At an IAS Term, Part 81 (MOA) of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 30th day of May, 2023.

P R E S E N T:
HON. CARL J. LANDICINO,
Justice.

----------X

AMARIS JACKSON-MUNOZ,

Plaintiff,

-against-

CS 225 PENNSYLVANIA LLC, CAYRE EQUITIES, LLC, UNIVERSAL SYSTEMS INC., HOLLISTER CONSTRUCTION SERVICES, LLC, PEGASUS CONSTRUCTION NY CORP. and TOP SHELF ELECTRIC COR

Defendant.

----------X

UNIVERSAL SYSTEMS INC.,

Third-Party Plaintiff,

-against-

THE TRAVELERS COMPANIES, INC., and MAIN STREET AMERICA ASSURANCE COMPANY,

Third-Party Defendants.

----------X

Index No.: 519932/2017

DECISION AND ORDER

Motion Sequence #8, 9, 10, 11, 12

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	227-245, 248-271, 272-300, 302-324,
Opposing Affidavits (Affirmations)	335-338, 340-343, 345-346, 351-353, 354-356, 360
Reply Affirmation or Affidavit	358, 359,
Memorandum of Law	301, 325, 327, 339, 344, 368, 369,

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The instant action results from a trip and fall incident that allegedly occurred on March 11, 2017. Plaintiff, Ameris Jackson-Munoz (hereinafter the "Plaintiff") allegedly injured herself when she purportedly tripped on the sidewalk abutting the premises known as 225 Pennsylvania Avenue, Brooklyn, New York (the "Premises").

Defendant Pegasus Construction Corp. (hereinafter "Pegasus") now moves (motion sequence #8) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the Plaintiff's second amended complaint, and all cross-claims against it. [1] Pegasus argues that the complaint and any cross-claims against it should be dismissed as it is not liable as a matter of law for the Plaintiff's injuries. Specifically, Pegasus argues that it was hired by Universal to erect a "sidewalk bridge" that was completed six months prior to the Plaintiff's accident and did not cause or create the condition at issue. Universal opposes this motion in as much as Pegasus seeks the dismissal of Universal's cross-claims against it.

Defendant Top Shelf Electric Corp. (hereinafter "Top Shelf") now moves (motion sequence #9) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the Plaintiff's second amended complaint, and all cross-claims against it.[2] Top Shelf argues that the complaint and any cross-claims against it should be dismissed as it is not liable as a matter of law for the Plaintiff's injuries. Specifically, Top Shelf argues that it was hired by Universal to install lighting to the sidewalk shed along Pennsylvania Avenue in 2016, and did not cause or create the condition at issue. Universal opposes this motion in as much as Top Shelf seeks the dismissal of Universal's cross-claims against it. The Plaintiff, although not generally not opposing the motion, makes clear that it disagrees with Top Shelf's assertion that the alleged sidewalk condition was open and obvious and not inherently dangerous.

---

[1] There is no opposition to the summary judgment application made by Pegasus to dismiss the Plaintiff's claims against Pegasus. Also, there is no opposition to that aspect of this motion for dismissal of the cross-claims by Defendants Top Shelf or Hollister against Pegasus. There is no cross-claim against Pegasus by CS 225. Accordingly, the motion by Pegasus is granted as it relates to dismissal of the Plaintiff's claims against it as well as to the cross-claims by Defendants Top Shelf and Hollister. *See Allan v. DHL Exp. (USA), Inc.*, 99 AD3d 828, 832, 952 N.Y.S.2d 275, 280 [2nd Dept, 2012].

[2] There is no opposition to the summary judgment application made by Top Shelf to dismiss the Plaintiff's claims against Top Shelf. Also, there is no opposition to that aspect of this motion for dismissal of the cross-claims by Defendants Pegasus or Hollister against Top Shelf. There is no cross-claim against Top Shelf by Defendant CS225 Accordingly, the motion by Top Shelf is granted as it relates to dismissal of the Plaintiff's claims against it as well as to the cross-claims by Defendants Pegasus and Hollister. *See Pagano v. Town of Smithtown*, 74 AD3d 1304, 1305, 904 N.Y.S.2d 729, 730 [2d Dept 2010].

