SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

----------X

DAVID RUDENSTINE, as executor of the estate of ZEBORAH SCHACHTEL,

Plaintiff,

- v -

THE CITY OF NEW YORK and RESTANI CONSTRUCTION CORP.

Defendants.

----------X

INDEX NO. 151178/2019

MOTION DATE 05/05/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 104, 106, 115, 116, 117, 118, 119, 120, 121, 129, 130, 131, 133, 135, 137, 138, 140, 141

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

In this action to recover damages for personal injuries and wrongful death, arising from a trip-and-fall accident, the defendant City of New York moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and on its cross claims for contribution and contractual indemnification against the defendant Restani Construction Corp. (Restani). The plaintiff opposes the motion and Restani opposes the motion in part. The motion is granted to the extent that the City is awarded summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and on its cross claim against Restani for contractual indemnification, limited to recovery of its defense costs. The motion is otherwise denied.

On May 16, 2018, the plaintiff's decedent was traversing the crosswalk in a public roadway at the intersection of West 26th Street and Seventh Avenue in Manhattan, walking from the southeast corner to the northeast corner thereof, when she tripped and fell to the pavement at a point in the crosswalk located approximately 17 feet south of the northeast corner of West 26th Street and Seventh Avenue. She injured herself as a consequence and,

according to the plaintiff, was caused to sustain occlusive pulmonary thromboemboli, with left leg deep venous thrombosis, that led to her death. In his complaint, the plaintiff alleged that the location of the roadway was "dangerously broken, cracked, raised, uneven, and depressed," and that these defects were caused by roadwork that Restani had undertaken in the days leading up to the accident. At least one non-party witness, Larry G. King, testified at his deposition that he witnessed the decedent's accident, explaining that the decedent was using a walker when she fell. He further asserted that the roadway on which she fell appeared to have been recently repaired, although he did not personally witness any roadwork being performed when he had walked by the location one week earlier. King testified that the surface of the roadway at the point where the decedent fell was "misshaped" and in "bad shape" and that he found it to be a "little dangerous" and "unleveled." A photograph authenticated by King as being a fair and accurate representation of the accident site at the time of the accident, depicted the declivity on which the decedent fell to be a rectangle approximately three feet long, one foot wide, and several inches deep. The photograph also depicted a roadway on which milling had been completed, some pavement patching had been performed around nearby manholes, but no repaving had commenced.

Michael Calderone, Restani's general superintendent, testified at his deposition that Restani had a contract with the City's Department of Transportation (DOT) to mill the existing pavement at and around the accident location in preparation for repaving by another contractor, and that the last daily report of which he was aware was dated May 9, 2018, or one week prior to the accident. Although he did not testify that May 9, 2018 was the last date on which any contractor performed repaving work at the location, he suggested that May 9, 2018 may have been the last date that Restani performed milling work thereat. Calderone further testified that Restani had placed barrels near the subject location when it was undertaking work, and had also provided flaggers and crossing guards to direct pedestrians around any dangerous conditions during that period of time as well. In addition, he asserted that several inspectors

from both the City and other contractors had inspected the work site every day that work was being performed.

In support of its motion, the City submitted the pleadings, the plaintiff's bill of particulars, the transcript of the plaintiff's General Municipal Law § 50-h hearing, the deposition transcripts of the parties and nonparties King and Federico Mancini, the contract between the City DOT and Restani, specifications for the subject milling and repaving project, and paving records, which demonstrated that paving at the accident location was ongoing as late as June 7, 2018 through June 9, 2018. The City also submitted the affidavit of Tatiana Pavlova, a paralegal for the City DOT tasked with conducting searches for written notices of roadway and crosswalk defects and dangerous conditions. She asserted therein that her search revealed that no one, including the Big Apple Pothole and Sidewalk Protection Committee, had provided the DOT with written notice of a defective or dangerous roadway or crosswalk at the location of the decedent's accident at any time prior to the subject accident. In addition, the City submitted the reservation of rights letter provided to it by Restani's liability insurer, Starr Indemnity & Liability Company (Starr), which quoted provisions from the relevant policy referable to whether the City was an additional insured under the policy and the circumstances under which the City would be indemnified by Starr on Restani's behalf. In opposition, the plaintiff and Restani relied on the same documentation, and each submitted a memorandum supporting their positions.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether

summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.; Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (*see Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

