

Chesher v Trader Joe's

2023 NY Slip Op 33338(U)

September 27, 2023

Supreme Court, New York County

Docket Number: Index No. 154237/2018

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

-----X

DEBORAH CHESHER,

Plaintiff,

- v -

TRADER JOE'S, THE BOARD OF MANAGERS OF THE
200-212 WEST 72ND STREET CONDOMINIUM, 2075
RETAIL CO. LLC, SCHINDLER ELEVATOR
CORPORATION, LIBERTY ELEVATOR CORPORATION,
EXCEL ELEVATOR AND ESCALATOR CORP.,

Defendants.

INDEX NO. 154237/2018

MOTION DATE 09/07/2023

MOTION SEQ. NO. 004 005 006

**DECISION + ORDER ON
MOTION**

-----X

HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 132, 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, 169, 170, 171, 172, 203, 206, 208, 212, 227, 228, 232, 233, 238, 241, 242, 243, 244

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 173, 174, 175, 176, 177, 178, 204, 207, 209, 213, 229, 230, 234, 235, 239, 240

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 205, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 236, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258

were read on this motion to/for

JUDGMENT - SUMMARY

Motion sequence numbers 004, 005, and 006 are consolidated for disposition. MS 004 by Excel Elevator and Escalator Corp. ("Excel") for summary judgment is granted in its entirety and MS 006 (a motion by Trader Joe's, the Board of Managers of the 200-212 West 72nd Street Condominium and 2075 Retail Co. LLC) for summary judgment dismissing plaintiff's complaint

and cross-motion by plaintiff for summary judgment is denied in its entirety. MS 005, a motion by defendant Liberty Elevator Corporation (“Liberty”), is decided as described below.

Background

This action arises out of an injury that plaintiff sustained while removing her cart from a cartolator at the grocery store, Trader Joe’s. A cartolator is, in simple terms, an escalator for grocery store carts. This particular Trader Joe’s branch is on more than one floor and so when shoppers want to go to another floor, they take the escalator and put their cart on the cartolator, which runs alongside the escalator. When the cart reaches the bottom, it is expelled from the cartolator – by that time, the shopper is there to greet it.

Trader Joe’s leases and operates a grocery store in a premises managed by co-defendants The Board of Managers of the 200-212 West 72nd Street Condominium and owned by 2075 Retail Co. LLC (the Board and 2075 Retail collectively referred to as “Owner”). Trader Joe’s contracted with co-defendant Liberty to provide services to the escalator and cartolator, and Liberty sub-contracted with Excel for the maintenance and repairs of the escalator and cartolator (NYSCEF Doc. No. 134). Although Schindler remains in the caption, it is no longer a party.

The Accident

On March 31, 2017, plaintiff went to Trader Joe’s and brought with her a “piece of wheeled, carry-on luggage” to aid in carrying her groceries home (NYSCEF Doc. No. 133 at 5). When she first retrieved the shopping cart, plaintiff placed her luggage on the bottom rack. She claimed that on numerous previous occasions, she had brought and stored luggage on the bottom rack of the cart (*id.* at 6). That day, plaintiff placed her cart on the cartolator to go down to the

bottom floor of Trader Joe's and begin shopping (NYSCEF Doc. No. 160 Chesher Dep. 62:12-16).

At the top of the cartolator, the cart became stuck; this is the point where the facts alleged by the parties diverge as to who resituated the cart. Plaintiff testified that a Trader Joe's employee resituated her suitcase over her calls to just place the suitcase into the cart basket (NYSCEF Doc. No. 159 Chesher Dep. 51:20-25). The employee allegedly removed the luggage, replaced it under the cart, readjusted it, and attempted to load the cart into the cartolator at least three times (NYSCEF Doc. No. 133 at 7). By the third time, the cart proceeded most of the way down the cartolator before getting stuck at the exit (*id.*). Plaintiff then rode the escalator to the bottom floor where she noticed two other employees but did not request any help from them in retrieving her cart (NYSCEF Doc. No. 159 Chesher Dep. at 64:11-16). Plaintiff noticed that the cartolator exit had red doors with "NO ENTRY" across the front, but plaintiff decided to reach her arm into the cartolator in an attempt to retrieve her luggage (*id.* at 234:24-25, 238:15-18). As plaintiff reached for her luggage, she claims another employee switched the cartolator back on, and the cart struck plaintiff in the head (*id.* at 82:3-7).

