SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49M

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SEARCY MOORE,

Plaintiff,

- v -

NATIONAL SEPTEMBER 11 MEMORIAL AND MUSEUM AT THE WORLD TRADE CENTER FOUNDATION, INC. and ABM INDUSTRIES INC.,

Defendants.

INDEX NO. 159652/2017

MOTION DATE 11/22/2022, 11/23/2022, 11/25/2022

MOTION SEQ. NO. 003, 004, 005

DECISION + ORDER ON MOTION

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NATIONAL SEPTEMBER 11 MEMORIAL AND MUSEUM AT THE WORLD TRADE CENTER FOUNDATION, INC.

Third-Party Plaintiff,

- v -

ANDREWS INTERNATIONAL, INC.

Third-Party Defendant.

Third-Party
Index No. 595974/2019

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 168, 169, 172, 175, 176, 177, 178, 179, 180, 181, 185, 186, 187, 188, 191, 194, 195, 196

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 004) 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 167, 170, 173, 182, 189, 192, 198

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 171, 174, 183, 184, 190, 193, 197, 199

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Plaintiff Searcy Moore (plaintiff) initiated this slip and fall action against defendants National September 11 Memorial and Museum at the World Trade Center Foundation, Inc. (9/11 Memorial) and ABM Industries Inc. (ABM) in

connection with an alleged fall that occurred on January 6, 2017 at the premises of the National September 11 Memorial and Museum in Manhattan, New York (the Museum) (NYSCEF # 1). In response, 9/11 Memorial asserted crossclaims against ABM for contractual and common-law indemnity, contribution, and breach of contract,[1] and it instituted a third-party action against third-party defendant Andrews International, Inc. (Andrews) for the same claims (NYSCEF # 5, 32).

Presently before the court are three motions pursuant to CPLR 3212: (1) ABM's motion for summary judgment dismissing plaintiff's claims and 9/11 Memorial's cross-claims (MS003, NYSCEF # 118); (2) 9/11 Memorial's motion for conditional summary judgment on its claims for contractual indemnification, common-law indemnification, and breach of contract against ABM and Andrews (MS004, NYSCEF # 133); and (3) Andrews's motion for summary judgment dismissing 9/11 Memorial's third-party complaint (MS005, NYSCEF # 152). Each of these motions is opposed. For the following reasons, ABM's and Andrews's motions are denied, and 9/11 Memorial's motion is granted in part and denied in part.

Background

The following facts are drawn from the parties' Rule 202.8-g statements and counterstatements, as well as accompanying exhibits. They are undisputed unless otherwise noted.

The Underlying Accident

On the morning of January 6, 2017, at approximately 9:00 a.m., plaintiff was involved in an accident while working as a security guard for U.S. Security Associates, an entity that either merged or was otherwise affiliated with Andrews (NYSCEF # 120 – ABM 202.8-g ¶¶ 1, 17-18; NYSCEF # 135 – 9/11 Memorial 202.8-g ¶ 2; NYSCEF # 164 – Andrews 202.8-g ¶ 1; NYSCEF # 175 – pltf counter-statement ¶ 4). The accident occurred at the "West Vent Structure" at the Museum (*id.* ¶ 5; ABM 202.8-g ¶ 1; 9/11 Memorial 202.8-g ¶¶ 2-3; Andrews 202.8-g ¶ 1). The "West Vent Structure" is a service entrance that provides access to vendors and employees (Andrews 202.8-g ¶ 13).

According to plaintiff, the accident occurred when he slipped on salt pellets on the floor, which were surrounded by water, while walking to the bathroom on a break (9/11 Memorial 202.8-g ¶ 2; pltf counterstatement ¶ 5; NYSCEF # 139, pltf tr at 115:13-118:15, 208:4-209:7). Plaintiff described the condition of the floor as "ice scattered all throughout the area" with water on the floor (*id.* at 79:12-17). He testified that the puddle formed because of the ice and snow brought in by people coming in and out of the West Vent Structure (*id.* at 79:12-17, 89:14-18). Plaintiff

[1] ABM likewise asserted cross-claims against 9/11 Memorial for, *inter alia*, contribution, common-law indemnity, and contractual indemnity (NYSCEF # 28).

did not know for how long the salt pellets were on the floor when he slipped (*id.* at 224:14-17; ABM 202.8-g ¶ 13; Andrews 202.8-g ¶ 10;).