Defendant Hollister Construction Services (hereinafter "Hollister") now moves (motion sequence #10) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the Plaintiff's second amended complaint, and all cross-claims against it.[3] Hollister argues that the second amended complaint and any cross-claims against it should be dismissed as it is not liable as a matter of law for the Plaintiff's injuries. Specifically, Hollister argues that it was hired by Defendant CS 225 Pennsylvania LLC to perform work in relation to the construction of a storage facility on the Premises and did not cause or create the condition at issue and was not responsible for the maintenance of the sidewalk. The Plaintiff opposes this motion. The Plaintiff argues that there are issues of fact regarding whether Defendant Hollister had a responsibility to maintain the sidewalk in a good condition or caused or created the sidewalk condition at issue sufficient to deny its motion.

Defendant Universal Systems, Inc. (hereinafter "Universal") now moves (motion sequence #11) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the Plaintiff's second amended complaint, and all cross-claims against it.[4] Defendant Universal also seeks summary judgment in favor of its cross-claims against Pegasus and Top Shelf. Universal argues that it did not cause or create the defect on the sidewalk that allegedly caused the Plaintiff to trip and fall. Specifically, Universal argues that it was hired to act as a general contractor in the installation of the sidewalk shed. Universal contends that its performance was completed prior to the Plaintiff's alleged accident and that did not have a responsibility to maintain the sidewalk and did not cause or create the sidewalk defect. Plaintiff opposes this motion. The Plaintiff argues that

---

[3] There is no opposition to the application made by Hollister to dismiss the cross-claims by Defendants Pegasus, Top Shelf and Universal. CS225 did not assert a cross-claim against Hollister. Accordingly, the motion by Hollister is granted as it relates to dismissal of the cross-claims by Defendants Pegasus, Top Shelf and Universal.

[4] There is no opposition to the application made by Universal to dismiss the cross-claims by Defendants Pegasus, Top Shelf, Hollister, or CS225 against Universal. Accordingly, the motion by Universal is granted as it relates to dismissal of the cross-claims by Defendants Pegasus, Top Shelf, Hollister, and CS225.

there are issues of fact regarding whether Defendant Universal caused or created the sidewalk condition at issue sufficient to deny Universal's motion. Top Shelf also opposes this motion and argues that it never had an obligation to indemnify Universal with respect to the work performed here, and as such, Universal is not entitled to summary judgment on its cross-claims against Top Shelf.

Defendant CS 225 Pennsylvania, LLC (hereinafter "CS 225") cross-moves (motion sequence #12) for an order pursuant to CPLR 3212 granting summary judgment and dismissal of the cross-claims against CS 225 asserted by Defendant Hollister. CS 225 argues that the Plaintiff has discontinued its claims against CS 225 and that as a result relieved CS 225 from liability against any other party in this action. The Plaintiff supports this application. Hollister opposes the motion and argues that the cross-motion by CS 225 is untimely by seven months, procedurally defective in as much as Hollister never served an amended answer, and that CS 225 has breached its contractual obligation to Hollister. Additionally, Hollister argues that the motion by CS 225 to dismiss Hollister's cross-claims should be denied as CS 225 did not interpose an answer or assert cross-claims after service of the second amended complaint.[5] Moreover, Hollister argues that CS 225 failed to show that it did not breach its agreement with Hollister to name Hollister as an additional insured on CS 225's insurance policy.

