity has not been resolved.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.