

McLaughlin v Sterling Mets, L.P.

2024 NY Slip Op 32656(U)

July 9, 2024

Supreme Court, New York County

Docket Number: Index No. 159123/2018

Judge: Leslie A. Stroth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LESLIE A. STROTH PART **12M**

Justice

-----X

REANNE MCLAUGHLIN,
Plaintiff,

- v -

STERLING METS, L.P., QUEENS BALLPARK COMPANY,
L.L.C., IMPERIAL PARKING MANAGEMENT CORP.,
IPARK PARKING MANAGEMENT SERVICES, INC.,

Defendants.

-----X

STERLING METS, L.P., QUEENS BALLPARK COMPANY,
L.L.C.

Third-Party Plaintiff,

-against-

IMPERIAL PARKING (US), LLC, IMPERIAL PARKING (US),
INC

Third-Party Defendants.

-----X

INDEX NO. 159123/2018
MOTION DATE 10/13/2022,
11/21/2022
MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595623/2020

The following e-filed documents, listed by NYSCEF document number (Motion 002) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 153, 154, 156, 162

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 003) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 157, 158, 159, 160, 163

were read on this motion to/for SUMMARY JUDGMENT

LESLIE A. STROTH, J.:

This personal injury action arises out of plaintiff Reanne McLaughlin's trip and fall allegedly caused by a defect in the pavement adjacent to a sewer grate in Parking Lot G at the Citi Field baseball stadium located at 123-01 Roosevelt Avenue, Queens, New York 11368.

Plaintiff commenced a direct action against defendants Sterling Mets, L.P. (Mets), Queens Ballpark Company, L.L.C. (QBC), Imperial Parking Management Corp. (IMP), and Ipark Parking Management Services, Inc. (Ipark).

Mets and QBC then commenced a third-party action against Imperial Parking (U.S.), LLC and Imperial Parking (U.S.), Inc. (collectively Imperial), with whom QBC had a parking facilities management contract, seeking contractual and common-law indemnification, and contribution, in the event plaintiff recovers a judgment against Mets and QBC.

In motion sequence no. 002, third-party defendant Imperial, moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the third-party complaint asserted against Imperial. Mets and QBC oppose the motion.

In motion sequence no. 003, Mets and QBC move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and granting summary judgment on defendants'/third-party plaintiffs' claims against Imperial. Plaintiff and Imperial oppose the motion.

Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

I. PERTINENT FACTS AND BACKGROUND

A. Plaintiff's accident

On October 4, 2015, plaintiff parked her car in Parking Lot G located at 123-01 Roosevelt Avenue, Queens, New York 11368 (NY St Cts Elec Filing [NYSCEF] Doc No. 114, McLaughlin deposition tr at 18 & 21). At approximately 12:40 p.m. (*id.* at 34), plaintiff was getting ready to walk toward Citi Field Stadium to attend a Mets baseball game (*id.* at 28 & 29), when she fell after stepping into a pothole (*id.* at 37 & 38). As a result, plaintiff twisted her left ankle (*id.* at 41) and sustained injuries to her left ankle, right knee, and lower back (*id.* at 69).

Plaintiff testified that she did not see the pothole before she stepped in it; and that she only noticed the pothole after she fell (*id.* at 38). Plaintiff also testified that the pothole was not large and that someone walking in the parking lot could “totally miss it” (*id.* at 38 & 39). Plaintiff described the pothole as a “crumbling area” of about four inches wide, five inches long, and two inches deep (*id.* at 37) abutting a sewer drain (*id.* at 38).

According to plaintiff, a parking lot attendant with a Mets logo on his cap brought her a bag of ice while she was on the ground (*id.* at 52 & 53). After the accident, plaintiff went to New York Presbyterian Queens Hospital, in an ambulance (*id.* at 64 & 65).

B. Contracts

In October 2015, the City of New York (the City) owned the property on which Parking Lot G is located (NYSCEF Doc No. 128, exhibit A). The City leased the property to nonparty New York City Industrial Development Agency (NYC IDA) pursuant to the Primary Site Ground Lease Agreement (*id.*). QBC subleased the parcel from NY IDA pursuant to the “Amended and Restated North Parking Site Lease Agreement” dated February 1, 2009 (lease agreement) (NYSCEF Doc No. 129, defendants’ exhibit B). On June 23, 2009, QBC and Imperial executed a Parking Facilities Management Agreement (management agreement), whereby QBC hired Imperial to manage the parking facilities leased to QBC (NYSCEF Doc No. 106 at 2).

The lease agreement states, in relevant part, that QBC is responsible for keeping the property “clean and free from rubbish and obstructions,” (NYSCEF Doc No. 129 at 59, section 9.01 [b]). Pursuant to the lease agreement, QBC is also responsible for “repairing potholes and other damaged surface conditions,” (*id.* at section 9.01 [b] [v]), as well as maintaining “the parking surface in safe and good repair and condition,” among other things (*id.*).