ABM's and Andrews's Responsibilities at the Museum Prior to the Accident

ABM was responsible for keeping the Museum facility, including the West Vent Structure, clean and properly maintained (9/11 Memorial 202.8-g ¶¶ 5, 10-11; Andrews 202.8-g ¶ 8; pltf counterstatement ¶ 6). ABM's employees typically worked three shifts, with cleaning of the West Vent Structure area occurring during the 2 p.m. to 10 p.m. shift and the 10 p.m. to 6 a.m. shift (NYSCEF # 160, tr at 63:12-19, 66:9-67:14). ABM supervisors also routinely patrolled this area every hour or two (*id.* at 68:21-69:21; *see also* Andrews 202.8-g ¶¶ 19-20).

ABM performed various indoor and outdoor cleaning and maintenance work at the Museum, including, among other duties, mopping floors, bringing in garbage bags to remove debris, unloading trucks, and handling maintenance and engineering issues at the Museum throughout the day (*see* 9/11 Memorial 202.8-g ¶ 10; NYSCEF # 142, tr at 11:2-6; 20:7-16, 42:25-43:5; NYSCEF # 143, tr at 29:24-30:7; NYSCEF # 139, pltf tr at 66:21-68:5). ABM also performed winter maintenance-related tasks at the Museum, including snow and ice removal (*see* 9/11 Memorial 202.8-g ¶¶ 11-14; NYSCEF # 142 tr at 11:2-9, 30:21-25, 73:22-74:8; NYSCEF # 143, tr at 30:16-24). Thus, ABM's employees were responsible for cleaning up material such as ice melt and water (NYSCEF # 142, tr at 14:21-17:22).

Andrews/U.S. Security's role at the Museum was to provide security to secure the plaza and interior of the memorial (Andrews 202.8-g ¶ 13). This included, among other duties, performing x-ray scans of people entering the Museum to screen for security threats (9/11 Memorial 202.8-g ¶ 18). On the date of the incident, Robert Pollastro was employed by U.S. Security/Andrews to serve as a security supervisor at the Museum (*see* NYSCEF # 143, tr at 11:11-12:2). Pollastro was stationed at the Museum's Emergency Command Center, and together with two other lead guards, he oversaw security guards, as well as other safety-related duties, at the Museum (*see id.* at 11:25-12:10, 16:12-17:9).

Security officers at the 9/11 Memorial, including plaintiff, had the ability to call and inform their "command center" (also referred to as a "camera room" or a "control room")[2] about areas at the Museum that needed cleaning, including the West Vent Structure (*see* ABM 202.8-g ¶¶ 5-6; Andrews 202.8-g ¶ 15; 9/11 Memorial 202.8 ¶ 20; pltf tr at 67:18-68:5; NYSCEF # 131, tr at 10-22). The commander center would then route complaints/requests to ABM's employees (*see* NYSCEF # 160, tr at

[2] John Conroy, 9/11 Memorial's Director of Security, Fire, Life, and Safety, testified that both Andrews and 9/11 Memorial had daily positions in the command center (NYSCEF # 131, tr at 10:14-11:24). That said, Pollastro could not be certain whether there were security personnel employed by 9/11 Memorial in the command center on the day of the accident, although he testified that "[i]n general, it [had] about three" employees stationed therein (NYSCEF # 143, tr at 18:21-19:11).

15:3-17:9; *see also* 9/11 Memorial 202.8-g ¶¶ 20-21). Once a cleaning condition was reported, ABM's employees had to act within a certain amount of time—approximately 15 to 20 minutes—or they could be written up (pltf tr at 60:22-61:5; NYSCEF # 142, tr at 27:16-19).

The Leadup to the Accident

On the evening prior to the accident, at approximately 5:30 p.m., four workers employed by ABM placed 20 to 30 salt pellet bags on pallets located in the West Vent Structure (9/11 Memorial 202.8-g ¶ 4; Andrews 202.8-g ¶ 4; pltf counterstatement ¶ 7; pltf tr at 210:15-213:1).[3] Plaintiff noticed salt coming out of the bags and falling on the floor (pltf tr at 211:20-213:9). Plaintiff accordingly asked these workers to clean up and remove the salt pellets and ice melt, and they acknowledged plaintiff's request (*id.* at 212:1-8, 214:3-11).