According to a witness who was a Trader Joe's employee at the time of the incident, when plaintiff's cart initially became stuck in the cartolator, she removed the cart and resituated the luggage herself, ignoring the employee's suggestion that she should not have her luggage on the bottom rack (NYSCEF Doc. No. 165 Milton Dep. 46:19-22). Out of concern for plaintiff, the employee then followed plaintiff onto the escalator that was adjacent to the cartolator and he testified that he witnessed her reaching over into the cartolator to pull on her luggage as the cart went down the cartolator (*id.* at 42:12-16). At the bottom of the cartolator, the employee claims he saw that the luggage was protruding from the cart horizontally and preventing the cart from

exiting the cartolator (*id.* at 23:17-25). As plaintiff reached into the cartolator and attempted to pull the luggage out of the cart, the employee claims that he called for her to stop and informed her that the manager was in the process of turning the cartolator back on (*id.* at 24:2-10). Moreover, the witness testified that the cart was jerking, as if “it was still trying to fix itself,” (*id.* at 104:18-21). As the plaintiff reached for her luggage, the cartolator began to move again, and the cart hit plaintiff in the head (*id.*).

Plaintiff claims she was struck on the top of her head, and subsequently filed two lawsuits that were consolidated into this matter. Trader Joe’s and the Owners filed crossclaims against Liberty and Excel for indemnification, contribution, and breach of contract for failure to procure insurance; similarly, Liberty filed its own crossclaims against all co-defendants for contribution, contractual and common law indemnification, and breach of contract for failure to procure insurance by failing to add Liberty as an additional insured, however Liberty does not present arguments in support of its claims for contribution.

MS 004

Excel moves for summary judgment dismissing all claims and crossclaims against it - plaintiff’s complaint and Liberty’s, Trader Joe’s and the Owner’s crossclaims for indemnification and breach of contract. Excel contends the cartolator was not defective and, even if it was, Excel had no notice of any alleged defect. Additionally, Excel argues that despite any contractual obligations it has toward Trader Joe’s, it does not possess any duty of care toward plaintiff. Further, Excel asserts it was not the proximate cause of plaintiff’s injury as plaintiff performed an unnecessary and unforeseeable act by sticking her arm into the cartolator. Similarly, Excel argues Trader Joe’s turned the cartolator back on, creating a superseding event.

Excel further contends that plaintiff's claims for *res ipsa loquitur* are inapplicable as plaintiff cannot satisfy any elements of such a claim. Finally, Excel argues its' co-defendant's crossclaims for indemnification should be dismissed as Trader Joe's and the Owner cannot prove that Excel was negligent in causing plaintiff's accident.

In opposition, Trader Joe's and Owner contend that contractual indemnification should not be dismissed because Trader Joe's and Owner are intended third-party beneficiaries of the contract between Excel and Liberty. Trader Joe's and Owner argue that Excel was on site just 8 days prior to the accident repairing the cartolator, triggering the indemnification clause. Similarly, Trader Joe's and Owner argue that plaintiff is the proximate cause of her own injuries and Trader Joe's employee attempted to aid plaintiff but she repeatedly ignored him. Finally, Trader Joe's and Owner argue that Excel failed to submit a statement of facts, entitling them to summary judgment.

In partial opposition, plaintiff agrees that Excel and Liberty are free of liability for her accident, but argues Trader Joe's is at fault for her injuries.

Finally, in reply, Excel argues that contractual indemnification should be dismissed as there is no savings clause included in the contract that would trigger indemnification, as the contract does not contemplate indemnification for Trader Joe's *own* acts of negligence. Additionally, Excel contends it only has to indemnify a defendant for accidents resulting from Excel's work on the premises, and here there is no indication Excel's work on the cartolator caused plaintiff's injuries. Finally, Excel asserts that failing to file a statement of facts should not be a fatal mistake to its motion for summary judgment.

MS 005

In motion sequence 005, Liberty moves for summary judgment dismissing the complaint and all crossclaims filed against Liberty, and for summary judgment on its crossclaims against Trader Joe's and the Owners. Regarding any alleged negligence, Liberty argues it had no notice of a defect with the cartolator and Liberty did not allow the cartolator to be kept in a dangerous condition; moreover, Liberty subcontracted maintenance of the cartolator to Excel. Liberty further asserts that plaintiff is the proximate cause of her injuries. Additionally, Liberty contends plaintiff has not established the necessary elements of *res ipsa loquitur*, and such claims should be dismissed. Liberty filed crossclaims for indemnification and breach of contract, and argues that Trader Joe's should indemnify and defend Liberty pursuant to their contractual obligations with Liberty. Additionally, Liberty maintains that Trader Joe's exercised exclusive control of the cartolator, and there is no evidence of negligence on behalf of Liberty.

