

Devita v NYY Steak Manhattan, LLC

2024 NY Slip Op 30190(U)

January 12, 2024

Supreme Court, New York County

Docket Number: Index No. 158327/2013

Judge: Margaret A. Chan

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN

PART

49M

Justice

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MICHELLE DEVITA, as Administratrix of the Estate of
KEVIN MCGONIGAL,

Plaintiff,

- v -

NY STEAK MANHATTAN, LLC, PLAZA CONSTRUCTION
CORP. and BARING INDUSTRIES, INC.,

Defendants.

INDEX NO. 158327/2013

04/17/2023,
04/28/2023,
05/03/2023,
05/12/2023,
05/26/2023

MOTION DATE

**MOTION SEQ. NO. 009 010 011
012 013**

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**DECISION + ORDER ON
MOTION**

PLAZA CONSTRUCTION CORP.,

Third Party Plaintiff,

- v -

BARING INDUSTRIES, INC.,

Third Party Defendant.

Third-Party
Index No. 595146/2014

-----X

BARING INDUSTRIES, INC.,

Second Third Party Plaintiff,

- v -

DAY & NITE REFRIGERATION CORP. and KIMCO
REFRIGERATION CORP.,

Second Third Party Defendants.

Second Third-Party
Index No. 595130/2015

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NY STEAK MANHATTAN, LLC and PLAZA
CONSTRUCTION LLC f/k/a PLAZA CONSTRUCTION
CORP.,

Third Third Party Plaintiffs,

- v -

B&G ELECTRICAL CONTRACTORS, ESS & VEE
ACOUSTICAL CONTRACTORS, INC. and BARING
INDUSTRIES, INC.,

Third Third Party Defendants.

Third Third-Party
Index No. 595638/2015

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 629, 640, 645, 646, 647, 648, 649, 650, 651, 671, 672, 704, 705

were read on this motion to/for

RENEW/REARGUE/RESETTLE/RECONSIDER

The following e-filed documents, listed by NYSCEF document number (Motion 010) 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 603, 604, 605, 606, 619, 630, 638, 641, 652, 656, 657, 668, 669, 670, 695, 696, 699, 700, 701, 713, 714

were read on this motion to/for

VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 600, 601, 602, 620, 621, 622, 623, 624, 625, 626, 627, 628, 631, 642, 653, 676, 709

were read on this motion to/for

RENEW/REARGUE/RESETTLE/RECONSIDER

The following e-filed documents, listed by NYSCEF document number (Motion 012) 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 643, 654, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 677, 680, 706, 707, 708, 710

were read on this motion to/for

RENEW/REARGUE/RESETTLE/RECONSIDER

The following e-filed documents, listed by NYSCEF document number (Motion 013) 632, 633, 634, 635, 636, 637, 639, 644, 655, 673, 674, 675, 678, 679, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 697, 698, 702, 703, 711, 712, 715

were read on this motion to/for

RENEWAL

In this personal injury action asserting Labor Law violations, Kevin McGonigal,¹ a laborer employed by Day and Nite Refrigeration Corp. (DNRC), was injured on September 6, 2013, when he was transporting a refrigeration condenser unit at a construction project at 7 West 51st Street, New York, New York (the Premises). McGonigal commenced this action alleging common law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6) against NYY Steak Manhattan, LLC (NYY Steak), the lessee of the Premises, Plaza Construction LLC f/k/a Plaza Construction Corp. (Plaza), the construction manager of the project, and Baring Industries Inc. (Baring), which furnished and installed the kitchen equipment in this project.

The three third-party actions concern indemnity and contribution. Relevant to the motions here, NYY Steak and Plaza (together, NYY/Plaza) jointly bring indemnification claims against Baring, B&G Electrical Contractors (B&G) – the electrical subcontractor, Ess & Vee Acoustical Contractors, Inc. (Ess & Vee) – the carpentry subcontractor; Baring seeks the same against DNRC – the refrigeration installation company and McGonigal’s employer.

¹ McGonigal passed away in December 2020, when this case was being appealed (NYSCEF # 582 – Death Certificate).

By Decision and Order dated May 14, 2020, as amended on July 21, 2020, this court, upon the parties' separate summary judgment motions, dismissed plaintiff's main action against NYY/Plaza and Baring, and dismissed the third-party actions for indemnity and contribution as academic (NYSCEF #s 500, 502, 504, 506, 520 – Prior Decision). On appeal, the First Department found that questions of fact existed in the main action and thus reinstated plaintiff's claims for common law negligence and Labor Law §§ 200, 240 (1), and 241 (6) violations against NYY/Plaza as well as plaintiff's claims under Labor Law §§ 240 (1) and 241 (6) against Baring (NYSCEF # 543 – Remittur).

Now, in motion sequences (MS) 009, 010, 011, 012, and 013, all defendants and third-party defendants move to reargue, renew, or modify the branch of the Prior Decision that dismissed the third-party actions as academic, and upon reargument, seek summary judgment in their favor on claims for breach of contract, contractual indemnity, and common law indemnity and contribution.

BACKGROUND

The court assumes the parties' familiarity with the background of this case, which was detailed in the court's Prior Decision (NYSCEF #s 500, 502, 504, 506). In short, McGonigal was allegedly injured on September 6, 2013, at a construction project to convert an old bank building at the Premises into a restaurant called the New York Yankee Steakhouse (NYSCEF # 352 – McGonigal tr at 32, 36; NYSCEF # 355 – Usher tr at 4-12, 17).

NYY Steak was the lessee of the Premises, and it hired Plaza as the construction manager of the project (NYSCEF # 401 – NYY Steak's Contract with Plaza). Plaza subcontracted with (i) Baring to furnish and install kitchen equipment (NYSCEF # 361 – Plaza's Sub-Contract with Baring, § 1.1), (ii) B&G for electrical work, including installing temporary lighting and fire alarm system at the site (NYSCEF # 364 – Plaza's Sub-Contract with B&G), and (iii) Ess & Vee for drywall, carpentry and acoustical work (NYSCEF # 363 – Plaza's Sub-Contract with Ess & Vee). McGonigal's employer, DNRC, was sub-subcontracted by Baring to install refrigeration evaporators and condensers for the project (NYSCEF # 340 – Baring's Purchase Order with DNRC).

Plaza's subcontracts with Baring, B&G, and Ess & Vee (NYSCEF #s 361, 363, 364 – the Subcontracts) each contained an indemnity provision that obligated the subcontractors to defend and indemnify NYY/Plaza for any claims that "arise out of" or "are claimed to arise out of":

1. The performance of Work by the Subcontractor, or any of its Sub-Subcontractors, any act or omission of any of the foregoing; [or]
2. Any accident or occurrence which happens, or is alleged to have happened, in or about the place where such Work is being performed or in the vicinity thereof (a) while the Subcontractor is performing the Work, either directly or indirectly through a Subcontractor or material agreement, or (b) while any of the

Subcontractor's property, equipment or personnel are in or about such place or the vicinity thereof by reason of or as a result of the performance of the Work.