The next morning, at approximately 5:30 a.m. plaintiff arrived at the West Vent Structure for his next work shift and engaged in his usual checks of the area (*see* 9/11 Memorial 202.8-g ¶ 6; ABM 202-.8-g ¶ 4; pltf tr at 74:4-15).[4] When he arrived, neither the salt pellet bags nor the pallet was present in the subject area (ABM 202.8-g ¶ 15; Andrews 202.8-g ¶¶ 6, 11; 9/11 Memorial 202.8-g ¶ 7; pltf counterstatement ¶ 8). Plaintiff, however, did observe salt pellets "everywhere," as well as puddles of water from the melted ice all over the entire length of the floor (pltf tr at 75:5-79:17, 87:14-88:18). There was also an orange cone placed by ABM in the area with a sign cautioning that the floor was wet (*id.* at 102:23-104:25).

Upon seeing the condition of the area, plaintiff asked the security guard he was relieving whether she had notified their supervisor, Pollastro (identified by plaintiff during his deposition as "Bobbie"), about the salt pellets on the floor (pltf tr at 44:6-23, 74:16-75:2, 216:17-22; 9/11 Memorial 202.8-g ¶ 21). She informed plaintiff that she had called Pollastro about the condition so that it could be cleaned up (*id.* at 74:16-78:21; 216:17-219:22; 9/11 Memorial 202.8-g ¶ 8; pltf counter-statement ¶ 8). Plaintiff then personally reported area's condition to the command center (9/11 Memorial 202.8-g ¶ 8; *see also* ABM 202.8-g ¶¶ 7-8; pltf counter-statement ¶ 9). Plaintiff proceeded to his security station, where he remained until his 9:00 a.m. break (pltf counterstatement ¶ 9). Plaintiff testified that, despite his report, no one arrived to clean up the salt pellets or wet condition prior to the

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[3] ABM typically stored bulk orders of ice melt materials offsite, but occasionally it shipped ice melt to the Museum's premises to ensure an adequate supply (*see* NYSCEF # 142, tr at 21:6-22:6). Although onsite storage occurred near the premise's loading dock, ABM would sometimes temporarily store deliveries at the West Vent Structure during the delivery process (*see* 9/11 Memorial 202.8-g ¶ 14; NYSCEF # 141, tr at 17:9-18:6; NYSCEF # 142, tr at 23:4-22, 25:12-26:4).

[4] According to Vincent Lupi, Senior Project Manager of Facilities for ABM, a "big percentage" of ABM's employees would pass through the West Vent Structure area around 6:00 a.m., i.e., the same time when plaintiff's shift began (*see* NYSCEF # 160, tr at 70:16-71:3).

accident (pltf tr at 91:16-92:4). Plaintiff is not aware whether ABM was informed about his complaint (*id.* at 191:17-20, 192:22-193:4; ABM 202.8-g ¶ 8).[5]

9/11 Memorial's Contract with ABM

At the time of plaintiff's incident, ABM performed its cleaning and maintenance duties pursuant to a Cleaning and Maintenance Agreement between the 9/11 Memorial and ABM Facility Services, dated January 1, 2016 (NYSCEF # 116 – ABM Agreement at 1; 9/11 Memorial 202.8-g ¶ 15; ABM 202.8-g ¶ 23). Pursuant to the ABM Agreement, ABM would provide cleaning and maintenance services on a 24-hour basis, seven days per week (ABM Agreement § 2).

The ABM Agreement set forth certain "basic services" that ABM would provide to the Museum (ABM 202.8-g ¶ 24). This included (1) the "cleaning of all areas, as well as the operation, maintenance and repair" of certain delineated systems and equipment, (2) supporting Museum operations "including shipping and receiving of deliveries, assistances with exhibitions installations, special events, snow removal and specialized cleaning," and (3) collaborating with 9/11 Memorial to determine the number and category of personnel needed at the Museum (ABM Agreement § 3(a)-(b), (d)). The ABM Agreement also incorporated a set of Maintenance Specifications, which provided that "[s]now removal and de-icing" were included as contractual duties (*id.* at Ex. C). Although the ABM Agreement provided that 9/11 Memorial would establish safety rules and regulations by which ABM's employees would abide, as well as provide "general supervision and direction" to ABM's employees (*id.* § 7 & Ex. A), 9/11 Memorial and ABM dispute whether 9/11 Memorial retained control over the supervision and direction of ABM's employees (*compare* ABM 202.8-g ¶ 30 *with* NYSCEF # 186 at Resp. Nos. 28, 30).

