SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** **05RCP**

Justice

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NANCY TORIBIO,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON INC., CITYBRIDGE, LLC,

Defendants.

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INDEX NO. 158257/2018

MOTION DATE 06/22/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

CITYBRIDGE, LLC ,

Third-Party Plaintiff,

-against-

MFM CONTRACTING CORP.,

Third-Party Defendant.

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Third-Party
Index No. 595398/2023

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to AMEND CAPTION/PLEADINGS.

On September 5, 2018, plaintiff commenced this action alleging that on April 22, 2018, she tripped and fell in the crosswalk at the intersection of Third Avenue and East 87th Street, New York, New York, sustaining injuries (NYSCEF Doc. No. 29 [Compl. at ¶¶4-5]). Plaintiff alleges that defendants the City of New York, Consolidated Edison Inc., and Citybridge, LLC ("Citybridge") negligently caused and created the defective condition at issue (Id. at ¶26).

On May 3, 2023, Citybridge commenced a third-party action against MFM Contracting Corp. ("MFM"), asserting claims for contractual and common law indemnification, contribution,

and breach of contract, alleging that, pursuant to a contractual agreement, "MFM agreed to provide services required to perform the installation, operation, and maintenance of Kiosks" and indemnify Citybridge for all claims arising out of MFM's performance of its contractual obligations (NYSCEF Doc. No. 18 [Third-Party Compl. at ¶¶10, 13]). On June 15, 2023, MFM interposed an answer to the third-party complaint which asserted, inter alia, a counterclaim against Citybridge for indemnification and contribution (NYSCEF Doc. No. 25 [Third Party Answer at ¶24]).

Plaintiff now moves, pursuant to CPLR §3025, to amend her complaint to assert negligence claims directly against MFM (NYSCEF Doc. No. 28 [Proposed Am. Compl. at ¶¶23-30]). MFM opposes plaintiff's motion, arguing that the statute of limitation has expired as against it and that permitting the amendment at this juncture would prejudice MFM. Plaintiff maintains that the statute of limitations has not expired.

For the reasons set forth below, plaintiff's motion is denied.

DISCUSSION

"Leave to amend pleadings under CPLR § 3025(b) should be freely given and denied only if there is prejudice or surprise resulting directly from the delay or if the proposed amendment is palpably improper or insufficient as a matter of law" (McGhee v Odell, 96 AD3d 449, 450 [1st Dept 2012]). A proposed amendment which asserts a claim against a new party that is barred by the applicable statute of limitations is "patently devoid of merit" (See e.g., Nossov v Hunter Mtn., 185 AD3d 948, 949 [2d Dept 2020]).

As the trip and fall giving rise to this instant action occurred on April 22, 2018, the statute of limitations for plaintiff's negligence claims expired (after accounting for the toll created by Executive Order No. 202.8) on December 8, 2022 (See CPLR §214[5]). Therefore, the statute of

limitations for plaintiff's negligence claims lapsed prior to the commencement of the third-party action against MFM, on May 3, 2023.

In light of the foregoing, MFM may only be added as a direct defendant if plaintiff establishes that the relation back-doctrine applies (See Weckbecker v Skanska USA Civ. Northeast, Inc., 173 AD3d 936, 937 [2d Dept 2019]). This doctrine permits new parties to be joined in a previously-commenced action, even after the statute of limitations has expired, upon a showing that: (i) the claims against the new defendants arise from the same conduct, transaction, or occurrence as the claims against the original defendants; (ii) the new defendants are "united in interest" with the original defendants, and will not suffer prejudice due to lack of notice; and (iii) the new defendants knew or should have known that, but for the plaintiffs' mistake, they would have been included as defendants (CPLR §203; Higgins v City of New York, 144 AD3d 511, 512-13 [1st Dept 2016] [internal citations omitted]). Plaintiff does not directly address any of these elements but merely asserts, incorrectly, that the statute of limitations has not run and that, as a result, MFM would not be prejudiced by the amendment sought.

While there is no dispute that plaintiff's claims against MFM arise from the same events as the claims against the original defendants, plaintiff has failed to satisfy the second and third elements of the relation-back doctrine. As to the second prong, "[a] unity of interest … will be found where there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other. The classic test is that [] the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other" (Vanderburg v Brodman, 231 AD2d 146, 147-148 [1st Dept 1997]). Here, the contract between MFM and Citybridge—submitted in connection with Citybridge's Third Party Complaint—reveals that MFM was an independent contractor retained by Citybridge to perform

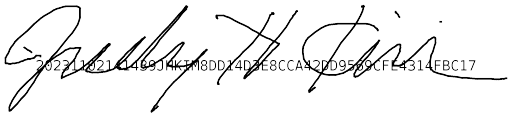
specified services. As a rule, "[a]n independent contractor and the party who retains him are not united in interest because the latter is not vicariously liable for torts of the former" (Kitson v Atl. Ref. & Mktg. Corp., 227 AD2d 971, 971-72 [4th Dept 1996]; see also Zhilkina v The City of New York. 2014 WL 12613666 [N.Y. Sup Ct, Kings County 2014] and Richard Klein, D.C., v Beta I, LLC, Bettina Equities Co., Pelham Constr. Corp., and 317 W. 54th Owners Corp., 2003 WL 25514350 [Sup Ct, NY County 2003]). The fact that MFM is contractually obligated to indemnify Citybridge for any losses and liabilities arising out of MFM's performance does not modify this principle (Cf. Ellis v Newmark & Co. Real Estate, Inc., 209 AD3d 520, 521-522 [1st Dept 2022] ["[r]eciprocal indemnification clauses in the agreements as between defendant and the proposed defendants provide a basis for finding vicarious liability"]).

Finally, plaintiff has also failed to make any showing that her failure to name MFM as a defendant was due to a mistake on her part (See Priestley v Panmedix, Inc., 202 AD3d 417, 418 [1st Dept 2022]).

In light of the foregoing, it is

ORDERED that plaintiff's motion to amend the complaint is denied.

This constitutes the decision and order of the Court.



11/2/2023
DATE

HON. JUDY H. KIM, J.S.C.

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