(NYSCEF #s 361, 363, 364, Art 9, § A – Indemnity Clause).

The Indemnity Clause further provided that it only applied “to the extent permitted by law” and “shall not be construed to indemnify any Indemnitee for its own negligence” (*id.*, Art 9, §§ A, C, E). Of relevance here, the Subcontracts defined the term “Work” to mean “furnish and install kitchen equipment” for Baring, “furnish & install electrical work” for B&G, and “furnish and install drywall, acoustics and carpentry work” for Ess & Vee (*id.*, Art 1, § 1.1).

Separately, the Subcontracts required the subcontractors to obtain commercial general liability insurance with “a combined single limit for personal injury of at least \$2,000,000 per occurrence and \$4,000,000 in the aggregate” (*id.*, Ex E, ¶ 2). However, Baring and Ess & Vee only obtained insurance for a lower limit: \$1,000,000 for personal injury per occurrence and \$2,000,000 in the aggregate (NYSCEF # 463 – Baring's Insurance Policy; NYSCEF # 254, Ex A – Ess & Vee's Insurance Policy).

On September 6, 2013, McGonigal was allegedly injured when he and his foreman at DNRC, Julian Gomez, used a dolly to deliver a refrigeration condenser unit to a kitchen located in the basement of the subject building (NYSCEF # 360 – Gomez tr at 24, 33-34; NYSCEF # 357 – Vespe tr at 23; McGonigal tr at 40-41, 73, 97-99).² Before the accident happened, McGonigal and Gomez took a freight elevator to the first basement floor,³ exited the elevator, and proceeded about eight feet down a poorly lit hallway (McGonigal tr at 76, 78-79, 81, 94-95). They then turned left into a second and darker hallway that was approximately four feet long, where there was an uncovered elevator pit about eighteen inches deep, eight feet wide, and eight feet long (*id.* at 89, 92-94, 97-99, 102; Usher tr at 88, 124:8-9). When McGonigal was about to turn into a third hallway as he was pulling the dolly and walking backwards, he tripped on “a piece of wood” that he did not see and fell into the eighteen-inch-deep pit (McGonigal tr at 97-99, 101-102; Gomez tr at 56; Usher tr at 92-93). Subsequently, during McGonigal's deposition, he was shown two photographs of the pit, which he confirmed to have depicted the subject hole and the materials inside the hole at the time of his fall (McGonigal tr at 111-116; NYSCEF # 365 – Scene Photos).

Plaza's superintendent at the project, George Usher, prepared a daily report that identified the trades working on the project site on any given day (Usher tr at 9, 16-17, 40:4-12; NYSCEF # 368 – Daily Report). According to Usher's Daily Report, on September 6, 2013, both B&G and Ess & Vee were on site, performing

² DNRC's employees at the site included McGonigal, DNRC's foreman, Gomez, and DNRC's construction manager, James Vespe (McGonigal tr at 34, Vespe tr at 9, Gomez tr at 11).

³ The parties referred to the first basement floor as the 2LL floor (Usher tr at 23:19-23) or the LL2 floor (Chin tr at 28).

work on the first basement level, which was referred to as the 2LL floor in the Daily Report (NYSCEF # 368 at 31). Specifically, the Daily Report showed that B&G did “fire alarm work” and Ess & Vee did work related to fiberglass reinforced panels on the 2LL floor on the day of the accident (*id.*; Usher tr at 70-71).

Uncovered Elevator Pit

Plaza was responsible for “initiating, maintaining and supervising all safety precautions” in connection with the project, including (i) covering any holes or openings at the site with wood, or (ii) installing barricades and guardrails around openings to prevent workers falling into the openings (NYSCEF # 401, Exhibit E, § 9.1.1; Usher tr at 26, 43:6-12, 54:21-55:2, 56:14-57:2). Specifically, Usher, working for Plaza, was responsible for walking through the project site, including the first basement floor where the incident happened, and visually inspecting the site for safety issues on a daily basis (Usher tr at 39, 131:7-12). One thing that Usher would look for in his daily walk-through was whether any opening’s protection had been removed (*id.* at 55:6-9). Usher was authorized to rectify any unsafe conditions he discovered on site (*id.* at 41:19-23). And if any trade working at the site removed safety protections around holes and openings, they would be required to restore such protections (*id.* at 55:3-5).

Regarding the pit that McGonigal fell into, Usher recalled that Plaza initially had covered the pit with planking and plywood (*id.* at 95-96, 124, 152-153). But on the day of the accident, the pit was uncovered, and Usher did not see who uncovered it (*id.*). Neither was the pit protected by caution tapes, warning signs, or protective barriers on the day of the accident (*id.* at 124). About twenty minutes after McGonigal fell, Usher arrived at the accident scene and saw there were “[r]eels of BX cable and a tripod work bench” stored inside the pit (*id.* at 122-124, 145:9-18). B&G’s subforeman, Raymond Chin, recognized from the Scene Photos that the materials inside the pit were “thousand foot coils of BX” that belonged to B&G and that the cables were placed into the pit by one of B&G workers (NYSCEF # 358 – Chin tr at 7-9, 47:9-48:5, 77:17-19). Chin also confirmed that the tripod work bench in the pit was similar to the kind of tri-stands B&G used in its work (*id.* at 77). Chin did not recall seeing any plywood or planking covering the subject pit or any barricades around the pit before his crew placed wire into it (*id.* at 78:11-21). Chin recalled that B&G had performed work inside the subject pit, but he did not remember if B&G worked in the pit on the day of the incident (*id.* at 53:13-54:10, 62:6-22).

Construction Debris

Plaza was responsible for removing construction debris at the site, including cleaning up debris in the corridor at the first basement level (Usher tr at 43:13-16, 72:17-20, 133:25-134:4; NYSCEF # 359 – Cioppa tr at 43-44, 58). On the day of the incident, when McGonigal was transporting the condenser unit on the first basement floor, he saw some construction debris—“like wood, probably sheetrock”—in the passageway (McGonigal tr at 84-85, 87-88). Specifically, in the first hallway

that McGonigal entered after he exited the elevator, he observed pieces of wood and sheetrock leaning against the walls (McGonigal tr at 87-88). After McGonigal made a left turn into the second hallway, he took six to eight steps and then tripped on a debris that he did not see and fell into the pit (McGonigal tr at 92-93, 97-98). McGonigal was not sure what debris he tripped on, but he learned after the fact that it was a piece of wood that was about two to three inches wide and three to four inches long (McGonigal tr at 98:18-19, 99, 101:25-102:9).

Ess & Vee was subcontracted by Plaza to perform drywall, sheetrock, and acoustical ceiling work for the project (NYSCEF # 363; Cioppa tr at 17:13-16, 19:20-23). Frank Cioppa was Ess & Vee's foremen for the project (*id.* at 10:18-11:2). Cioppa testified that Ess & Vee performed work related to drywall and ceilings on the first basement floor, and erected sheetrock walls on that level when Ess & Vee just started working for the project (*id.* at 30:12-24, 31:19-21, 32:24-33:13, 35:4-11, 44:20-45:4). Cioppa added that Ess & Vee did not use any wood to perform its work on its job on the first basement floor, rather, the materials used was sheetrock and metal stud (*id.* at 30:19-31:3, 44:20-45:12). According to Cioppa, Ess & Vee had performed work in the kitchen down the hallway of the first basement floor (*id.* at 32). But Ess & Vee did not create the elevator pit, nor did it store its materials in the pit (*id.* at 51:7-11, 54:17-24, 56:7-21).