The ABM Agreement included an indemnification provision, pursuant to which ABM agreed to

> indemnify, defend, reimburse and hold harmless [9/11 Memorial] and [its] respective officers, directors, agents or employees . . . from and against any and all claims and demands of any persons (including those for personal injury, disease, death and/or property damage), arising out of, resulting from or caused by (i) the negligence, misconduct or other fault of [ABM], its officers, directors, agents, employees or subcontractors at the World Trade Center site, or (ii) [ABM's] performance or nonperformance of the services or subject matter called for in this Agreement . . . .

[5] Pollastro testified that neither he nor anyone else at the command center received any complaints about the ice melt at the West Vent Structure prior to plaintiff's accident (NYSCEF # 143, tr at 66:12-67:4). Rather, he claims he first learned about plaintiff's accident when another U.S. Security guard, Jenna Cappola, informed him of the incident (9/11 Memorial 202.8-g ¶ 21).

(ABM Agreement at Ex. A § 8.2; 9/11 Memorial 202.8-g ¶ 16).

Finally, pursuant to Article X of Exhibit A to the ABM Agreement, ABM agreed to procure insurance coverage (including umbrella/excess liability), naming 9/11 Memorial as an additional insured, and endorsing the coverage afforded to 9/11 Memorial as primary and non-contributory (ABM Agreement at Ex. A § 10.1).

9/11 Memorial's Contract with Andrews

At the time of plaintiff's incident, U.S. Security employees, including plaintiff, performed security services at the Museum pursuant to the Security Guard Services Agreement between the 9/11 Memorial and Andrews (U.S. Security's corporate affiliate), dated as of August 1, 2015 (9/11 Memorial 202.8-g ¶ 22; Andrews 202.8-g ¶ 21; NYSCEF # 145 – the Andrews Agreement). Section 3 of the Andrews Agreement set forth the scope of Andrews's services (Andrews 202.8-g ¶¶ 21-22). The services contemplated by the Andrews Agreement included (1) providing "security services that reflect the high profile nature" of the Museum, (2) performing criminal and legal residency background checks for all its employees, and (3) supervising all security services using both on-site security supervisory staff as well as off-site corporate personnel (Andrews Agreement § 3(a)-(e)). The Andrews Agreement does not specify that Andrews's employees had duties or responsibilities related to premise maintenance (Andrews 202.8-g ¶¶ 23, 27, 29).

As set forth in Section 8.2 of Exhibit A the Andrews Agreement, Andrew (like ABM) agreed to indemnify, defend, reimburse, and hold harmless 9/11 Memorial from and against certain claims and demands under certain conditions identical to those set forth in the ABM Agreement (*see* Andrews Agreement at Ex. A § 8.2; 9/11 Memorial 202.8-g ¶ 22; Andrews 202.8-g ¶ 24. Also like the ABM Agreement, the Andrews Agreement required Andrews to procure insurance coverage (including umbrella/excess liability), naming 9/11 Memorial as an additional insured, and endorsing the coverage afforded to 9/11 Memorial as primary and non-contributory (Andrews Agreement at Ex. A § 10.1)

Legal Standard

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once that showing is made, the burden shifts to the party or parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, 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]). Although summary judgment is "considered a drastic remedy," "when there is no genuine issue to be resolved at trial, the case should be summarily decided" (*Andre*

v Pomeroy, 35 NY2d 361, 364 [1974]). In this regard, the court's task at this juncture "is issue finding, not issue determination" (*Lebedev v Blavatnik*, 193 AD3d 175, 184 [1st Dept 2021]).

Discussion

I. Plaintiff's Negligence Claim Against ABM

In his complaint, plaintiff alleges that his slip-and-fall accident and his corresponding injuries were a result of 9/11 Memorial's and ABM's negligence (*see* NYSCEF #1 ¶¶ 24-28). To establish a claim for negligence, a plaintiff must show that (1) the defendant owed a duty to plaintiff, (2) the defendant breached that duty, and (3) defendant's breach proximately caused the plaintiff harm (*Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 459 [1st Dept 2016]).