Liability for failing to maintain premises in a safe condition must be based on occupancy, ownership, control, special use, statutory obligation, or contractual obligation (*see Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57 [1st Dept 2006]). It is undisputed that the City owned the subject roadway and, thus, owed a general duty to the public to maintain it in a safe condition. A private landowner moving for summary judgment in a trip-and-fall action has the initial burden of showing that it did not create the alleged hazardous condition and lacked actual or constructive notice of its existence (*see Velocci v Stop & Shop*, 188 AD3d 486, 489 [1st Dept 2020]). A municipality, however, has authority under General Municipal Law § 50-e(4) to enact a local law requiring prior written notice of a dangerous or defective street, highway, bridge, culvert, sidewalk, or crosswalk as a condition precedent to the commencement of an action to

recover damages for personal injuries or property damage sustained as a result of such a danger or defect (*see Walker v Town of Hempstead*, 84 NY2d 360, 367 [1994]; *see also Groninger v Village of Mamaroneck*, 17 NY3d 125, 128 [2011]). The City has enacted such a local law, which provides, in relevant part, that

> "[n]o civil action shall be maintained against the city for . . . injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe"

(Admin. Code of City of N.Y. § 7-201[c][2]). Hence, where a municipality such as the City moves for summary judgment dismissing the complaint in a trip-an-fall action involving a highway or crosswalk, it need only demonstrate that it never received prior written notice of the dangerous or defective condition (*see Rivera v City of New York*, 210 AD3d 512, 513 [1st Dept 2022]). The City established its prima facie entitlement to judgment as a matter of law dismissing the complaint against it by demonstrating that it never received prior written notice of the alleged defective highway and crosswalk condition upon which the decedent tripped and fell. In opposition to that showing, the plaintiff failed to raise a triable issue of fact as to whether the City had been provided with the necessary prior written notice.

The court notes that there are two exceptions to the prior written notice requirement---where a municipality directly created the dangerous condition through its own employees' work prior to the accident or where the municipality maintained a special use over the subject roadway (*see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). "The affirmative creation exception . . . '[is] limited to work by the City that immediately results in the existence of a

dangerous condition'" (*Martin v City of New York*, 191 AD3d 152, 153 [1st Dept 2020], quoting *Yarborough v City of New York*, 10 NY3d 726, 728 [2008] [some internal quotation marks omitted]; *see Oboler v City of New York*, 8 NY3d 888, 889 [2007]; *Bielecki v City of New York*, 14 AD3d 301, 301-302 [1st Dept 2005]). The City established, prima facie, that its workers did not create the condition, as they did not directly work on the milling of the roadway surface and they did not "exert[ ] control over the method of construction" (*Bonesteel v Fitzgerald Bros. Constr. Co.,* 86 AD2d 715, 716 [3d Dept 1982]) employed by its contractor, Restani. The City demonstrated that, at most, it deployed inspectors to inspect Restani's work. Contrary to the plaintiff's contention, the City's alleged failure properly to inspect the sidewalk is not an omission that constituted affirmative negligence sufficient to excuse compliance with the prior written notice requirement (*see Vnuk v City of Albany,* 191 AD3d 1056, 1059 [3d Dept 2021]). In opposition to the City's showing in this regard, the plaintiff failed to raise a triable issue of fact. Moreover, the plaintiff raises no argument that the City had a special use over the portion of the roadway on which his decedent tripped and fell.

Consequently, the City must be awarded summary judgment dismissing the complaint insofar as asserted against it.

A claim for contribution lies where a defendant "owed a duty to the plaintiff which was breached and which contributed to or aggravated plaintiff's damages" (*Rosner v Paley*, 65 NY2d 736, 738 [1985]). "[T]he breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]; *see Nelson v Chelsea GCA Realty, Inc.*, 18 AD3d 838, 840-841 [2d Dept 2005]; *Trump Vill. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 896 [1st Dept 2003]), and will lie whether or not the culpable parties are allegedly liable for the injury under the same or different theories (*see Raquet v Braun*, 90 NY2d 177 [1997]), and "whether or not the party from whom contribution is sought is allegedly responsible for the injury as a concurrent, successive, independent, alternative, or

even intentional tort-feasor" (*Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp*, 71 NY2d at 603). Moreover, a cause of action for contribution may also be stated where it is alleged that a contributor breached a duty owed to the defendant whom the plaintiff seeks to hold liable, even if no duty exists between the contributor and the injured plaintiff (*see Raquet v Braun*, 90 NY2d at 182; *Sommer v Federal Signal Corp.*, 79 NY2d 540 [1992]; *Darzimanova v Le Clere*, 122 AD3d 421, 422 [1st Dept 2014]). "[C]ommon-law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing plaintiff's injuries" (*Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909, 911 [1st Dept 2011]), without any fault on its own part (*see Lehr Assoc. Consulting Engrs., LLP v Daikin AC (Ams.) Inc.,* 133 AD3d 533, 534 [1st Dept 2015]).