---

[5] As an initial matter, the Court finds that the motion by CS 225 is untimely, however, it will be considered given that it addresses the issue of indemnification and the contract between Hollister and CS 225. Although, "an untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds." *Grande v. Peteroy*, 39 AD3d 590, 591–92, 833 N.Y.S.2d 615, 617 [2d Dept 2007]. The motion, with respect to indemnification, must relate to the indemnity clause at issue. *See Reutzel v. Hunter Yes, Inc.*, 135 AD3d 1123, 1124, 25 N.Y.S.3d 370 [3d Dept 2016]; see also *Whitehead v. City of New York*, 79 A.D.3d 858, 913 N.Y.S.2d 697 [2d Dept 2010]; *Sanchez v. Metro Builders Corp.*, 136 AD3d 783, 784, 25 N.Y.S.3d 274 [2d Dept 2016]. The motion does address that clause. The Court also finds that insofar as the cross-claims constituted independent and separate claims contained in the responsive pleading, those claims survive, notwithstanding CS225's apparent failure to interpose an amended answer to the amended complaint.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment 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. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 610 N.Y.S.2d 50 [2d Dept 1994].

Liability- The Sidewalk Law

Sidewalk liability is covered by §7-210 of Administrative Code of City of N.Y. (hereinafter "the Sidewalk Law"). The Sidewalk Law provides in pertinent part that:

> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably

> safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.
>
> c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

An owner subject to the Sidewalk Law must "provide any evidence showing that she properly maintained the sidewalk as the Administrative Code of the City of New York requires, or that any failure to properly maintain the sidewalk was not a proximate cause of the plaintiff's injuries." *See James v. Blackmon*, 58 AD3d 808, 809, 872 N.Y.S.2d 179, 180 [2d Dept 2009]. "Thus, in support of a motion for summary judgment dismissing a cause of action pursuant to Section 7–210, the property owner has the initial burden of demonstrating, *prima facie*, that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." *Harakidas v. City of New York*, 86 AD3d 624, 627, 927 N.Y.S.2d 673, 676 [2d Dept, 2011]. "Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." *Fasano v. Green-Wood Cemetery*, 21 AD3d 446, 446, 799 N.Y.S.2d 827, 828 [2d Dept 2005]. Such facts and circumstances include "the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury." *Trincere v. Cty. of Suffolk*, 90 N.Y.2d 976, 978, 688 N.E.2d 489, 490 [1997], *quoting Caldwell v. Vill. of Island Park*, 304 N.Y. 268, 107 N.E.2d 441 [1952]. Also, in a trip and fall case, a defendant makes a *prima facie* showing of its

entitlement to summary judgment by presenting sufficient evidence to show that they neither created nor had actual or constructive notice of the allegedly dangerous condition. *See Hackbarth v. McDonalds Corp.*, 31 AD3d 498, 499, 818 N.Y.S.2d 578 [2d Dept 2006]; *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2d Dept 2005].

A contractor's agreement to perform work on a property "generally does not give rise to a duty of care to persons not a party to the contract, absent evidence that the contractor or subcontractor assumed a comprehensive maintenance obligation, created or exacerbated a dangerous condition or launched a force or instrument of harm, or that the plaintiff detrimentally relied on the contractor's continued performance of its obligation." *Georgotas v. Laro Maint. Corp.*, 55 AD3d 666, 667, 865 N.Y.S.2d 651, 652 [2d Dept 2008]; *see also Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136, 773 N.E.2d 485 [2002].

The Plaintiff was deposed on February 22, 2021 (NYSCF Doc. #257). When asked if she was walking at the time of her accident, the Plaintiff stated, "[y]es." (Page 21). The Plaintiff stated that she was coming "from the train station." When asked where she was going, the Plaintiff stated, "[h]ome." (Page 21). When asked how her accident occurred, the Plaintiff stated, "[i]t was like I was walking and my toe like just hit, like a curb -- it felt like a curb but it was like a dip in the street in the sidewalk." (Page 28). When asked which foot hit the dip in the pavement, the Plaintiff stated, "[m]y right foot." (Page 29). When asked if she saw the defect after she had fallen, the Plaintiff stated, "[y]es, ma'am. Right when I sat up and I turned over and I looked down to see, like between -- you know, what took place, I there was a -- pretty much a -- like a triangle or hole inside the …" (Page 30). When asked whether the defect was triangular shaped, the Plaintiff stated, "[y]es, ma'am." (Page 30). When asked about the depth of the defect, the Plaintiff stated "I'm going to say about like 4 to 5 inches." (Page 30). When asked if there was a sidewalk shed over the area of the sidewalk where the defect was located, the Plaintiff stated, "[y]es." (Page 32). When asked

what the lighting conditions were, the Plaintiff stated, "[u]nder there it was dark, but the rest of the block was like -- you know, lit up from the street light." (Page 34). When asked if she saw any light fixtures or bulbs illuminating the area under the scaffold, the Plaintiff stated, "[n]ot any -- I don't recall, no." (Page 35). When asked how much of the sidewalk was under the scaffold, the Plaintiff stated, "I want to say one sidewalk flag." (Page 35).