In seeking summary judgment on plaintiff's claim, ABM argues that it did not owe plaintiff a duty of care (NYSCEF # 118). To support this position, ABM contends that its services rendered at the Museum were only pursuant to its contract with 9/11 Memorial, and it thus invokes the general rule in New York that a contractual obligation does not give rise to tort liability in favor of a third party (NYSCEF # 121 – ABM MOL at 4-5). ABM further avers that none of the exceptions to this general rule apply because ABM's employees did not launch, create, or increase the risk of an accident, plaintiff did not reasonably rely on defendant's continuing performance of a contractual obligation, and ABM did not entirely displace 9/11 memorial's duty to maintain the premises safely (*id.* at 6-7; NYSCEF # 195 – ABM Reply at 3). In response, plaintiff argues that ABM has failed to meet its prima facie burden of establishing its entitlement (NYSCEF # 175, pltf opp at 4-5). Specifically, plaintiff contends that the evidence in the record raises a question of fact as to whether ABM created the condition causing his injury (*see id.* at 5).

"Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Medinas v MILT Holdings LLC*, 131 AD3d 121, 126 [1st Dept 2015], quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). In assessing the existence of a duty in connection with contractor rendering services pursuant to a contract, the New York Court of Appeals has held that a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party (*Espinal*, 98 NY2d at 139 [2002]; *Cornell v 360 West 51st Street Realty, LLC*, 51 AD3d 469, 470 [1st Dept 2008]). That said, courts in New York recognize three situations when a contractor performing services pursuant to a contract may nevertheless assume a duty of care to a third party: (1) when "the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm'"; (2) when "the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) when "the contracting party has entirely displaced the other party's duty to maintain the

premises safely" (*Espinal*, 98 NY2d at 140 [alterations and internal citations omitted]).

Here, despite ABM's contentions to contrary, there is sufficient evidence in the record to raise a triable issue of fact as to whether ABM may have launched, created, or increased the risk of an accident. It is true that, according to plaintiff's testimony, he was unable to indicate how long the salt pellets had been on the ground before he slipped on them (*see* pltf tr at 224:14-17). Nor is there any indication that ABM was aware of any hazardous conditions at the West Vent Structure on the day of the accident (*see id.* at 91:16-92:4, 191:17-20, 192:22-193:4; ABM 202.8-g ¶ 8).

But the record also contains evidence that there were salt pellet bags sitting on pallets in area on the day prior to plaintiff's accident, and that plaintiff had noticed salt coming out of the bags and falling on the floor (*see id.* at 210:15-213:1, 211:20-213:9; pltf counterstatement ¶ 7). There is also evidence in the record that plaintiff informed ABM's employees of these conditions prior to departing for the day (*id.* at 212:1-8, 214:3-11). Furthermore, as the record indicates, when plaintiff arrived at the Museum the next day, he observed that ABM seemingly had acted in response to plaintiff's notification because certain materials had been removed and an orange cone had been placed in the area (*see* ABM 202.8-g ¶ 15; Andrews 202.8-g ¶¶ 6, 11; 9/11 Memorial 202.8-g ¶ 7; pltf counterstatement ¶ 8; pltf tr at 102:23-103:24). Yet, despite ABM's apparent remedial efforts, plaintiff still observed salt pellets "everywhere," as well as puddles of water from the melted ice all over the entire length of the floor, and these conditions were not addressed by the time his accident occurred (*see* pltf tr at 75:5-79:17, 87:14-88:18, 91:16-92:4).

A reasonable jury considering these facts—many of which ABM fails to address in its moving papers—could conclude that ABM's employees exacerbated the conditions at the West Vent Structure based on the manner they performed their custodial work at the Museum (*see Tamhane v Citibank, N.A.*, 61 AD3d 571, 572-73 [1st Dept 2009] [concluding that triable issue of fact in record support denial of motion for summary judgment where record indicated that general maintenance and custodial services contractor may have exacerbated alleged thaw-refreeze conditions]; *Cornell*, 51 AD3d at 470 [concluding that triable issue of fact existed regarding the manner in which contractor performed the work for which it had been hired]). Accordingly, ABM has failed to meet its prima facie burden that is entitled to judgment as a matter of law. Its motion for summary judgment dismissing plaintiff's negligence claim is denied.