In partial opposition, Trader Joe's and the Owners contend plaintiff was the proximate cause of her injuries and argue that the indemnification clause is void and unenforceable as it only pertains to accidents arising from Liberty's own negligence. Trader Joe's further argues it performed its necessary duty to customers and kept the cartolator under surveillance and warned plaintiff about the dangers of reaching into the cartolator. Finally, the Owners contend they had no obligation to repair the cartolator and never had notice of any issues.

Also in partial opposition, plaintiff does not oppose that Liberty and Excel are free of liability for her accident; however, plaintiff maintains that Trader Joe's is a proximate cause of her injuries.

In reply, Liberty contends that plaintiff is the proximate cause of her injuries and that Trader Joe's failed to keep the cartolator in a safe condition. Liberty argues it is free from

negligence and that Trader Joe's is contractually bound to indemnify Liberty. Moreover, Liberty maintains it did not create or have notice of any defect with the cartolator, further demonstrating Liberty's lack of negligence.

MS 006

Trader Joe's and the Owners move for summary judgment dismissing the complaint and all crossclaims filed against them. Plaintiff cross-moves against Trader Joe's for summary judgment on liability.

Trader Joe's and the Owners contend that they are not responsible for maintaining the cartolator and had no notice of any issues. Incredibly, they also argue they had no duty of care to plaintiff because they did not have a contract with plaintiff (NYSCEF Doc. No. 199 at 3), apparently ignoring the vast law on premises liability for invited guests. Trader Joe's and the Owners further argue that *res ipsa loquitur* is inapplicable as plaintiff cannot demonstrate the necessary elements, including that Trader Joe's had exclusive control of the cartolator and that plaintiff was free of any contributory negligence. Trader Joe's and the Owners maintain that plaintiff is the proximate cause of her own injuries. As to crossclaims against Trader Joe's and the Owners, they argue that their contracts do not require that they indemnify Excel and Liberty, and because there is no negligence on behalf of Trader Joe's and the Owners, no common law indemnification is necessary either.

In partial opposition, Excel contends that plaintiff cannot establish any proof of negligence by any of the defendants. Further, Excel argues that no party has shown that Excel had any notice of a defective condition. Excel asserts that if summary judgment is denied to Excel, then summary judgment must also be denied to Trader Joe's on the basis of premises liability. Moreover, Excel contends that if this Court finds that plaintiff is not the proximate

cause of her injuries, then Trader Joe's actions of turning on the cartolator are an intervening and superseding cause of plaintiff's injuries.

Similarly, in partial opposition, Liberty agrees that plaintiff is the sole proximate cause of her injuries, and asserts that Trader Joe's is not entitled to dismissal of Liberty's crossclaims for contractual indemnification as the parties entered an express agreement and Trader Joe's was negligent in its supervision of the cartolator.

In reply, Trader Joe's and the Owners contend they are not responsible for the cartolator or any potential issues with it. They maintain that the doctrine of *res ipsa* is inapplicable and assert that plaintiff is the proximate cause of her injuries. Furthermore, Trader Joe's and the Owners contend they are only contractually obligated to indemnify Liberty for Liberty's own negligence. They further highlight that Excel did not specifically oppose dismissal of the crossclaims. In reply to Liberty's partial opposition, Trader Joe's contends it is entitled to contractual indemnification from Liberty and should have been named as an additional insured under Liberty's insurance policy. Moreover, Trader Joe's argues that Liberty is not entitled to contractual indemnification as the contract only contemplates indemnification for Liberty's own negligence. Further, Trader Joe's asserts that the Owners are not a party to any contract with Liberty, and do not owe any indemnification to Liberty. They maintain that plaintiff is the proximate cause of her injuries.

Plaintiff cross-moves for summary judgment on the issue of Trader Joe's liability for her injuries. Plaintiff contends at least two experts in this litigation claimed Trader Joe's was negligent in plaintiff's accident. Additionally, plaintiff argues that reaching for a suitcase in the cartolator was not an unforeseeable disregard for her safety; rather, she argues that it was

expected and makes sense given that the cart was stuck. Plaintiff asserts Trader Joe's did, in fact, owe a duty to plaintiff and argues that premises liability is applicable in this action.