Temporary Lighting

B&G, the electrical subcontractor for the project, was responsible for providing temporary lighting, electricity, and fire alarms for the project site (NYSCEF # 358 – Chin tr at 16, 20). Chin from B&G testified that B&G provided temporary string lighting for the project site, with 100-watt lightbulbs attached to the ceiling every six feet (*id.* at 21-22, 25, 46, 66). According to Chin, B&G affixed temporary lighting to the ceiling above the subject pit (*id.* at 43, 46). But McGonigal did not remember seeing any string lights in the hallway where he fell (McGonigal tr at 95:12-17). The pit itself was not illuminated by any interior lighting (Usher tr at 124).

For his part, Usher from Plaza did not recall receiving any complaints about the lighting condition at the job site (*id.* at 146). Usher described the temporary lighting on the first basement floor as “typical construction lighting” that “wasn’t incredibly bright, but it wasn’t too dark either” (*id.* at 147). Baring’s project manager, Chris Wolske, also testified that Baring did not receive any complaints concerning the lighting (NYSCEF # 356 – Wolske tr at 9, 93). Wolske considered the lighting at the project generally adequate (*id.* at 93).

Procedural History

McGonigal initially commenced this action in 2013, and in 2015, he filed a supplemental summons and complaint against NYY/Plaza and Baring, alleging Labor Law violations and common law negligence (NYSCEF #s 1,32). Plaza initiated the first third-party action against Baring in June 2014 (NYSCEF # 7). Baring, in turn, brought the second third-party action against DNRC in February

2015 (NYSCEF # 34). Finally, NYY/Plaza commenced the third third-party action against B&G, Ess & Vee, and Baring in September 2015, asserting claims for common law indemnity and contribution, contractual indemnity, and breach of contract (NYSCEF # 84 – Third Third-Party Compl).

In 2020, this court issued the Prior Decision on the parties' summary judgment motions (MS 003, 005, 006, 007), dismissing plaintiff's main action against NYY/Plaza and Baring, and dismissing the third-party actions for indemnity and contribution as academic (NYSCEF #s 500, 502, 504, 506, 520).

On appeal, the First Department found that questions of fact existed in the main action, and thus it reinstated plaintiff's claims for common law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6) against NYY/Plaza as well as plaintiff's claims under Labor Law §§ 240 (1) and 241 (6) against Baring (NYSCEF # 543). The First Department rendered its decision only on the main action, without reaching the merits of the third-party actions (NYSCEF #s 543, 584).

In the instant motions (MS 009-013), NYY/Plaza, Baring, DNRC, B&G, Ess & Vee all move to reargue, renew, or modify the branch of the Prior Decision to the extent it dismissed the third-party actions as academic, and upon renewal or reargument, seek summary judgment in their favor on their third-party claims. Subsequently, Baring withdrew the second third-party action against DNRC, including all claims, cross-claims and counterclaims asserted therein (NYSCEF #s 715, 718). This withdrawal moots DNRC's summary judgment motion dismissing the second third-party complaint (MS 009) and moots that branch of Baring's summary judgment motion against DNRC (MS 013).

Now before the court are the remaining portions of MS 009-013 concerning the third third-party action, which are: (i) NYY/Plaza's summary judgment motion on contractual indemnity against Baring, B&G, and Ess & Vee (MS 010); (ii) Baring's motion for leave to amend its pleading to assert cross-claims against B&G and Ess & Vee for common law indemnity and contribution, as well as Baring's motion for conditional summary judgment on the same (MS 013); and (iii) Ess & Vee and B&G's respective summary judgment motion dismissing all claims against them, including NYY/Plaza's claims for breach of contract, contractual indemnity, and common law indemnity and contribution, and Baring's cross-claims for common law indemnity and contribution (MS 011, 012). This Decision and Order addresses these portions of MS 009-013 below.

DISCUSSION

Initially, in MS 009-013, NYY/Plaza, Baring, DNRC, B&G, and Ess & Vee all move pursuant to CPLR 5015 (a) (5) for an order vacating or modifying the portions of the Prior Decision that dismissed the third-party claims as academic. In light of the First Department's decision to reinstate the main action (NYSCEF # 543), this court now vacates the portions of the Prior Decision dismissing the third-party actions as moot.

Next, NYY/Plaza, Baring, DNRC, B&G, and Ess & Vee all move to renew or reargue the branch of their prior motions or cross-motions for summary judgments on the third-party actions (MS 003, 005, 006, 007). A motion for renewal can be granted where “there has been a change in the law that would change the prior determination” (CPLR 2221 [e] [2]). For this purpose, an appellate court’s decision that modifies or reverses a trial court’s decision constitutes “a change in the law” (*see Rodriguez v Riva Const. Group, Inc.*, 147 AD3d 656, 656 [1st Dept 2017] [granting renewal based on an appellate court’s decision modifying the prior decision made by a trial court]). Here, the First Department’s decision to reinstate the main action is a change in law that warrants renewal of defendants’ summary judgment motions on the third-party actions (*id.*; *see also Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 293 [1st Dept 2008] [“because we are reinstating certain of plaintiff’s claims, we necessarily reinstate the cross claims and the third-party complaint [that] [t]he IAS court denied as moot”).⁴ The court grants the branches of defendants’ motions for renewal.

Upon renewal, the court considers the parties’ motions for summary judgment on claims for common law contribution and indemnity, contractual indemnity, and breach of contract. On a motion for summary judgment, evidence presented must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017]). “It is well settled that ‘the 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’ ” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

If the moving party makes this initial showing, the burden shifts to the opposing party to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Common Law Contribution and Indemnity (MS 011, 012, 013)

In the third third-party action, NYY/Plaza have asserted claims for common law indemnity and contribution against Baring, B&G, and Ess & Vee (NYSCEF # 84). In MS 013, Baring seeks leave to amend its answer to the third third-party complaint to assert common law indemnity and contribution cross-claims against

⁴ In alternative to their motions to renew, DNRC, B&G, and Ess & Vee move to reargue their prior motions for summary judgment (MS 009, 011, 012). Since the court grants DNRC, B&G, and Ess & Vee’s motion for renewal, the court needs not reach their alternative motion for reargument.

B&G and Ess & Vee (NYSCEF # 636 – MS 013 MOL at 24-25), and if leave is granted, Baring then seeks conditional summary judgment on these claims (*id.* at 26-27). At the same time, B&G and Ess & Vee move in MS 011 and 012 for summary judgment dismissing all claims against them (NYSCEF # 602 – MS 011 MOL; NYSCEF # 614 – MS 012 MOL).