David Cohen was deposed on March 17, 2021 (NYSCF Doc. #258). When asked who he was employed by, Mr. Cohen stated, "Treasure Island Management LLC." (Page 12). When asked how he was related to the Premises, Mr. Cohen stated, "[o]kay, so CS 225 Pennsylvania is an SPE which owns the property. The ultimate owners of that LLC are the same principals as the owners of Treasure Island Management." (Page 9). When asked what his position was, Mr. Cohen stated, "I guess you could call me the equivalent of a vice president, but we don't really have titles." (Page 10). When asked what the business relationship was at the time of the Plaintiff's accident between Treasure Island and CS 225 Pennsylvania, Mr. Cohen stated, "'I'm not sure if there was a direct one at that time yet, because I believe construction was still going on, at which the general contractor would have been managing the site." (Page 11). When asked what his familiarity was with the Premises prior to the Plaintiff's accident, Mr. Cohen stated, "I have been to this site several times since we purchased it back in 2014, through the time that we still own it now." (Page 12). When asked if he was familiar with the condition of the sidewalk at the Premises, Mr. Cohen stated, "[n]o." (Page 29). When asked what the stage of construction was when the Plaintiff's accident occurred, Mr. Cohen stated, "I think we were about 60 percent done." (Page 29). When asked if he had spoken with anyone about sidewalk renovation being included in the construction of the storage facility, Mr. Cohen stated, "I did not." (Page 30). When asked who had the responsibility to maintain or repair the sidewalk during the construction period, Mr. Cohen stated

"[t]hat would have had to be done by the general contractor as they were the ones effectively managing the site during the construction." (Page 35).

Marius Mera was deposed on April 26, 2021 (NYSCF Doc. #259). When asked who he was employed by, Mr. Mera stated, "Universal Systems, Inc." (Page 9). When asked what his position was there, Mr. Mera stated "[f]ield manager." (Page 9). When asked if he was employed by Universal in March of 2017, Mr. Mera stated, "[y]es." (Page 10). When asked what type of business Universal is, Mr. Mera stated, "[i]t's a scaffolding and general construction." (Page 10). When asked what his responsibilities involved as a field manager, Mr. Mera stated, "[y]ou know, estimate for the job and at the time of installation, instructing our people to what they need to do." (Page 11). When asked if he was personally involved at the Premises with the construction of the sidewalk shed, Mr. Mera stated, "[y]es. On the first date when we first installed I show my foreman the layout where it goes and that's pretty much my involvement." (Page 17). When asked if he remembered where the sidewalk shed was erected, Mr. Mera stated, "[o]n the two elevations, that was Pitkin Avenue and Pennsylvania Avenue." (Page 18). When asked if he inspects the sidewalk when providing an estimate, Mr. Mera stated, "[w]e look in general to the sidewalk, if it's structurally stable to construct the sidewalk shed." (Page 22). When asked when this particular sidewalk shed was constructed, Mr. Mera stated, "2016, sometime in 20l6." (Page 23). When asked what time of year it was constructed, Mr. Mera stated, "I believe it was spring, if I'm not mistaken." (Page 23). When asked for the identity of the general contractor when the sidewalk shed was constructed, Mr. Mera stated, "Inspiron." (Page 25). When asked what Pegasus was, Mr. Mera stated that, "[o]ur subcontractor, who performed the installation who performed the work." (Page 27). When asked if he returned to the job site to inspect the scaffolding after it was installed, Mr. Mera stated, "[y]es. Once in a while we pass by the job sites to look over things that may be wrong, but we didn't find anything else." (Page 31). When asked if he was informed of any defects with