II. 9/11 Memorial's Claims for Contractual and Common-Law Indemnification against ABM and Andrews

9/11 Memorial seeks summary judgment on its crossclaim against ABM and its third-party claim Andrews on the basis that it is entitled to recover for

contractual and common-law indemnification in connection with plaintiff's accident (NYSCEF # 136 – 9/11 Memorial MOL at 2). As to contractual indemnification, 9/11 Memorial argues that the indemnification provisions in both the ABM Agreement and Andrews Agreement obligate ABM and Andrews to indemnify and defendant 9/11 Memorial because plaintiff's claims arose out of ABM's and Andrews's respective performance or nonperformance of services called for under their contracts with 9/11 memorial (*see id.* at 3-6). With regard to common-law indemnification, 9/11 Memorial avers that nothing in the record indicates that it was "actively negligent,' while the record supports a conclusion that both ABM and Andrews were negligent (*see id.* at 6-8).

Both ABM and Andrews contend that 9/11 Memorial's indemnification claims must be dismissed (ABM MOL at 8-9; ABM Reply at 2-3; NYSCEF # 165 – Andrews MOL at 6). In relation to 9/11 Memorial's contractual indemnification claim, Andrews contends that it did not have any cleaning or maintenance duties at the Museum, and it did not otherwise create the conditions that resulted in plaintiff's accident (Andrews MOL at 6-11). Meanwhile, ABM avers that it only is required to indemnify 9/11 Memorial if it or its employees were negligent in performing their contractual duties (ABM Reply at 2). As for common-law indemnification claim, both ABM and Andrews argue that there is no evidence indicating that plaintiff's injury resulted from their negligence (ABM MOL at 8; Andrews MOL at 1112).

Below, the court addresses, in turn, 9/11 Memorial's claims for contractual indemnification and common-law indemnification.

A. Contractual Indemnification

Under New York law, "[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 [1987]; *Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 86 [1st Dept 2018]). Thus, if a contractual indemnification provision is "unambiguous and clearly sets forth the parties' intention," summary relief is appropriate (*see Roddy v Nederlander Producing Co. of Am., Inc.*, 44 AD3d 556, 556 [1st Dept 2007]). In this regard, "[t]he right to contractual indemnification depends upon the specific language of the contract" (*Sherry v Wal-Mart Stores East L.P.*, 67 AD3d 992, 994 [2d Dept 2009] [internal citation and quotation omitted]).

Here, as the relevant indemnification provisions contained in both the ABM Agreement and Andrews Agreement make clear, there are two situations for which ABM and Andrews agreed to indemnify 9/11 Memorial: (1) claims and demands "arising out of, resulting from or caused by" ABM's or Andrews's "negligence, misconduct or other fault" at the Museum; and (2) claims and demands "arising out of, resulting from or caused by" ABM's or Andrews's "performance or

nonperformance of the services or subject matter called for in" their respective contracts with 9/11 Memorial (*see* ABM Agreement § 8.2; Andrews Agreement § 8.2). These "broad terms" evince the parties' intent that 9/11 Memorial should be indemnified, regardless of ABM's or Andrews's negligence, if the claim or demand is tied to their performance or nonperformance of services at the Museum (*see Brown v Two Exchange Plaza Partners*, 76 NY2d 172, 178 [1990] [concluding that indemnification clause providing for indemnification for "any other claim arising out of, in connection with or as a consequence of the performance of the [works set forth in the contract] and/or any acts or omission of the Subcontractor or any of its subcontractors" did not require a finding of negligence to be triggered]).

With this framing in mind, the court concludes that 9/11 Memorial has made a prima facie showing that it is entitled to judgment as a matter of law against ABM in connection with its contractual indemnification claim. As the record establishes, ABM's employees were responsible for keeping the Museum facility, including the West Vent Structure, clean and properly maintained (9/11 Memorial 202.8-g ¶¶ 5, 10-11). To this end, ABM performed winter maintenance-related tasks at the Museum, including snow and ice removal and storing winter maintenance materials on the premises (*see* NYSCEF # 142, tr at 11:2-9, 30:21-25, 73:22-74:8; NYSCEF # 143, tr at 30:16-24). These were all services contemplated by the ABM Agreement (*see* ABM Agreement § 3(a)-(b), (d) & Ex. C). Furthermore, there is no meaningful dispute that plaintiff's claim arose out of a condition that could have been impacted by ABM's performance and/or nonperformance of its custodial duties at the Museum (*see e.g.* pltf tr at 60:22-61:5; NYSCEF # 142, tr at 27:16-19). Consequently, as ABM fails to rebut this prima facie showing, 9/11 Memorial is entitled to conditional summary judgment as to its contractual indemnification claim against ABM (*see Ajche v Park Ave. Plaza Owner, LLC*, 171 AD3d 411, 413-414 [1st Dept 2019] [granting claim for contractual indemnification where contract required indemnification for any "claim arising out of, in connection with, or as a consequence of the performance or nonperformance of" co-defendant's work]).