Common law indemnification obligates “those actively at fault in bringing about the injury” to indemnify a party that is “held to be vicariously liable without proof of any negligence or actual supervision on its own part” (*McCarthy v Turner Const., Inc.*, 17 NY3d 369, 375, 377-78 [2011]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004] [a common law indemnity claim requires “proof of [indemnitee’s] freedom from negligence” and proof of some negligence on the part of the indemnitor]). Meanwhile, common law “[c]ontribution enables a joint tortfeasor that has paid more than its equitable share of damages to recover the excess from the other tortfeasors” (*Sommer v Fed. Signal Corp.*, 79 NY2d 540, 555-56 [1992]; CPLR 1402).

Under these standards, the court addresses Baring, B&G, and Ess & Vee’s motions below.

A. NYY/Plaza’s Common Law Indemnity and Contribution Claims Against B&G and Ess & Vee (MS 011, 012)

In seeking to dismiss NYY/Plaza’s common law indemnity and contribution claims against them, B&G and Ess & Vee argue that there is no evidence any negligence on their part and that NYY/Plaza are not entitled to common law indemnity because NYY/Plaza themselves are not free from negligence (NYSCEF # 602 at 9-10; NYSCEF # 709, ¶ 19; NYSCEF # 614 at 6-7; NYSCEF # 706, ¶ 56). NYY/Plaza counter that B&G and Ess & Vee fail to prove as a matter of law that B&G and Ess & Vee were not at fault (NYSCEF # 620 at 5-6; NYSCEF # 658 at 7).

The court agrees that B&G has not proved its lack of negligence as a matter of law. B&G provided the temporary lighting at site on the day of the accident, and the First Department has found that an issue of fact exists concerning the sufficiency of illumination at the site (NYSCEF # 543 at 4). In addition, according to the Scene Photos and the testimony from Plaza and B&G, the pit was initially covered with plywood, but on the day of the accident it was not covered, with B&G’s equipment storing inside (NYSCEF # 365; Usher tr at 95-96, 124, 152-153; Chin tr at 7-9, 47:9-48:5, 77:17-19). The record thus raises a question of fact as to whether B&G uncovered the pit to put its equipment in there and then left the pit uncovered despite being required as a subcontractor to restore any safety protections they removed (Usher tr at 55:3-5). Therefore, issues of fact as to B&G’s negligence exist, precluding summary judgment dismissing NYY/Plaza’s common law indemnity and contribution claims against B&G.

As to Ess & Vee, the Daily Report shows that on the day of the accident, its employees performed work related to fiberglass reinforced panels on the floor of the subject pit and used pieces of sheetrock for such work (NYSCEF # 368 at 31; Usher

tr at 70-71; Cioppa tr at 30:19-31:3, 44:20-45:12).) McGonigal testified that shortly before the accident, when he was transporting the condenser unit, he saw construction debris—“like wood, probably sheetrock”—in the passageway (McGonigal tr at 84-85, 87-88). Moments later, McGonigal tripped over debris that he later described as “a piece of wood” and fell into the pit (*id.* at 97-99, 101-102). Based on the record before the court, a reasonable jury could find that the debris, while resembling a piece of wood, was a piece of sheetrock that Ess & Vee used for its work. (McGonigal tr at 85:21-22 [loosely referring to the debris in the area close to the pit as “like wood, probably sheetrock”]). Thus, Ess & Vee’s attempt to draw a sharp distinction between wood and sheetrock fails, and the record presents triable issues of fact as to Ess & Vee’s negligence.

In any event, B&G and Ess & Vee also fail to prove as a matter of law that NYY/Plaza were negligent in causing the accident. Relying on the same set of deposition testimony currently before the court, the First Department found that issues of fact exist as to NYY/Plaza’s negligence (NYSCEF # 543 at 4 [issues of fact exist as to whether NYY/Plaza had constructive notice of the insufficient lighting at site and the uncovered pit]). These factual issues remain present here and are best left for jury to decide. B&G and Ess & Vee tender no new evidence that might resolve these issues in their favor and establish NYY/Plaza’s negligence as a matter of law.

Accordingly, B&G and Ess & Vee’s summary judgment motions dismissing NYY/Plaza’s common law indemnification and contribution claim against them are denied.

B. Baring’s Proposed Common Law Indemnity and Contribution Claims Against B&G and Ess & Vee (MS 013)

At the outset, in MS 013, Baring moves to amend its answer to the third third-party complaint to assert common law indemnity and contribution cross-claims against B&G and Ess & Vee (NYSCEF # 636 at 24-25). Ess & Vee and B&G oppose, asserting that the proposed cross-claims have no merits (NYSCEF # 674 at 3; NYSCEF # 681, ¶¶ 2, 5).

A party may amend its pleading “at any time by leave of court” (CPLR 3025 [b]). Generally, “leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court” (*Davis v S. Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks omitted]).

Here, Baring’s proposed cross-claims against B&G and Ess & Vee for common law indemnity and contribution do not patently lack merit. As discussed above, questions of fact exist as to whether Ess & Vee was negligent in leaving sheetrock debris on the first basement floor and whether B&G was negligent in providing insufficient lighting at the site and possibly uncovering the pit. Baring’s amendment of its pleading to include these cross-claims would not prejudice B&G

and Ess & Vee, who already face the same claims asserted by NYY/Plaza based on the same set of factual allegations (*see Mansion Realty LLC v 656 6th Ave Gym LLC*, 79 Misc 3d 372, 381 [Sup Ct, New York County 2023] [finding that permitting plaintiff to amend the complaint to add a claim would not prejudice defendant Because the factual allegations supporting the proposed claim “substantially overlap with the allegations supporting” the existing claim]). Accordingly, the branch of Baring’s motion for leave to amend is granted (*see Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014] [“absent prejudice, courts are free to permit amendment” at any time]).

Upon amendment, Baring moves for conditional summary judgment on the common law indemnity and contribution cross-claims against B&G and Ess & Vee (NYSCEF # 636 at 26-27). In opposition, B&G and Ess & Vee aver that they were not negligent in causing the accident (NYSCEF # 674 at 4; NYSCEF # 681, ¶ 7).⁵

“Where a defendant’s alleged liability is purely statutory and vicarious, conditional summary judgment in that defendant’s favor on the basis of common-law indemnification is premature absent proof, as a matter of law, that [the proposed indemnitor] was negligent or had authority to direct, supervise, and control the work giving rise to the plaintiff’s injury” (*Nasuro v PI Assoc., LLC*, 49 AD3d 829, 832 [2d Dept 2008] [internal citation and quotation omitted]; *Shaughnessy v Huntington Hosp. Ass’n*, 147 AD3d 994, 999 [2d Dept 2017]).