the sidewalk under the Pennsylvania portion of the sidewalk shed, Mr. Mera stated, "[n]o." (Page 50). Mr. Mera was shown photographs of the alleged sidewalk defect, and asked whether the sidewalk appeared cracked and damaged, Mr. Mera stated, "I don't see any crack, I don't know. It's wear and tear maybe, but not a crack." (Page 50). When asked whether he had observed this condition of the sidewalk in that location when he first inspected the area, Mr. Mera stated, "I did not observe that." (Page 52). When asked if he had looked over the sidewalk prior to the construction of the sidewalk shed, Mr. Mera stated "[y]es." (Page 53). When asked what he would have done if he had noticed that there was a defect, Mr. Mera stated, "I did not observe, and if there are any major issues I will make a note." (Page 53). When asked again if he would make note of a defect, Mr. Mera stated, "[i]f it's a major issue, yes, I may make a note of it and let the customer know." (Page 65). Mr. Mera then stated that the sidewalk depicted, "was not a danger for pedestrians to walk as per my knowledge at my time of estimate." (Page 65). When asked if a raised or uneven sidewalk flag would be unsafe for pedestrians, Mr. Mera stated, "I don't know if a raised slab will be a major issue for pedestrians." (Page 66). When asked why he was inspecting the sidewalk prior to building the sidewalk shed, Mr. Mera stated, "I'm look [sic] for the integrity of the sidewalk shed, I mean, to support the sidewalk shed support column." (Page 70).

Michael Ochs sat for a deposition on June 7, 2021 (NYSCF Doc. #260). When asked what his position was with Defendant Hollister, Mr. Ochs stated, "I was the general counsel of the company until December 30th of 2020." (Page 11). When asked what happened at that time, Mr. Ochs stated, "all employees were terminated as a result of the Chapter bankruptcy." (Page 11). When asked when he was hired by Hollister, Mr. Ochs stated, "[a]pproximately, call it March of 2016." (Page 12). When asked what his duties were, Mr. Ochs stated, "[m]y duties as general counsel included contract drafting, handling and managing outside counsel for various things that we did not handle internally, resolving disputes with lien claimants, and the like." (Page 14). When

asked whether he was familiar with the Project at issue, Mr. Ochs stated, "I've never been to the site. I believe it preexisted -- the contracts preexisted my entry, so I did not negotiate any documents on that transaction." (Page 14). When asked if he remembers who the project manager was on this project, Mr. Ochs stated, "I do not." (Page 31). When asked to review a document and name the construction manager referenced in the agreement between Hollister and CS225, Mr. Ochs stated, "Dominic Aquilina." (Page 35).

Michael Cacace was deposed on November 30, 2021 (NYSCF Doc. #261). When asked who he was employed by, Mr. Cacace stated, "Top-Shelf Electric." (Page 10). When asked what position he has with Top Shelf, Mr. Cacace stated, "[e]lectrician." (Page 10). When asked how long he had been employed with the company, Mr. Cacace stated, "[t]wenty-two years." (Page 11) When asked if he was employed by Top Shelf at the time of the Plaintiff's accident, Mr. Cacace stated, "[y]es." When asked if he was personally involved in this work, Mr. Cacace affirmed that he was. (Page 11). When asked how Top Shelf was involved, Mr. Cacace stated, "[w]e were involved in the lighting for the sidewalk shed, not the construction of the job itself." (Page 14). When asked how long he spent at the job site, Mr. Cacace stated, "[i]t was two visits, let's say, worth, because there was a section of shed completed and then they built another section of shed. So it was over two days, not two full work days, a couple of hours each day, but I don't remember the day." (Page 18). When asked whether there were any requirements for inspection of the work he completed, Mr. Cacace stated, "[t]he lighting has to be intact, not broken." (Page 35).