In opposition, Trader Joe's argues plaintiff's expert should be disqualified as he cannot opine on the issue of negligence. Further, whether or not Trader Joe's acted reasonably is a question for a jury that cannot be resolved on summary judgment. Trader Joe's highlights plaintiff's disregard for warnings not to enter the cartolator and argues that plaintiff is either the sole proximate cause of her injuries, or proximate cause is an issue of fact.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably

conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Common Law Negligence

"In any common-law negligence case brought pursuant to New York law, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Ferreira v City of Binghamton*, 38 NY3d 298, 308, 173 NYS3d 484, 194 N.E.3d 239 [2022]).

"A landlord has a duty to maintain its property in a reasonably safe condition under the extant circumstances, [and] [f]or a plaintiff to show a breach of that duty she is required to first establish that the landlord either created or had actual or constructive notice of the hazardous condition which precipitated an injury," (*Beck v J.J.A. Holding Corp.*, 12 AD3d 238, 240, 785 NYS2d 424 [1st Dept 2004] [internal citations and quotations omitted]).

Maintaining the Cartolator

As an initial matter, there is no proof that anything was wrong with the cartolator. All indications are that it stopped because it got jammed by the luggage. The luggage underneath the basket was horizontal; this increased the width and caused the luggage to be wedged between the sides of the cartolator, resulting in the whole machine stopping. In other words, there is no proof that the machine malfunctioned; rather, something foreign got it stuck. The employee who witnessed the accident testified the luggage was stored *horizontally* in the cart, obviously blocking the cart from exiting the cartolator (NYSCEF Doc. No. 165 Milton Dep. at 56:11).

Given that there is no evidence of a malfunction and nothing was wrong with the cartolator until it got stuck because of the luggage, none of the defendants could have had any actual or constructive notice that anything was wrong with the cartolator – because nothing was wrong with it. Nobody claims with any specificity that Excel failed to properly repair or maintain the cartolator; everyone agrees that, since the last time Excel was there eight days before, the cartolator was working fine until the luggage got it stuck. No expert opines on anything Excel did wrong in repairing or maintaining the machinery.

Plaintiff doesn't claim that there was anything wrong with the cartolator itself – her claims concern Trader Joe's' actions and inactions in (allegedly) placing the luggage and starting the cartolator after it got stuck. In fact, no one, and no expert, claims that there was anything wrong with the cartolator.

Therefore, there can be no liability for negligence against the Owner, Liberty or Excel because there was nothing they could have, or should have, done to keep the cartolator running properly – it was running properly. Nor was Trader Joe's actions in relation to *maintaining* the cartolator (as opposed to the allegation of improperly loading the cart and improperly starting it after it was stuck) an issue here. The facts show that Trader Joe's regularly called Excel when something was wrong with the cartolator; the last time Excel serviced the cartolator was eight days prior to the accident, which suggests that Trader Joe's complied with its duty to keep the cartolator maintained. These facts absolve the Owner defendants, Excel and Liberty of any negligence. Therefore, the branch of Trader Joe's and Owner's summary judgment motions (MS 006) dismissing claims against the Owners for common law negligence is granted and these claims are severed and dismissed. And all negligence-related claims against Excel and Liberty are likewise severed and dismissed.

Trader Joe's and what happened that day

Summary judgment cannot be granted when there are issues of credibility. There are wildly different versions of what happened in the few minutes it took to load the cart (incorrectly), ride down the escalator (next to the cartolator) and then what happened while plaintiff went past the “NO ENTRY” area and tried to free her stuck cart.

Plaintiff insists that Trader Joe's was negligent when its employee placed the luggage on the bottom of the cart and it was negligent when it failed to stop plaintiff from going past the “NO ENTRY” doors and reaching into the cartolator as the manager was turning it back on. Plaintiff contends her conduct is an issue of comparative negligence, wherein Trader Joe's was obviously negligent in its failure to stop plaintiff.

While plaintiff admits her negligence by ignoring the warning signs posted in front of the cartolator exit, she does not meet her burden of showing that Trader Joe's was also negligent. The Court cannot determine the credibility of one's testimony, moreover, “where. . . various reasonable inferences could be drawn from the evidence presented, the determination of proximate cause must be left to the jury.” (*Turturro v City of New York*, 28 NY3d 469, 485, 45 NYS3d 874 [2016]).