Here, there is no evidence suggesting that B&G and Ess & Vee had authority to supervise or control DNRC’s work of transporting the condenser unit on the first basement floor. While the First Department has found Baring not negligent in causing the accident, for Baring to prevail on this conditional summary judgment motion, Baring must, but fails on this motion for indemnity and contribution, to establish that B&G and Ess & Vee were negligent as a matter of law (*id.*; *see McCarthy*, 17 NY3d at 375 [common law “imposes indemnification obligations upon those actively at fault in bringing about the injury”]). Indeed, in two paragraphs, with no citations of evidence, Baring argues that B&G was negligent because “plaintiff attributes poor illumination as a causative factor in his accident” and that Ess & Vee was negligent because Ess & Vee worked in the area of the accident using pieces of sheetrock (NYSCEF # 636 at 26-27). This general recount of the record is not sufficient to establish B&G and Ess & Vee’s negligence as a matter of law, although it may raise questions of fact as to B&G and Ess & Vee’s negligence. Specifically, the record does not conclusively establish that (1) the debris McGonigal tripped over was sheetrock that belonged to Ess & Vee; or (2) the lighting around the pit was inadequate and the allegedly inadequate illumination caused McGonigal to fall into the pit while walking backwards.

⁵ While B&G and Ess & Vee oppose to Baring’s motion for summary judgment on its cross-claims, they have not submit competing summary judgment motion dismissing Baring’s cross-claims. While B&G and Ess & Vee move for summary judgment dismissing all claims against them, B&G and Ess & Vee’s motions (MS 011, 012) predate Baring’s motion (MS 013) and contain no specific application or argument for dismissing Baring’s proposed cross-claims.

Accordingly, Baring's motion for conditional summary judgment on its common law indemnity and contribution claims against Ess & Vee and B&G (MS 013) is denied.

Contractual Indemnity (MS 010, 011, 012, 013)

In NYY/Plaza's third third-party complaint, NYY/Plaza asserted claims for contractual indemnity against Baring, B&G, and Ess & Vee (NYSCEF # 84). Now, in MS 010, NYY/Plaza move for conditional summary judgment on this claim (NYSCEF # 588, ¶¶ 24-31).⁶ In response, in MS 011-013, Baring, B&G, and Ess & Vee each moves for summary judgment dismissing this claim (NYSCEF # 602 at 6-8; NYSCEF # 614 at 4-6; NYSCEF # 636 at 12-20).

NYY/Plaza's contractual indemnity claim is based on the Indemnity Clause in Plaza's Subcontracts with Baring, B&G, and Ess & Vee, which holds NYY/Plaza harmless for any claims that "arise out of" or "are claimed to arise out of":

1. The performance of Work by the Subcontractor, or any of its Sub-Subcontractors, any act or omission of any of the foregoing; [or]
2. Any accident or occurrence which happens, or is alleged to have happened, in or about the place where such Work is being performed or in the vicinity thereof (a) while the Subcontractor is performing the Work, either directly or indirectly through a Subcontractor or material agreement, or (b) while any of the Subcontractor's property, equipment or personnel are in or about such place or the vicinity thereof by reason of or as a result of the performance of the Work.

(NYSCEF #s 361, 363, 364, Art 9, § A).

The Subcontracts defined the term "Work" to mean "furnish and install kitchen equipment" for Baring, "furnish & install electrical work" for B&G, and "furnish and install drywall, acoustics and carpentry work" for Ess & Vee (*id.*, Art 1, § 1.1). Below, the court considers NYY/Plaza's claim against Baring, B&G, and Ess & Vee, respectively, under the terms of the Indemnity Clause.

A. NYY/Plaza's Contractual Indemnity Claim Against Baring (MS 010, 013)

NYY/Plaza assert that Baring is liable under the Indemnity Clause because the accident here "arose out of Baring's work which it subcontracted to [DNRC]" (NYSCEF # 588, ¶ 27). Baring counterargues that it has no contracts with NYY Steak, thus, NYY Steak may not assert any contractual claims against Baring (NYSCEF # 656, ¶¶ 3-8; NYSCEF # 636 at 12-14). As to Plaza's contractual

⁶ NYY/Plaza also move for summary judgment dismissing any cross-claims and counterclaims against them for contractual indemnification and breach of contract (NYSCEF # 588, ¶ 2 [ii] [c]). The court grants this branch of NYY/Plaza's summary judgment motion, which is unopposed (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [granting an unopposed motion for summary judgment dismissing certain claims]).

indemnity claim, Baring posits, among other things, that (i) the Indemnity Clause was not triggered as the incident occurred outside the Indemnity Clause's scope (NYSCEF # 656, ¶¶ 9-15; NYSCEF # 636 at 14-17), (ii) General Obligations Law (GOL) § 5-322.1 does not allow Plaza to be indemnified because Plaza is wholly at fault for the accident (NYSCEF # 656, ¶¶ 16-28), and (iii) the Indemnity Clause is unenforceable as vague and ambiguous (NYSCEF # 656, ¶¶ 29-36; NYSCEF # 636 at 18-20).⁷

In reply, NYY Steak and Plaza emphasize that the Subcontracts indemnify both “the Owner [i.e., NYY Steak]” and “the Construction Manager [i.e., Plaza]” for claims arising out of Baring's or DNRC's performance of work (NYSCEF # 361, Art 9, § A; NYSCEF # 699, ¶ 14). They add that the Indemnity Clause is not void under GOL § 5-322.1 because it only applies “to the extent permitted by law” and “shall not be construed to indemnify any Indemnitee for its own negligence” (NYSCEF # 361, Art 9, §§ A, C, E). NYY/Plaza further contend that issues of fact regarding NYY/Plaza's negligence do not preclude them from moving for a *conditional* summary judgment (NYSCEF # 699, ¶ 21).

“The right to contractual indemnification depends upon the specific language of the contract” (*Trawally v City of New York*, 137 AD3d 492, 492-493 [1st Dept 2016] [internal citation omitted]). A party is entitled to 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” (*Masciotta v Morse Diesel Intl., Inc.*, 303 AD2d 309, 310 [1st Dept 2003]; *Needham & Co., LLC v UPHealth Holdings, Inc.*, 212 AD3d 561, 561 [1st Dept 2023] [“the intention to indemnify must be unmistakably clear from the language of the promise”]). A third-party beneficiary may sue on a contract if “an intent to benefit the third party [is] shown” (*Dormitory Auth. V Samson Constr. Co.*, 30 NY3d 704, 710 [2018] [internal quotation omitted]) and the “benefit was direct rather than incidental” (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 368 [1st Dept 2006]).