Juan Carlos Campos Ramirez was deposed on December 20, 2021 (NYSCF Doc. #262). When asked if he was an employee of a company called Pegasus, Mr. Ramirez stated, "[y]es. I am the owner." (Page 11). When asked whether the company still existed, Mr. Ramirez stated, "[n]o, it doesn't exist anymore." When asked when it stopped doing business, Mr. Ramirez stated "[i]t was in 2016, around the middle of the year. I don't recall the exact date." (Page 12). When asked

if Pegasus was hired to install the scaffolding at the Premises, Mr. Ramirez stated, "[y]es. They did hire us to install those scaffolding." (Page 20). When asked if he was present on the three dates when this scaffolding was installed, Mr. Ramirez stated, "[y]es, sir." (Page 21). When asked what he did on those days, Mr. Ramirez stated, "[t]o make sure that everyone was doing a good job, that there were no accidents, to verify that each man was doing the job correctly, aside from my brother doing that, too." (Page 23). When asked if he would have reported a sidewalk defect, Mr. Ramirez stated, "[n]o, sir. Well, it was Universal Systems who would take care of telling us where exactly they wanted us to place the posts. If there was a huge hole or if there was a crack, then they would have reported that to us, but it didn't look any different than any other sidewalk in New York." (Page 31). When asked if he remembered any cracks in the sidewalk in the area where the scaffold was installed, Mr. Ramirez stated, "[n]o, sir. It's impossible to recall." (Page 31). When asked if Pegasus caused any damage to the sidewalk during their work, Mr. Ramirez stated, "[n]o, that's incorrect. We weren't using any heavy machinery." (Page 40). When asked if anyone inspected the work after it was completed, Mr. Ramirez stated, "I personally did." (Page 41). When asked if the structure was sound, Mr. Ramirez stated, "[p]erfectly." (Page 42).

Turning to the merits of the motion by Defendant Hollister (motion sequence #10) the Court finds that it has not met its *prima facie* burden. Defendant Hollister argues that it was hired to act as a construction manager on the project to construct the storage facility at the Premises. Defendant Hollister contends that it did not have a duty to the Plaintiff in as much as it was not responsible for maintaining the sidewalk. Defendant Hollister also argues that it did not have notice of the condition and did not cause or create the sidewalk condition that the Plaintiff claims caused her accident. In support of this position, Defendant Hollister relies on the deposition of the Plaintiff, the deposition of Juan Carlos Campos Ramirez of Pegasus, the deposition of Michael Ochs of Hollister, the deposition of Marius Mera of Universal, and the deposition Michael Cacace

of Top Shelf. As referenced above, Mr. Ochs stated that he had never been to the site and was unable to testify regarding Hollister's responsibilities during the construction project. Even assuming that the google map images that Hollister relies on are admissible, they are inconclusive in as much as it is not clear whether the condition changed over time and was not otherwise negatively impacted or exacerbated by the work conducted by Hollister. Moreover, Hollister's evidence failed to eliminate triable issues of fact as to whether it caused or created the condition at issue and failed to exercise reasonable care during the construction project. *See Pinto v. Walt Whitman Mall, LLC,* 175 A3d 541, 544, 107 N.Y.S.3d 373, 377 [2d Dept 2019]; *see also Jackson v. Conrad*, 127 A.D.3d 816, 818, 7 N.Y.S.3d 355, 358 [2d Dept 2015]. Even assuming, *arguendo*, that Defendant Hollister had met its *prima facie* burden, the Plaintiff raises material issues of fact regarding whether Hollister as the general contractor that managed the construction of the storage facility launched an instrument of harm which resulted in the Plaintiff's accident. The Plaintiff points in her memorandum of law to the testimony of Mr. Cohen for CS225 who stated that the accident occurred during the period when construction of the storage facility was ongoing and as a result during a period when Hollister was managing such work and the Premises in general. *See Rodgers v. City of New York*, 79 AD3d 1003, 1004, 914 N.Y.S.2d 245, 246 [2d Dept 2010]. Accordingly, the motion by Defendant Hollister (Motion Sequence #10) is denied.