The versions of those present differ dramatically. On these papers, there is a question of fact as to who put the suitcase where it should not have been; plaintiff claims a Trader Joe's employee loaded it (NYSCEF Doc. No. 159 Chesher Dep. 51:20-25). The Trader Joe's employee insists that Trader Joe's had informed him no large items were allowed to be stored in the bottom shelf of the cart (NYSCEF Doc. No. 165 Milton Dep. 46:9-11), that he did not load it, that he told her not to load it that way but that she insisted and ignored him (*id.* at 46:19-22). As for

what happened when they reached the lower floor, plaintiff insists she never heard a warning (NYSCEF Doc. No. 159 Chesher Dep. 82:8-10) and received no assistance when she reached the bottom of the escalator (*id.* at 79-80:22-5) and that employees were standing around; they didn't offer to help and she didn't ask them (*id.*). On the other hand, the same employee who claims he tried to stop her from putting the cart on the cartolator testified that he followed her down the escalator, he warned her multiple times, and was even standing next to her during the accident (NYSCEF Doc. No. 165 Milton Dep. 42:12-16).

As for the accident itself, plaintiff claims that the cartolator was off when she went past the "NO ENTRY" gates (NYSCEF Doc. No. 159 Chesher Dep. 82:3-4) and that an employee restarted it while she was reaching behind the gates (*id.* at 82:3-7). On the other hand, the employee who says he was telling her to get out of the dangerous area said that the cart was jerking, suggesting that it was still on, when she yanked her luggage and the cart hit her. (NYSCEF Doc. No. 165 Milton Dep. 105:2-5). Indeed, as between Trader Joe's and plaintiff, this is a classic "he says, she says" and a jury must decide who, and how much, to believe. There are glaring issues of fact, as the testimony of the plaintiff and the Trader Joe's employee differ so dramatically.

Defendants also insist that plaintiff's actions are a clear intervening and superseding cause, but this is not so evident based on the record before this Court. "An intervening act will be deemed a superseding cause and will serve to relieve defendant of liability when the act is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant," (*Kush v Buffalo*, 59 NY2d 26, 33, 462 NYS2d 831 [1983]).

According to plaintiff's testimony, at the time she reached into the cartolator, the equipment was off (NYSCEF Doc. No. 160 Cheshier Dep. 91:22-25). To the contrary, the employee witness claimed the cart was jerking while plaintiff reached into the cartolator, suggesting the equipment was still on (NYSCEF Doc. No. 165 Milton Dep. 105:2-5). Once again, the competing testimonies require the jury to decide who and how much to believe. The record does not clarify exactly when the machine was turned back on – whether was it before or after the plaintiff went through the “do not enter” area. Moreover, the party witness produced by Trader Joe's was not asked about the protocols for operating the cartolator (*see generally* NYSCEF Doc. No. 162). The timeframe matters, as it is unexpected that a manager would turn on the cartolator while someone is reaching inside, especially if the manager could see plaintiff and was supposed to follow certain steps prior to turning the cartolator key. Because there are contradictory facts alleged, there is no clear indication that either side is the proximate cause of plaintiff's injuries as a matter of law. Such a question is best left for a jury to decide.

Res Ipsa Loquitur

In order to establish *res ipsa loquitur*, “(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.” (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209, 818 NYS2d 792 [2006] [internal citations and quotations omitted]).

Plaintiff cannot establish *res ipsa loquitur*. The record clearly demonstrates, and plaintiff admits, that she willingly and voluntarily reached past the gates of the cartolator, ignoring the

posted warning sign. Therefore, the branch of defendants' summary judgment motion dismissing the cause of action for *res ipsa loquitur* is granted.

Common Law Indemnification

“Common-law indemnification is predicated on vicarious liability, which necessitates that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine” (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [internal quotations and citations omitted]). “[I]n the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident” (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]).

The only two parties who could be negligent here are plaintiff and Trader Joe's, and that will be determined by the jury. Because there is no proof that anything was wrong with the cartolator, there was no reason for any party to give notice, and no one ignored notices. Therefore, because the proposed indemnitors were not negligent, all common law claims and crossclaims for common law indemnification are severed and dismissed.

Contractual Indemnification

"In contractual indemnification, the one seeking indemnity need only establish that it was free from negligence . . . Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]). “A party is entitled to full contractual indemnification 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,” (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777, 521 NYS2d 216 [1987] [internal citations and quotations omitted]). Generally, a contractual indemnification clause will be upheld so long as it does not indemnify a party for its own negligence (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 207, 869 NYS2d 366 [2008]).