Applying these principles, the court grants conditional summary judgment in favor of NYY/Plaza on their contractual indemnity claim against Baring. First, Baring's argument that NYY Steak lacks standing to enforce the Subcontract fails. While NYY Steak is not in contractual privity with Baring, it may enforce the Subcontract as an intended third-party beneficiary. Contrary to Baring's assertion that the Subcontract contained no “express term that gives NYY [Steak] a right to enforce” it (NYSCEF # 636 at 13), the Indemnity Clause expressly provided that NYY Steak, which was defined as “Owner” under the Subcontract, shall be indemnified by Baring (NYSCEF # 361, Art 9, § A). The court need not look further than that (*see Commr. Of Dept. of Social Services of City of New York v New York-Presbyt. Hosp.*, 164 AD3d 93, 98 [1st Dept 2018] [allowing a third-party beneficiary

⁷ Baring also oppose NYY/Plaza's contractual indemnity claim on the ground that the First Department has found Baring to be non-negligent in causing the accident (NYSCEF # 636 at 16). However, this is irrelevant to NYY/Plaza's contractual indemnity claim against Baring, which is governed by the terms of Baring's Subcontract.

to enforce an indemnity clause under which the indemnitor agreed to “assume full responsibility” as it is “clear from the language of the contract that there was an intent to permit enforcement by the third party”).⁸

Next, the court rejects Baring’s argument that the Indemnity Clause was not triggered. The Indemnity Clause by its plain terms applies to any claims arising or allegedly arising out of the performance of work by Baring or its sub-subcontractor, DNRC (NYSCEF # 361, Art 9, § A). Under Plaza’s Subcontract with Baring, Baring’s work was to “furnish and install kitchen equipment” and such work “shall include . . . the delivery and installation . . . of materials and machinery” (*id.*, §§ 1.1, 1.2). Baring’s sub-subcontract with DNRC further required DNRC to deliver refrigerators to the project site “pursuant to [Baring’s] directions” and install “all of the refrigeration systems” on site (NYSCEF # 340 at 1, 3-4). The accident occurred when DNRC’s employee, McGonigal, was performing his contracted-for work – transporting a refrigerator unit to the basement kitchen for installation (McGonigal tr at 40-41, 73, 97-99). As such, plaintiff’s claims regarding the accident indeed arise out of DNRC’s performance of work, thus triggering the Indemnity Clause upon which NYY/Plaza sue (*see Masciotta*, 303 AD2d at 311 [contractual indemnification provision was triggered by plaintiff’s injuries that occurred during the performance of work]).

Baring’s reliance on GOL § 5-322.1 is also unavailing. While GOL § 5-322.1 voids any contractual clauses that indemnify owner or general contractor for their own negligence (*Nielson v Vornado Forest Plaza, LLC*, 155 AD3d 424, 425 [1st Dept 2017]), owner and general contractor may still be indemnified under an indemnity agreement that only applies to the extent permitted by law, as is the case here (*Herrero v 2146 Nostrand Ave. Assoc., LLC*, 193 AD3d 421, 424 [1st Dept 2021] [enforcing an indemnification clause that contained the “to the fullest extent” savings language]; *see Farrugia v 1440 Broadway Assoc.*, 163 AD3d 452, 456 [1st Dept 2018] [same]). The court further rejects Baring’s argument that Plaza is wholly at fault for the accident and thus is “statutorily barred from being indemnified” under GOL § 5-322.1. As discussed above, the record at least presents questions of fact regarding B&G and Ess & Vee’s contributing negligence in causing the accident. Hence, GOL § 5-322.1 does not bar NYY/Plaza from recovering under the Indemnity Clause.

Additionally, issues of fact as to NYY/Plaza’s negligence do not preclude them from obtaining *conditional* summary judgment on contractual indemnity claims against Baring (*Herrero*, 193 AD3d at 424 [while “issues of fact exist as to its negligence, [general contractor] is entitled to conditional summary judgment on its contractual indemnification claim against” subcontractor]; *Sanchez v 404 Park Partners, LP*, 168 AD3d 491, 493 [1st Dept 2019] [granting conditional summary

⁸ Baring’s claim that “Plaza’s subcontract with Baring provides that there are no third party beneficiaries” misrepresents the contract provision at issue (NYSCEF # 403, Art 19 [“*except as otherwise provided herein*, no provision of this Contract shall in any way inure to the benefit of any third party”] [emphasis added]).

judgment on contractual indemnity claim while issues of fact as to indemnitee's negligence are pending, allowing full indemnification if indemnitee is found not negligent and partial indemnification if otherwise]).

Finally, the court disagrees with Baring's claim that the Indemnity Clause is vague, ambiguous, and therefore unenforceable. In fact, First Department has enforced indemnity clauses with substantially the same language as the Indemnity Clause at issue here (*see Valbuena v 650 Madison Ave. Owner, LLC*, 191 AD3d 493, 493-494 [1st Dept 2021], *lv to appeal dismissed*, 37 NY3d 1041 [2021]; *see also Masciotta*, 303 AD2d at 310). Accordingly, that branch of Baring's summary judgment motion dismissing the NYY/Plaza's claim on this ground is denied (MS 013). Conversely, that branch of NYY/Plaza's motion for conditional summary judgment on contractual indemnity against Baring (MS 010) is granted as follows: NYY/Plaza are entitled to full contractual indemnification from Baring if they are found not negligence in the main action at trial; otherwise, they are entitled to partial indemnification to the extent allowed by GOL § 5-322.1.

B. NYY/Plaza's Contractual Indemnity Claim Against B&G (MS 010, 012)

NYY/Plaza contend that B&G's conduct triggers the Indemnity Clause because plaintiff claims that B&G uncovered the pit to store equipment inside and failed to provide sufficient lighting at the site (NYSCEF # 588, ¶ 28; NYSCEF # 658, ¶¶ 13-18; NYSCEF # 668, ¶¶ 7-31). In response, B&G denies that it uncovered the pit or that the temporary lighting at the site was inadequate, and thus asserts that it is not obligated to indemnify NYY/Plaza (NYSCEF # 614 at 4-6).

The court grants NYY/Plaza conditional summary judgment on their contractual indemnity claim against B&G. Although B&G disputes whether the incident arose out of its conduct, the Indemnity Clause extends to accidents that "*are claimed to arise out of*" B&G's performance of work or the omission thereof (NYSCEF # 364, Art 9, § A [emphasis added]). Hence, under the terms of the Indemnity Clause, B&G would be contractually liable for indemnifying NYY/Plaza due to plaintiff's claims that the incident arose out of B&G's removal of the cover and its failure to provide adequate on-site lighting. In any event, B&G is conditionally liable for indemnification because the accident happened in the vicinity of B&G's equipment: when McGonigal fell into the pit, B&G's BX cables and tri-stands were stored in the elevator pit as a result of B&G's performance of work (Chin tr at 47:9-48:5, 77:17-19; *see Valbuena*, 191 AD3d at 493 [finding that an indemnification clause was triggered where "materials belonging to [defendant] or its subcontractors were at least allegedly present in the area where plaintiff fell"])).

In short, NYY/Plaza has established as a matter of law B&G's conditional liable to indemnify NYY/Plaza under the Indemnity Clause to the extent allowed by GOL § 5-322.1, pending a determination of the issues of fact as to NYY/Plaza's negligence. The branch of NYY/Plaza's conditional summary judgment motion on this claim against B&G (MS 010) is granted, and B&G's summary judgment motion dismissing the same (MS 012) is denied.