The court reaches a different conclusion with respect to 9/11 Memorial's contractual indemnification claim against Andrews. As a preliminary matter, the record is devoid of any evidence indicating that plaintiff's claim triggered the second indemnification situation set forth in the Andrews Agreement. To reiterate, plaintiff's injuries arose after slipping and falling at the West Vent Structure based on conditions that would have been addressed by premise cleaning and maintenance. The Andrews Agreement, however, states that Andrews and its employees were to provide "security services" at the Museum (Andrews Agreement § 3[a]-[e]), and nothing therein indicates that the parties contemplated that Andrews's employees would provide services related to premise maintenance (*see* Andrews 202.8-g ¶¶ 23, 27, 29).[6] This record therefore does not support a conclusion

[6] To be sure, the record does indicate that U.S. Security personnel could report areas that needed cleaning to their command center (Andrews 202.8-g ¶ 15; 9/11 Memorial 202.8 ¶ 20). But, as also

that plaintiff's accident arose out of performance or nonperformance the services or subject matter called for by the Andrews Agreement. And insofar as 9/11 Memorial contends that plaintiff's injury occurred while he was "performing security guard services" (NYSCEF # 183 at 9), that contention must fail. The record is clear that plaintiff sustained his injuries while on a break, not while performing security services as the Museum (9/11 Memorial 202.8-g ¶ 2; pltf counterstatement ¶¶ 5, 9; pltf tr at 115:13-118:15, 208:4-209:7). Stated succinctly, the evidence before the court does not support a conclusion that, under the clear terms of the indemnification clause, plaintiff's injuries arose out of Andrews's performance or nonperformance of services delineated in the Andrews Agreement.

But the court's analysis of 9/11 Memorial's contractual indemnification claim does not end here. It must also consider whether plaintiff's claim implicates the first indemnification situation set forth in the Andrews Agreement, i.e., claims and demands "arising out of, resulting from or caused by" Andrews's "negligence, misconduct or other fault" at the Museum (Andrews Agreement § 8.2). Regarding this issue, neither party has made a prima facie showing of evidence on the record establishing their entitlement to judgment as a matter of law. On the one hand, there is evidence in the record that indicates that the conditions that caused plaintiff's accident may have been communicated to the command center, and no action was seemingly taken (9/11 Memorial 202.8-g ¶ 8; pltf tr at 91:16-92:4). On the other hand, there is also testimony on the record indicating that plaintiff's supervisors may not have been aware of any issues prior to the accident (NYSCEF # 143, tr at 66:12-67:4; *see also* 9/11 Memorial 202.8-g ¶ 21). Meanwhile, as noted above, there remain issues of fact as to ABM's role in causing plaintiff's accident, thereby furthering clouding the issue of negligence (*see e.g.* pltf tr at 75:5-79:17, 87:14-88:18, 91:16-92:4, 212:1-8, 214:3-11; NYSCEF # 142, tr at 14:21-17:22). These triable issues of fact necessarily preclude summary judgment in favor of either 9/11 Memorial or Andrews on this particular claim.

In conclusion, for foregoing reasons, the court denies 9/11 Memorial's motion for conditional summary judgment on its contractual indemnification claim against Andrew, as well as Andrews's motion for summary judgment dismissing this claim.