Pursuant to the agreement between Liberty and Excel, Excel agreed to “indemnify, protect and hold harmless Liberty and the owner of the site. . . from and against all suits, claims, losses. . . out of or in connection with (a) work or presence on the site, including but not limited to any negligent acts, errors or omissions, intentional misconduct or fraud of Excel,” (NYSCEF Doc. No. 167 at 3). The contract further provides that “[t]he foregoing indemnification shall apply irrespective of whether Claims are asserted by a party or Owner. . . and regardless of whether any such injury, loss, expense or damage is caused by, or is claimed to be caused in part by the negligence or fault of Liberty or Owner,” (*id.* at 4).

Similarly, Liberty’s agreement with Trader Joe’s provides that Liberty agrees “to indemnify the Owner, their agent and employees against any loss, cost expense, liability or damage and will hold each of them harmless from and pay any loss, cost, expense, liability or damage. . . which the Owner incurs because. . . of the performance of the services. . . and/or any acts or omissions of the Contractor or any of its. . . agents, subcontractors, or anyone directly or indirectly employed by the Contractor,” (NYSCEF Doc. No. 166 at 7).

Liberty, also seeking contractual indemnification, points to an addendum to its agreement with Trader Joe’s, which provides that “[i]n consideration of Liberty Elevator Corporation performing the services herein specified, [Trader Joe’s] expressly agree[s] to indemnify, defend, save harmless, discharge, release and forever acquit Liberty Elevator Corporation. . . from and

against any and all claims. . . and proceedings brought against Liberty Elevator Corporation. . . arising out of or in connection with any failure by you to meet your obligations set forth in this paragraph,” (NYSCEF Doc. No. 175 at 2).

As an initial matter, Liberty cannot attempt to contract away its own liability for negligence, which is exactly what the second clause of its contract with Excel contemplates. An expert hired by plaintiff and one hired by Excel agreed that neither Excel nor Liberty are responsible for plaintiff’s accident (NYSCEF Doc. Nos. 217 at 2, 223 at 5). The cartolator did not stop because of shoddy repairs or a failure to maintain the equipment – it stopped because the cart was improperly loaded on the bottom rack. There is nothing in the record to indicate the cartolator was defective, and because of this, there is no reason to require that a party free of liability indemnify a co-defendant. Even if Trader Joe’s was a third-party beneficiary to the contract, as it argues, contractual indemnification is only proper if Trader Joe’s could prove it was not negligent. Thus, because neither Liberty nor Excel were negligent in this accident, Liberty is not entitled to indemnification from Excel, and Trader Joe’s is not entitled to indemnification from Liberty.

The remaining question is whether Liberty is entitled to indemnification from Trader Joe’s. This Court does not find that Trader Joe’s was free of negligence as a matter of law. As previously noted, that is up to a jury. Because whether Trader Joe’s was negligent has not yet been decided, Liberty’s motion for summary judgment on its contractual indemnification claims against Trader Joe’s is denied as premature.

Breach of Contract

The elements of a breach of contract claim are “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” (*Markov v Katt*, 176 AD3d 401, 402-403, 109 NYS3d 295 [1st Dept 1995]).

In an insurance agreement, “where a third party seeks the benefit of coverage, the terms of the contract must clearly evince such intent” (*Sixty Sutton Corp. v. Illinois Union Ins. Co.*, 34 A.D.3d 386, 388, 825 NYS2d 46 [1st Dept 2006] [internal quotations and citations omitted]).

Liberty argues that Trader Joe’s failed to procure insurance adding Liberty as an additional insured, as required by the contract addendum. Trader Joe’s offers no opposition to the branch of Liberty’s motion for summary judgment on this crossclaim. Therefore, the Court grants this branch of Liberty’s motion on default.


Accordingly, it is hereby

ORDERED that Excel’s motion (MS004) for summary judgment dismissing all claims and crossclaims against it is granted; and it is further

ORDERED that the branch of Liberty’s motion (MS005) for summary judgment dismissing plaintiff’s complaint as against Liberty and dismissing Trader Joe’s cross-claims for indemnification is granted and that the branch of Liberty’s motion for summary judgment on its cross-claim for breach of contract against Trader Joe’s for failure to procure insurance adding Liberty as an additional insured is granted on default; and the branch of Liberty’s motion for summary judgment on its contractual indemnification claim against Trader Joe’s is denied as premature; and it is further

ORDERED that Trader Joe’s motion for summary judgment (MS006) dismissing plaintiff’s complaint and all crossclaims against Trader Joe’s is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on liability against
Trader Joe's is denied.

<u>9/27/2023</u>					
DATE			ARLENE P. BLUTH, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
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APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>
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