C. NYY/Plaza's Contractual Indemnity Claim Against Ess & Vee (MS 010, 011)

NYY/Plaza contend that Ess & Vee is liable under the Indemnity Clause because Ess & Vee performed work on the first basement floor on the day of the incident and the pieces of sheetrock that McGonigal observed in the first hallway, as well as the piece of wood that McGonigal tripped over in the second hallway, likely belonged to Ess & Vee (NYSCEF # 588, ¶ 29; NYSCEF # 620, ¶¶ 9, 10; NYSCEF # 605, ¶¶ 9, 10). Ess & Vee counterargues that it did not work with wood, so it did not create the wooden debris that caused McGonigal to fall (NYSCEF # 602 at 6-9; Cioppa tr at 30:19-31:3, 44:20-45:12). Ess & Vee also claims that the Indemnity Clause is void under GOL § 5-322.1 because it purports to indemnify NYY/Plaza for their own negligence (NYSCEF # 602 at 8).

For reasons discussed above in the context of Baring and B&G's challenge to conditional summary judgment, the court rejects Ess & Vee's argument that the Indemnity Clause is voided by GOL § 5-322.1 in light of the provision's savings clause. However, unlike Baring and B&G, questions of fact exist as to Ess & Vee's involvement in the incident because it is not evident from the record that the debris McGonigal stepped on was a piece of sheetrock belonging to Ess & Vee. Here, the record suggests that there were two pieces of debris in the area of the accident: one in the first hallway leaning against the wall, and the other in the second hallway, lying next to the subject pit (McGonigal tr at 87-88, 92-93, 97-98). McGonigal tripped over on the second piece of debris but could not identify it with certainty (*id.* at 98:18-19). Although Ess & Vee performed work related to fiberglass reinforced panels on the first basement floor on the day of the incident (NYSCEF # 368 at 31; Usher tr at 70-71), the record contains no direct evidence proving or disproving that any debris near the area of the accident belonged to Ess & Vee (NYSCEF # 365 [no debris was shown in the Scene Photos]). As a result, questions of fact exist as to whether Ess & Vee triggered the Indemnity Clause by its performance of work or by having its property in the vicinity of the accident, thereby precluding summary judgment in favor of either NYY/Plaza (MS 010) or Ess & Vee (MS 011).

In sum, NYY/Plaza's motion for conditional summary judgment on contractual indemnity (MS 010) is granted as against Baring and B&G and denied as against Ess & Vee. Along this line, the branches of Baring, B&G, and Ess & Vee's respective motions for summary judgment (MS 011-013) that seek to dismiss NYY/Plaza's contractual indemnity claim are denied.

Breach of Contract (MS 010, 011, 012, 013)

In the third third-party complaint, NYY/Plaza asserts claims for breach of contract against Baring, B&G, and Ess & Vee (NYSCEF # 84). Now in MS 010, NYY/Plaza move for summary judgment on this claim against Baring (NYSCEF # 588). Meanwhile, in MS 011-013, Baring, B&G, and Ess & Vee, respectively, move for summary judgment dismissing NYY/Plaza's breach of contract claim (NYSCEF # 602; NYSCEF # 614; NYSCEF # 636). NYY/Plaza's breach of contract claim as

against Baring will be addressed first followed by its claim as against B&G and Ess & Vee

A. NYY/Plaza's Breach of Contract Claim Against Baring (MS 010, 013)

In MS 010, NYY/Plaza argue that Baring breached its contractual obligations by failing to obtain personal injury insurance with correct coverage limits (NYSCEF # 588, ¶ 32). Specifically, Baring's Subcontract with Plaza required Baring to obtain commercial general liability insurance with "a combined single limit for personal injury of at least \$2,000,000 per occurrence and \$4,000,000 in the aggregate" (NYSCEF # 361, Ex E, ¶ 2), but the insurance Baring obtained for personal injury was capped at \$1,000,000 per occurrence and \$2,000,000 in the aggregate (NYSCEF # 463). For damages, NYY/Plaza seek from Baring (i) the premiums they paid for their own insurance, (ii) the amount they paid as deductible and other out-of-pocket costs, and (iii) any increase in future insurance premiums (NYSCEF # 588, ¶ 33).

Baring opposes NYY/Plaza's motion and moves for summary judgment dismissing NYY/Plaza's breach of contract claim (NYSCEF # 636 at 12-14, 20-22). Baring does not dispute that the insurance it obtained had lower limits of coverage for personal injury than what were contractually required (NYSCEF # 462, ¶ 15).⁹ However, Baring argues, *inter alia*, that NYY Steak has no right to enforce Plaza's contract with Baring (NYSCEF # 656, ¶ 38; NYSCEF # 636 at 12-14), and that Plaza has not shown any injury resulting from the alleged breach (NYSCEF # 656, ¶ 41).¹⁰ NYY/Plaza respond that the Subcontract specifically required Baring to obtain insurance for NYY Steak (NYSCEF # 699, ¶ 8; NYSCEF # 361, Ex E, ¶ 2). NYY/Plaza further allege that for the instant motion, they need not prove injury resulting from the breach (NYSCEF # 699, ¶ 30).

A prima facie case on a breach of contract claim requires "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Belle Light. LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019]). Regarding the damages element, "[n]ominal damages are always available in breach of contract action[s]" (*Schleifer v Yellen*, 158 AD3d 512, 513 [1st Dept 2018], citing *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 [1993]). "A nonparty can assert a breach of contract claim only if it is an intended, and not a mere incidental, beneficiary"; and "the parties' intent to benefit the third party must be apparent from the face of the contract" (*CWCapital Investments LLC v*

⁹ Baring asserts that in addition to personal injury insurance, it also obtained an umbrella insurance policy with limits up to \$10,000,000 (NYSCEF # 462, ¶ 15; NYSCEF # 656, ¶ 41). This is irrelevant to Baring's alleged breach concerning the personal injury insurance.

¹⁰ Baring also claims that, because NYY/Plaza have sought, in the U.S. District Court for the Southern District of New York (SDNY), a declaratory judgment that they are covered by Baring's insurance policy (Civil Action No. 1:19-cv-04566), "further litigation to resolve coverage issues" should not proceed in this court (NYSCEF # 656, ¶¶ 39, 40; NYSCEF # 636 at 20-22). But the SDNY action regarding NYY/Plaza's entitlement to coverage has no bearing on whether Baring breached its contract with Plaza by failing to obtain the insurance with the correct coverage limits.

CWCapital Cobalt VR Ltd., 182 AD3d 448, 452 [1st Dept 2020] [internal citation omitted]).

Here, as an initial matter, NYY Steak may assert a breach of contract claim against Baring as an intended third-party beneficiary to Baring's Subcontract. As explained above, Plaza and Baring's intent to benefit NYY Steak is apparent from the face of Baring's Subcontract, wherein Baring was obligated by express contractual terms to obtain insurance for NYY Steak (NYSCEF # 361, Ex E, ¶ 2 [naming NYY Steak as a "certificate holder" in the sample insurance certificate attached to the Subcontract's exhibit of insurance requirement]). As for Plaza, it is undisputed that Plaza and Baring executed the Subcontract under which Plaza performed and yet Baring failed to obtain insurance for personal injury with the correct coverage thresholds as specified in the Subcontract (*id.*; NYSCEF # 463).