B. Common-Law Indemnification

"To establish a claim for common-law indemnification, the party seeking indemnification must prove not only that the proposed indemnitor's negligence contributed to an accident but also that it was not negligent beyond statutory liability (*see Winkler v Halmar International, LLC*, 206 AD3d 458, 461 [1st Dept 2022]; *Pena v Intergate Manhattan LLC*, 194 AD3d 576, 578 [1st Dept 2021]). Here, neither 9/11 Memorial nor ABM and Andrews have made a prima facie showing

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reflected in the record, the commander center routed those complaints to ABM's employees for them to conduct any clean up (*see* NYSCEF # 160 at Tr. 7-17; *see also* 9/11 Memorial 202.8-g ¶¶ 20-21).

that they are entitled to judgment as a matter of law on 9/11 Memorial's common-law indemnification claims. Indeed, as explained above, there are numerous triable issues of fact precluding summary judgment as it relates to whether either ABM's or Andrews's negligence resulted in plaintiff's accident. The court therefore denies 9/11 Memorial's motion for conditional summary judgment as to its common-law indemnification claim, as well as ABM's and Andrews's motion for summary judgment dismissing this claim (*see Shelton v Chelsea Piers, L.P.*, 214 AD3d 490, 490 [1st Dept 2023] [affirming denial of summary judgment on common-law indemnification claim where triable issues of fact existed as to negligence]).[7]

III. 9/11 Memorial's Failure to Procure Claims against ABM and Andrews

9/11 Memorial contends that it is entitled to summary judgment on its breach of contract claims against ABM and Andrews based on their alleged failure to procure insurance coverage as required under the terms of the ABM Agreement and Andrews Agreement, respectively (9/11 Memorial MOL at 9). 9/11 Memorial avers that, to date, both ABM and Andrews declined to provide requisite insurance coverage to 9/11 Memorial despite document requests submitted during discovery (*id.*). In response, ABM and Andrews argue that there is no evidence in the record that they failed to procure insurance (NYSCEF # 198 at 3; NYSCEF # 199 at 7).

To be entitled to summary judgment on a claim for failure to procure insurance, a party must meet "its prima facie burden by establishing that a contract provision requiring the procurement of insurance was not complied with" (*Benedetto v Hyatt Corp.*, 203 AD3d 505, 506 [1st Dept 2022]). A party will typically make this showing "by submitting . . . copies of the contract requiring the procurement of insurance and of correspondence from the insurer of the party against whom summary judgment is sought indicating that the moving party was not named as an insured on any policies issued" (*Dorset v 285 Madison Owner LLC*, 214 AD3d 402, 404 [1st Dept 2023]).

Here, although 9/11 Memorial submits copies of the contract that requires both ABM and Andrews to procure insurance coverage, it does not submit any evidence that either ABM or Andrews failed to procure insurance coverage. Rather, it simply submits a document demand asking for copies of such policies (NYSCEF # 147) and avers, without evidentiary support, that ABM and Andrew declined to provide anything (*see* 9/11 Memorial MOL at 9). Such a showing is insufficient to establish entitlement to judgment as a matter of law (*see e.g. Erez v Partnership 92 West, L.P.*, 2016 WL 6157115, at *2 [Sup Ct, NY County, Oct. 20, 2016] [denying motion for summary judgment on claim for failure to procure insurance coverage where defendant failed to submit any evidence in support of claim, "such as an affidavit stating that [defendant] had investigated and found that [co-defendant]

[7] To the extent that ABM and Andrews seek to dismiss 9/11 Memorial's contribution claims, their motions are likewise denied for the same reasons (*see, e.g. DeJesus v 888 Seventh Ave. LLC*, 114 AD3d 587, 588 [1st Dept 2014] [claims for contribution not dismissed where triable issues of fact existed regarding negligence]).

failed to procure insurance or insurance documents showing that a procured policy had an insufficient limit"]; *Bermejo v N.Y.C. Health*, 2012 NY Slip Op 33824[U], at *13 [Sup Ct, NY County, May 17, 2012] [denying motion for summary judgment on claim for failure to procure insurance coverage where third-party plaintiff failed to submit any documentary evidence establishing that third-party defendant failed to procure insurance]).

In sum, 9/11 Memorial's motion for conditional summary judgment on its breach of contract claim is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that that defendant ABM Industries Inc.'s motion for summary judgment (MS 003) is denied; and it is further

ORDERED that that the branch of defendant/third-party plaintiff National September 11 Memorial and Museum at the World Trade Center Foundation, Inc.'s motion for conditional summary judgment (MS 004) is granted only as to its contractual indemnification crossclaim against defendant ABM Industries Inc., and denied in all other respects; it is further

ORDERED that third-party defendant Andrews International, Inc.'s motion for summary judgment (MS 005) is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon the other parties and the Clerk of the Court within ten days of the date of this order.

10/06/2023
DATE

MARGARET A. CHAN, J.S.C.

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