The City, by establishing that it may not be held liable to any party for negligence, and by relying on the other parties' submissions reflecting the existence of a triable issue of fact as to whether Restani may be held liable for its own negligence by creating the dangerous roadway and crosswalk condition or permitting it to remain unremedied (*see Rudenstine v City of New York*, Index No. 151178/2019, MOT SEQ 004 [Sup Ct, N.Y. County, Aug. 23, 2023] [Kelley, J.]), demonstrated, prima facie, that it may not be held liable to Restani for contribution or common-law indemnification (*see Hawthorne v South Bronx Community Corp.*, 78 NY2d 433, 437 [1991]; *Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d at 911; *Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc.*, 59 AD3d 311 [1st Dept. 2009]). In opposition to that showing, Restani failed to raise a triable issue of fact. Hence, summary judgment must be awarded to the City dismissing Restani's cross claims against it.

Contractual indemnification clauses must be "construed as to achieve the apparent purpose of the parties" (*Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]), and are enforced only where "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins.*

Co., 32 NY2d 149, 153 [1973]; *see Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 595 [1st Dept 2014]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]). Where, as here, the subject indemnification provision obligates the indemnitor to pay the indemnitee for all losses "arising" from an "occurrence" or in connection with the indemnitor's performance of the contract (*see Burlington Ins. Co. v New York City Tr. Auth.*, 29 NY3d 313 [2017]), "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant'" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003], quoting *Correia v Professional Data Management, Inc.*, 259 AD2d 60, 65 [1st Dept 1999]; *see Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]). The plain and unambiguous terms Restani's insurance contract with Starr do not condition Restani's obligation to indemnify the City for attorneys' fees and costs incurred in the defense of this action on a finding of fault (*see Diudone v City of New York,* 87 AD3d 608, 609 [2d Dept 2011]). Hence, it is irrelevant to the City's contractual indemnification cross claim whether Restani was or was not negligent in its performance of its contractual obligations.

With respect to the City's claim for contractual indemnification against Restani, the court recognizes that a construction-related indemnification agreement that purports to indemnify a party for its own negligence is void and unenforceable (*see* General Obligations Law § 5-322.1; *Giangarra v Pav-Lak Contr., Inc.*, 55 AD3d 869, 870 [2d Dept 2008]). As relevant here, the Starr insurance policy provided that "[t]he insurance afforded" to the City, as an additional insured, "applies to the extent permitted by law." Where an agreement authorizes indemnification "to the fullest extent permitted by law," it does not violate General Obligations Law § 5-322.1 (*see Giangarra v Pav-Lak Contr., Inc.*, 55 AD3d at 871; *Farrugia v 1440 Broadway Assoc.*, 157 AD3d 565, 569 [1st Dept 2018]), as the law itself permits indemnification where the indemnitor itself is shown to be negligent, or the indemnitee's liability arises solely because it violated a statute that does not require a finding of negligence, provided that there is no evidence of negligence on the part of the indemnitee. Under those circumstances, an

indemnification clause is enforceable (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *see also Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795, n 5 [1997]). In fact, the courts have found that that statute also permits a partially negligent insured party to seek contractual indemnification "so long as the indemnification provision does not purport to indemnify" the party "for its own negligence" (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 207 [2008]).

Here, the plaintiff's accident was one "arising" from an "occurrence," as defined in Restani's insurance policy with Starr, which provided, as to its insured and additional insureds under the policy, such as the City, that:

> "[w]e will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages even if the allegations of the 'suit' are groundless, false or fraudulent."

Hence, the City, which cannot be held liable for negligence due to the absence of prior written notice, has established that Restani is obligated to indemnify it for its losses. Nonetheless, in light of the dismissal of the complaint in the main action against the City, it is only entitled to summary judgment on so much of its cross claim for contractual indemnification as seeks to recover the costs, expenses, and attorneys' fees that it incurred in defending the action; the remaining portions of that cause of action must be dismissed as academic (*see Payne v 100 Motor Parkway Assoc., LLC*, 45 AD3d 550, 554 [2d Dept 2007]; *Cardozo v Mayflower Ctr., Inc.*, 16 AD3d 536, 538-539 [2d Dept 2005]).

In connection with the City's cross claim for contribution against Restani, that claim has been rendered academic in light of the dismissal of the complaint insofar as asserted against the City (*see Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 699 [2d Dept 2016]). Consequently, that branch of the City's motion seeking summary judgment on its cross claim for contribution must be denied.

The trial on the issue of damages on the City's cross claim against Restani for contractual indemnification shall be conducted simultaneously with the trial on the plaintiff's claims against Restani.

Accordingly, it is

ORDERED that the motion of the defendant City of New York is granted to the extent that it is awarded summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and on the issue of liability on its cross claim against the defendant Restani Construction Corp. for contractual indemnification, with recovery limited to its defense costs, the motion is otherwise denied, and the complaint and all cross claims insofar as asserted against the defendant City of New York are dismissed; and it is further,

ORDERED that, on the court's own motion, the complaint and all cross claims insofar as asserted against the defendant City of New York are severed; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint and all cross claims insofar as asserted against the defendant City of New York.

This constitutes the Decision and Order of the court.

8/23/2023
DATE

JOHN J. KELLEY, 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