Baring nevertheless argues that NYY/Plaza have not shown injury resulting from the breach, and thus are not entitled to summary judgment on breach of contract (NYSCEF # 656, ¶ 41). The court disagrees. Baring's uncontested breach under the Subcontract entitles NYY/Plaza to summary judgment on liability, as "[n]ominal damages are always available in breach of contract action[s]" (*Schleifer*, 158 AD3d at 513). That said, because NYY/Plaza have not substantiated the alleged injuries resulting from the breach by sufficient evidence, the court denies NYY/Plaza's summary judgment motion on breach of contract claim as to damages.

Accordingly, that branch of NYY/Plaza motion seeking summary judgment on breach of contract against Baring (MS 010) is granted on liability and denied on damages, and that branch of Baring's summary judgment motion dismissing NYY/Plaza's breach of contract claim (MS 013) is denied.

B. B&G and Ess & Vee's Summary Judgment Motion Dismissing NYY/Plaza's Breach of Contract Claim (MS 011, 012)

In MS 011 and MS 012, B&G and Ess & Vee move for summary judgment dismissing NYY/Plaza's breach of contract claim against them (NYSCEF #s 602, 614); NYY/Plaza oppose (NYSCEF #s 620, 658). For the following reasons, Ess & Vee's summary judgment motion dismissing the breach of contract claim (MS 011) is denied, and B&G's motion for the same (MS 012) is granted.

In MS 011, like Baring, Ess & Vee concedes that the insurance it obtained had coverage limits for personal injury of \$1,000,000 per occurrence and \$2,000,000 in the aggregate, falling short of the coverage limits required under its Subcontract: \$2,000,000 per occurrence and \$4,000,000 in the aggregate (NYSCEF # 602 at 5-6; NYSCEF # 254, Ex A – Ess & Vee's Insurance Policy). Thus, Ess & Vee has failed to establish prima facie entitlement to summary judgment dismissing NYY/Plaza's breach of contract claim, thereby warranting denial of this branch of its motion (*see Winegrad*, 64 NY2d at 853).

But, in MS 012, B&G contends that, unlike Baring, and Ess & Vee, it obtained the correct insurance coverage as required under the Subcontract

(NYSCEF # 614 at 7-9). B&G submits the declaration pages of its insurance policy to show that its insurance policy complies with the Subcontract's insurance requirements in terms of the coverage limits (NYSCEF #s 616, 617, B&G Insurance Policy [having commercial general liability coverage of \$2,000,000 per occurrence of personal injury and \$4,000,000 in the aggregate]). NYY/Plaza, without citing any cases in support, counterargue that B&G may not introduce new evidence not previously included in its original motion (i.e., the copy of its insurance policy) upon renewal (NYSCEF # 658, ¶¶ 3-4). NYY/Plaza add that even if the newly submitted copy of insurance policy can be considered, it is not sufficient to establish that B&G satisfied the Subcontract's "multitude of requirements" on insurance coverage (*id.*, ¶¶ 6-7).

Contrary to NYY/Plaza argument, courts may consider new and unrebutted evidence when deciding summary judgment motions upon renewal (*see First Mercury Ins. Co. v Nova Restoration of NY, Inc.*, 203 AD3d 598 [1st Dept 2022] [affirming summary judgment upon renewal based on "new, unrebutted evidence"]). Further, the copy of insurance policy submitted by B&G constitutes prima facie proof that B&G did not breach the Subcontract for failing to obtain insurance correctly, shifting the burden to NYY/Plaza to "rebut the prima facie showing by producing evidentiary proof . . . sufficient to require a trial of material issues of fact" (*Cabrera*, 72 AD3d at 553-554). NYY/Plaza produce no such evidence. While they claim that B&G's insurance policy might not meet all the requirements under the Subcontract, NYY/Plaza fail to specify any contract terms that B&G's insurance policy did not satisfy, let alone tender any evidence of breach. Speculation without evidentiary support is not sufficient for raising a triable issue of fact precluding summary judgment (*see Schloss v Steinberg*, 100 AD3d 476 [1st Dept 2012] ["speculative arguments are insufficient to raise triable issues of fact"]). Accordingly, that branch of B&G's motion for summary judgment dismissing NYY/Plaza's breach of contract claim (MS 012) is granted.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendant NYY Steak Manhattan, LLC, defendant Plaza Construction Corp., third-party defendant Baring Industries, Inc., third-party defendant B&G Electrical Contractors, third-party defendant Ess & Vee Acoustical Contractors, Inc., and third-party defendant Day & Nite Refrigeration Corp.'s motions for renewal (MS 009-013) are granted; and it is further

ORDERED that upon renewal, the branch of Baring Industries, Inc.'s motion (MS 013) for leave to amend its answer to the third third-party complaint to assert crossclaims for common law indemnity and contribution against B&G Electrical Contractors and Ess & Vee Acoustical Contractors, Inc. is granted, and upon amendment, the branch of Baring Industries, Inc.'s motion for conditional summary judgment (MS 013) on the same crossclaims is denied; and it is further

ORDERED that upon renewal, the branches of B&G Electrical Contractors and Ess & Vee Acoustical Contractors, Inc.'s respective motions for summary judgment (MS 011, 012) dismissing New York Steak and Plaza Construction Corp.'s claim for common law indemnity and contribution as against them are denied; and it is further

ORDERED that upon renewal, the branch of New York Steak and Plaza Construction Corp.'s motion for conditional summary judgment (MS 010) on the contractual indemnity claim is granted as against Baring Industries, Inc., and B&G Electrical Contractors, and denied as against Ess & Vee Acoustical Contractors, Inc.; and the branches of Baring Industries, Inc., B&G Electrical Contractors, Ess & Vee Acoustical Contractors, Inc.'s respective motions for summary judgment (MS 011-013) dismissing the same are denied; and the branch of New York Steak and Plaza Construction Corp.'s unopposed motion for summary judgment (MS 013) dismissing any cross-claims and counterclaims for contractual indemnity against them is granted; and it is further

ORDERED that upon renewal, the branch of New York Steak and Plaza Construction Corp.'s motion for summary judgment (MS 010) on the breach of contract claim against Baring Industries, Inc. is granted on liability and denied on damages; and the branches of Baring Industries, Inc. and Ess & Vee Acoustical Contractors, Inc.'s respective motions for summary judgment (MS 011, 013) dismissing New York Steak and Plaza Construction Corp.'s breach of contract claim are denied; and the branch of B&G Electrical Contractors' motion for summary judgment (MS 012) dismissing the same is granted; and the branch of New York Steak and Plaza Construction Corp.'s unopposed motion for summary judgment (MS 013) dismissing any cross-claims and counterclaims for breach of contract against them is granted; and it is further

ORDERED that in light of Baring Industries, Inc., and Day & Nite Refrigeration Corp.'s stipulation to withdraw the second third-party complaint (NYSCEF #s 715, 718), Day & Nite Refrigeration Corp.'s motion for summary judgment (MS 009) dismissing the second third-party complaint and the branch of Baring Industries, Inc.'s motion for summary judgment (MS 013) on claims in the second third-party complaint against Day & Nite Refrigeration Corp are both denied as moot.

01/12/2024
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE: CASE DISPOSED GRANTED DENIED NON-FINAL DISPOSITION GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE