SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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CARMEN TIBURCIO,

Plaintiff,

- v -

152 SHERMAN HOLDING LP, ALL CITY REMODELING, INC., GLOBAL TILE, INC. TODAY'S WINDOW & DOOR CORP., JUST TILE & TRI STATE INC., STONE CARE SERVICES, INC., and RANDY SMITH d/b/a STONE CARE SERVICES,

Defendant.

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INDEX NO. 154086/2016

MOTION DATE

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 123, 124, 127, 128, 129, 130

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

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

Under Movant's unchallenged the statement of material facts, served pursuant to Uniform Rule for Trial Courts §202.8-b, many of the salient facts are established. This action arises from an incident that occurred on November 23, 2015, while Plaintiff Carmen Tiburcio was present at a premises located at 152 Sherman Avenue, New York, New York. Defendant 152 Sherman Holding LP ("Sherman") was the owner of the premises. On the day of the incident, Plaintiff was a home health aide servicing a client who lived on the second floor at the premises. Plaintiff ascended the stairs in this "walk-up" type premises at approximately 8:58 am without incident to begin working that day. At approximately, 10:00am, Plaintiff departed her client's apartment to do some grocery shopping. As she descended the stairway, Plaintiff claims she slipped and fell down the stairs. Plaintiff posits that a wet condition on the stairs caused her to fall. On the day of the incident, construction work was being performed at the premises. Defendant Sherman retained Defendant All City Remodeling, Inc. ("All City") to perform the renovations. All City, acting as general contractor, retained various subcontractors to perform services at the subject premises which were also named as Defendants herein.

In the compliant, Plaintiff pled causes of action based upon common-law negligence. Defendant Sherman answered and pled, *inter alia*, crossclaims against All City for common-law indemnification and contribution as well as contractual indemnification. Now, Sherman moves for summary judgment against All City on its crossclaims for common-law and contractual indemnification and to dismiss Plaintiff's complaint as against Sherman. Plaintiff and All City oppose the motion.

"'[T]he proponent of a summary judgment motion 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'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make the requisite showing requires denial of the motion, regardless of the sufficiency of the opposition papers (*see id.* at 324; *see also Smalls v AJI Industries. Inc.,* 10 NY3d 733, 735 [2008]). Once a *prima facie* demonstration has been made, the burden shifts to the opponent to produce evidentiary proof that establishes the existence of a material issues of fact (*see eg Giuffrida v Citibank Corp.,* 100 NY2d 72 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

On the branch of Sherman's motion to dismiss Plaintiff's complaint, to sustain a negligence cause of action arising out of the ownership or control of real property "there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it" (*Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.*, 61 AD3d 629 [2d Dept 2009]; *see also Basso v Miller*, 40 NY2d 233 [1976]; *Tatom v Andrews Intl., Inc.*, 178 AD3d 981 [2nd Dept 2019]; *Davis v Commack Hotel, LLC*, supra at 502). Therefore, Movant was required to demonstrate, *prima facie*, that one or more of these essential elements are negated as a matter of law (*see eg Poon v Nisanov*, 162 AD3d 804 [2d Dept 2018]; *Nunez v Chase Manhattan Bank*, 155 AD3d 641 [2d Dept 2017]). Specifically, Sherman was obliged to prove "it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discovery and remedy it" (*see Ceron v Yeshiva Univ.*, 126 AD3d 630 [1st Dept 2015]). To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employee to discovery and remedy it (*see Johnson v 101-105 S. Eighth St. Apts. Hous. Dev. Fund Corp.,* 185 AD3d 671 [2d Dept 2020]; *see also Gordon v American Museum of Natural History*, supra). To meet its burden on the issue of lack of constructive notice, a Defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the accident (*see Johnson v 101-105 S. Eighth St. Apts. Hous. Dev. Fund Corp.*, *supra*).

In this case, Sherman demonstrated its lack of negligence in the first instance with the deposition testimony of Hector DeLeon ("DeLeon"), the superintendent at the premises on the day of the accident (*see eg Frederick v New York City Hous. Auth.*, 172 AD3d 545 [1st Dept 2019]). He averred that he arrived soon after Plaintiff fell and observed that All City personnel "had chemicals on the steps". DeLeon also testified that were no caution signs or tape. Further, the deposition testimony of Plaintiff establishes that the condition was in existence for, at most, one hour.

In opposition, only Plaintiff proffered opposition to this branch of the motion. The argument that there are issues of fact as to Sherman's control over All City's personnel is both speculation and a red herring. Although a landlord which retains an independent contractor remains responsible to maintain a safe premises (*see Bernstein v. El-Mar Painting & Decorating Co.*, 13 NY2d 1053 [1963]; *Thomassen v J & K Diner, Inc.*, 152 AD2d 421 [2d Dept 1989]), in this case Sherman demonstrated its lack of notice irrespective of this continuing duty.

Concerning the branch of Sherman's motion on its contractual indemnification claim against All City, this cause of action is dependent upon the specific language of the contract (*see Ging v F.J. Sciame Constr. Co., Inc.*, 193 AD3d 415, 418 [1st Dept 2021]; *Anderson v United Parcel* Service, 194 AD3d 675, 678 [2d Dept 2021]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]; *see also Wai Cheung v 48 Tenants' Corp.*, 192 AD3d 503 [1st Dept 2021]). Further, absent a legal duty to indemnify, an agreement containing that obligation must be strictly construed so as not to create an unintended responsibility (*see eg Tonking v Port Auth.*, 3 NY3d 486, 490 [2004]). An authenticated agreement containing the indemnification provision must be proffered by the party seeking contractual indemnification (*see eg Peranzo v. WFP Tower D Co. L.P.*, 201 AD3d 486, 489 [1st Dept 2022]).

The terms and conditions of the indemnification provision in contract between Sherman and All City reads as follows:

> Contractor shall defend, indemnify and hold harmless Owner, Barberry Rose Management Co., Inc., and each of its respective members, managers, affiliates, directors, officers, employees, agents, mortgagee, representatives, contractors, invitees, concessionaries and/or licensees (collectively, "Indemnitees") from and against any and all liability, loss, claims, demands, damages, costs or expenses, including reasonable attorneys' fees, whether for personal injury, theft, property damage (including loss of use thereof) or otherwise (collectively "Claims") arising out of or from or in connection with or related to Contractor's or any of Contractor's directors, officers, members, employees, agents, contractors, subcontractors, representatives, invitees, concessionaires and/or licensees (collectively "Contractor's Agents") performance or non-performance of the Work or if caused by, related to as a result of the negligence or misconduct of Contractor or any Contractor's Agents. If any claim, action or proceeding is brought against Owner or any Indemnitees by reason of any claims, Contractor upon written demand from Owner or any Indemnitee shall defend the same at Contractor's sole cost and expense by counsel reasonably satisfactory to Owner.

The above contract language obligated All City to indemnify Sherman not only in the case of their negligence, but also for acts "arising out of or resulting from any work and caused in whole or in part by any act or omission" (*see Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 490-491 [1st Dept 2018]). Sherman established with the deposition testimony of Plaintiff DeLeon, that the incident arose out of All City actions at the premises and that it was absent negligence. All City's complaint that the contract at issue was not authenticated is without merit as the document was exchanged by it in response to a notice for discovery and inspection served by Sherman (*see* CPLR §4540-a).

Common-law indemnification cannot be obtained "unless [the putative indemnitee] has been held to be vicariously liable without proof of any negligence or actual supervision on its own part" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]; *Broyhill Furniture*

Indus., Inc. v Hudson Furniture Galleries, LLC, 61 AD3d 554, 556 [1st Dept 2009]). Based on the foregoing deposition testimony, Sherman demonstrated its absence of negligence, but not the existence of any vicarious liability on its part. As such, with the dismissal of Plaintiff's negligence claim against Sherman, its claim for common law indemnification against All City fails (*see Nieves-Hoque v. 680 Broadway, LLC,* 99 AD3d 536, 537 [1st Dept 2012]["Absent liability, vicarious or otherwise, there is no basis for indemnification"]).

Accordingly, it is

ORDERED that the branches of Sherman's motion to dismiss Plaintiff's claims against it and for summary judgment on its cross claim for contractual indemnification are granted, and it is

ORDERED that the balance of Sherman's motion is denied.

10/12/2023
DATE

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

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