Turning to the merits of the motion by Defendant Universal (motion sequence #11) the Court finds that it has met its *prima facie* burden. Defendant Universal argues that it was hired to act as a construction manager on the project to construct the sidewalk shed at the Premises. Defendant Universal argues that it did not have a duty to the Plaintiff in as much as it was not responsible for maintaining the sidewalk. Defendant Universal also argues that it did not have notice of the condition and did cause or create the sidewalk condition that the Plaintiff claims caused her accident. In support of this position, Defendant Universal relies primarily on the

deposition of Marius Mera of Universal and the Plaintiff, but also the deposition of Juan Carlos Campos Ramirez of Pegasus, the deposition of Michael Ochs of Hollister, the deposition of Marius Mera of Universal, and the deposition Michael Cacace of Top Shelf. Both Mera and Ramirez testified that they did not cause the sidewalk defect and significantly that they completed any work on the sidewalk shed in the spring of 2016, nearly ten months prior to the Plaintiff's accident. This testimony is sufficient for Defendant Universal to meet its *prima facie* burden. *See Melendez v. City of New York,* 182 AD3d 430, 119 N.Y.S.3d 862 [2d Dept 2020]; *Zhilkina v. City of New York*, 121 AD3d 975, 975, 995 N.Y.S.2d 162, 163 [2d Dept 2014]; *Nealy v. Pavarini-McGovern, LLC,* 135 AD3d 917, 919, 24 N.Y.S.3d 372, 375 [2d Dept 2016]; *Medinas v. MILT Holdings LLC*, 131 AD3d 121, 127, 13 N.Y.S.3d 81 [1st Dept 2015]. In opposition, the Plaintiff has failed to raise a material issue of fact that would show that Defendant Universal had a duty to maintain the sidewalk or caused and created the condition at issue. *See Izzo v. Proto Const. & Dev. Corp.,* 81 AD3d 898, 900, 917 N.Y.S.2d 287, 288 [2d Dept 2011].[6]

Indemnification

Turning to the merits of the motion by Defendant CS 225 (motion sequence #12) Defendant CS 225 argues that its motion should be granted as it has settled the matter with the Plaintiff. "A release given in good faith by the injured person to one tortfeasor as provided in [General Obligations Law § 15-108 (a)] relieves him [or her] from liability to any other person for

[6] The Court finds that as a result of the Court's decision dismissing the complaint against Universal, that aspect of Universal's motion (motion sequence #11) seeking summary judgment on its cross-claims against Defendants Pegasus and Top Shelf are deemed academic. In its Affirmation in Partial Opposition to the motions by Pegasus (NYSCEF Doc. 351), Universal argues that its application for summary judgment on its cross-claims against Pegasus is conditional upon whether the Court grants its application for summary judgment against the Plaintiff. Universal states (Paragraph 5) that "if Plaintiff's Complaint and the cross-claims as to UNIVERSAL are not dismissed, then UNIVERSAL is entitled to an order granting it summary judgment on its cross-claims against TOP SHELF and PEGASUS, since they actually erected the sidewalk shed and installed the lighting." Universal also makes this same statement in its Affirmation in Partial Opposition to the motions by Top Shelf (NYSCEF Doc. 354, Paragraph 5).

contribution as provided in article fourteen of the civil practice law and rules." *U.S. Fire Ins. Co. v. Raia*, 121 AD3d 970, 971–72, 996 N.Y.S.2d 286 [2d Dept 2014]; see also *Balkheimer v. Spanton*, 103 AD3d 603, 603, 959 N.Y.S.2d 697, 698 [2d Dept 2013]; *Ziviello v. O'Boyle*, 90 AD3d 916, 917, 935 N.Y.S.2d 89, 90 [2d Dept 2011]. The Court finds that the release between the Plaintiff and CS 225 does relieve CS 225 as it relates to any cross-claims for contribution, but that those remaining cross-claims for indemnification and breach of contract will be addressed independently of the release between those parties.[7]

CS 225 seeks summary judgment dismissal of the cross-claim by Hollister for contractual indemnification. The contract between CS225 and Hollister provides in pertinent part that

> "To the fullest extent permitted by law, Construction Manager shall indemnify, defend and hold Owner and such other entities as listed on Exhibit "H" and their agents, members, officers, directors and employees harmless from and against all claims, actions, damages, losses and expenses, including, but not limited to, attorneys' fees and disbursement (expressly including attorneys' fees incurred in the enforcement of this indemnification), to the extent arising out of or resulting from any act or omission of Construction Manager, anyone employed by it or anyone for whose acts it may be liable, provided that any claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself).

CS 225 argues that the cross-claim for contractual indemnification should be dismissed as the obligation to indemnify runs in favor of CS225 and not Hollister. "In the absence of a legal duty to indemnify, a contractual indemnification provision 'must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed.'" *Alfaro v. 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255–56, 904 N.Y.S.2d 205, 207 [2d Dept 2010], quoting *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 548 N.E.2d 903 [1989]. "In addition, a party seeking contractual indemnification pursuant to a contract relative to the construction of a building must prove itself free from negligence, because to the extent its negligence contributed to

[7] The Court notes that Hollister does not explicitly oppose CS 225's motion as it relates to dismissal of the cross-claims for contractual and common law indemnification.

the accident, it cannot be indemnified therefor." *Mogrovejo v. HG Hous. Dev. Fund Co., Inc.*, 207 AD3d 461, 463, 170 N.Y.S.3d 628, 630 [2d Dept 2022]. In the instant matter it is clear that the contract between CS 225 and Hollister does not provide for an obligation on the part of CS 225 to indemnify Hollister. Therefore, Hollister's cross-claim against CS 225, for contractual indemnity is dismissed.

CS 225 also seeks summary judgment dismissal of the cross-claim for common law indemnification. CS 225 alleges that this cross-claim should be dismissed given that it did not have a duty to Hollister in this regard. "The key element of a cause of action for common-law indemnification is not a duty running from the indemnitor to the injured party, but rather, is a separate duty owed the indemnitee by the indemnitor." *Metadijia Atanasoki v. Braha Indus.*, Inc., 124 AD3d 705, 706, 2 N.Y.S.3d 524, 525 [2d Dept 2015]. Hollister has no vicarious liability for the actions of CS 225. Accordingly, the Court finds that CS 225 did not have a separate duty to Hollister such that a cross-claim for common law indemnification would be viable. The cross-claim for common law indemnification is dismissed.

The Court finds that CS 225 does not meet its *prima facie* burden regarding Hollister's cross-claim for breach of contract regarding the procurement of insurance. "A provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated." *Assevero v. Hamilton & Church Properties, LLC*, 189 AD3d 1146, 1148, 138 N.Y.S.3d 549, 551 [2d Dept 2020]. In the instant proceeding, the agreement between CS 225 and Hollister states that "[t]he parties acknowledge that Owner has purchased Project specific Commercial General Liability Insurance policies (collectively, the "Project Specific Policy"), including Owner and General Contractor as named insured which shall be maintained through completion of the Work pursuant to the terms set forth in such policies." (NSYCEF Doc. 367). However, CS 225 does not address this issue or

provide proof that insurance was procured, and no reply papers were filed. Accordingly, the cross-claim by Hollister regarding breach of contract will continue.

Based upon the foregoing, it is hereby ORDERED as follows:

The motion by Defendant Pegasus' (motion sequence #8) is granted as to the Plaintiff's claims and any cross-claims against Pegasus.

The motion by Defendant Top Shelf (motion sequence #9) is granted as to the Plaintiff's claims and any cross-claims against Top Shelf.

The motion by Defendant Hollister (motion sequence #10) is denied as to the Plaintiff's claims. However, the motion is granted to the extent that the cross-claims by Defendant Pegasus, Defendant Top Shelf and Defendant Universal are dismissed.

The motion by Defendant Universal (motion sequence #11) is granted as to the Plaintiff's claims and any cross-claims.

The motion by Defendant CS 225 (motion sequence #12) is granted to the extent that the cross-claims against it are dismissed except as to Hollister's cross-claim for breach of contract.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.