Imperial provided parking management services pursuant to the management agreement. The management agreement states that QBC “hereby appoints Manager and delegates to Manager the sole and exclusive right to manage, supervise and operate the Parking Facilities,” (NYSCEF Doc No. 106 at 9, section 2.01). The management agreement obligates Imperial to “institute, be responsible for and supervise all operational activities of the Parking Facilities,” excluding security services (*id.* at 10, section 3.02 [i] & 20, section 3.24). Under Article III, titled “Responsibilities of Manager,” Imperial, is obligated to

“promptly inform[] QBC of any unusual incidents, events or conditions which occur[ed] at the Parking Facilities or the Parking Sites, such as injury or death to persons . . . which come to the attention of Manager in the course of its duties under this Agreement, and prepar[e] written incident reports for any incidents . . . that could subject either QBC or Manager to liability and delivering same to QBC within two (2) business Days following the occurrence of any such incident” (*id.* at 11, section 3.02 [v]).

Pursuant to Subsection 3.13, QBC reserves the right to

“at any time, without prior notice, to inspect, examine, and investigate any and all operations and activities of Manager and its officers and employees in connection with the operation and maintenance of the Parking Facilities and the performance of Manager under this Agreement. Manager shall permit QBC . . . and their respective representatives, to enter the Parking Facilities at all reasonable hours for the purposes of: (i) making repairs, replacements or improvements in or to the Parking Facilities or equipment therein; . . . (v) exercising any right reserved to QBC under this Agreement.”

Article VI, titled “Insurance and Indemnification” states in relevant part the following:

“Manager shall provide and maintain in full force and effect . . . the following policies of insurance which shall protect Manager and the Additional Insureds on a primary basis from any Claim(s) caused by, resulting from or arising out of the obligations and responsibilities of Manager pursuant to this Agreement . . . (iv) Commercial General Liability insurance on an occurrence basis with limits not less than \$1,000,000 each \$2,000,000 in the aggregate. Such insurance coverage shall include coverage for contractual liability (applying to the terms and conditions of this Agreement), products-completed operations liability, personal injury liability, advertising injury liability, property damage liability and bodily injury liability” (*id.* at 26-27, section 6.01 [iv]).

Pursuant to Article VI, “Additional Insureds” include, among others, QBC, and the management contract requires that the “Commercial General Liability” insurance “shall be endorsed to name QBC . . . as additional insureds” (*id.* at 27, section 6.02).

Subsection 6.04, titled “Manager’s Indemnification Responsibilities,” obligates Imperial

“to indemnify, defend and hold harmless QBC, and each of its parent and affiliated companies . . . including . . . Sterling Mets, L.P. from and against any and all actions, suits, proceedings, judgments, settlements, demands, claims, damages, liabilities, losses or expenses, whatsoever, including claims for bodily injury and property damage . . . caused by, resulting from, arising out of or in connection with (i) any action, inaction, negligence, misconduct, error or omission by Manager in the performance of its obligations and responsibilities pursuant to this Agreement; . . . (iv) any misrepresentation, breach or alleged breach of any term, covenant, condition, or warranty contained in this Agreement by Manager, and/or (v) any actions of Manager beyond the scope of the authority conferred upon Manager hereunder. . . . The aforementioned indemnity provision does not apply to the extent that any Claim results from the gross negligence or willful misconduct of QBC or any of the QBC Parties.” (*id.* at 28).

The management agreement also contains an indemnification provision running in Imperial’s favor, whereby QBC agrees to indemnify Imperial as follows:

“Except for any matter for which Manager is required to indemnify QBC Parties pursuant to Section 6.04 above . . . QBC shall indemnify, defend and hold harmless Manager and its employees from any and all Claims which may be incurred by or made against Manager or its employees arising out of (i) QBC’s operation of the Stadium, or (ii) the gross negligence or willful misconduct of QBC.” (*id.* at 29, section 6.05).

C. Testimony of Sue Lucchi

Sue Lucchi (Lucchi), Vice President of Ballpark Operations for QBC, testified that she never observed and was not aware of Imperial repairing potholes in the parking lot (NYSCEF Doc No. 116, exhibit N, Sue Lucchi deposition tr at 17). Lucchi represented that in 2015, Imperial performed inspections for potholes (*id.* at 23) and that part of Imperial’s job was to maintain the parking lots (*id.*). Lucchi claimed that besides performing inspections and directing people on game day, Imperial’s maintenance work consisted of picking up garbage and blowing leaves and bagging them (*id.* at 35-36). When asked whether she was aware of anything that

Imperial may have done to cause or create the condition alleged by plaintiff, she answered that she did not (*id.* at 91).

Lucchi testified that Imperial reported potholes to the building command center, which is a “24-hour hub that all issues get called into” located inside the ballpark (*id.* at 30 & 57). When an issue was reported, it was communicated to the transportation department for handling (*id.* at 42). A QBC employee determined whether the pothole needed to be repaired (*id.* at 34). The purchasing department then arranged for pothole repairs using outside contractors (*id.* at 32).

According to Lucchi, QBC typically hired an outside contractor for maintenance work in the parking lots (*id.* at 35). Lucchi testified that QBC engineers did not repair potholes (*id.* at 32). If Imperial reported the existence of a pothole or QBC noticed a pothole independently (*id.* at 32-33), QBC arranged for pothole repair (*id.* at 33).

D. Testimony of Jean Chassagne

Jean Chassagne (Chassagne), senior operations manager with Imperial, testified that in October 2015, Imperial managed the parking lots at Citi Field (NYSCEF Doc No. 117, at 9). Chassagne explained that Mets was Imperial’s “direct” client, but was not certain regarding the nature of QBC’s relationship to Imperial or to Mets (*id.* at 11-13). Chassagne testified that he and Tom Wigfall (Wigfall), director of parking operations with Mets, communicated daily regarding operational events, scheduling, budgeting, and anything else that the client needed (*id.* at 14). Regarding Imperial’s relationship with the client, Chassagne represented: “I know it was a client management relationship, but it was more than that. . . . [Wigfall] was on site as well.” (*Id.* at 65-66).

Chassagne testified that he was familiar with the Parking Facilities Management Agreement (*id.* at 62-63). Chassagne represented that pursuant to the contract, Imperial was

required to inform QBC of gate damage, fence damage, broken booth windows, and anything that needed to be repaired in the lots, including potholes (*id.* at 64-65). Chassagne acknowledged that pursuant to the Parking Facilities Management Agreement, Imperial was required to inform QBC of conditions in writing and maintained that besides verbal notification, Imperial also informed QBC in writing by text and email (*id.* at 67).

Chassagne testified that on game day, there were approximately 10 to 15 staff in Parking Lot G alone, of which five were Mets employees (*id.* at 21-22). Imperial employees consisted of cashiers, traffic directors, supervisors, and maintenance (*id.* at 16). The five Mets employees, who were supervisors, checked in players, staff, and guests with prepaid parking passes (*id.* at 22). While Chassagne did not give Mets employees directives (*id.* at 83), Mets employees “[gave] [Imperial] a hand in the lots. Anything that we needed to help, traffic coming in, helping staff.” (*Id.* at 84).

Chassagne further testified that Imperial maintenance workers performed daily inspections (*id.* at 71). They checked every single item on a maintenance checklist consisting of about 30 to 33 tasks, which included potholes (*id.* at 26-27). Although the maintenance workers were not specifically tasked with inspecting for potholes (*id.* at 85-86), they were required to report potholes they observed while performing other tasks (*id.* at 31), “except for like the pothole where it said weekly. Then we would kind of do more of a detail type of inspection”. (*id.* at 69).

When Imperial employees observed hazardous conditions, they patched minor conditions with black tar as a temporary fix and informed Mets to get approval, if additional work was needed (*id.* at 32 & 34). If there was a large pothole, Imperial filled it if they could for a temporary fix, then informed Wigfall to get a contractor to repair it (*id.* at 35). Mets had the final

approval over the repairs (*id.* at 42). Chassagne maintained that Imperial never repaired any potholes in Parking Lot G (*id.* at 38).

At the deposition, Chassagne examined a photograph showing the sewer drain and the abutting pothole (*id.* at 53). Chassagne testified that had he been advised of the condition, he would have documented it and sent it to the client for approval to get the pothole repaired because it was not the kind of condition Imperial would have repaired (*id.* at 54).

IV. DISCUSSION

A. Summary Judgment Standard

The proponent of a summary judgment motion has the initial burden of establishing a prima facie showing that it is entitled to summary judgment as a matter of law, providing sufficient evidence that no material issues of triable fact exist (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 74 [2020]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this burden has been met, the burden shifts to the opposing party to

“produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which [it] rests [its] claim or [to] demonstrate acceptable excuse for [its] failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]).

The function of the summary judgment procedure is “issue-finding,” not “issue-determination” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012] [internal quotation marks and citation omitted]). “The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist” (*Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011] [internal quotation marks and citation omitted]). When considering a motion for summary judgment, the “facts must be viewed in the

light most favorable to the non-moving party” (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal quotation marks and citation omitted]; *De Lourdes Torres*, 26 NY3d at 763).

B. Imperial’s Motion Seeking Summary Judgment Dismissing the Third-Party Complaint

i. Contractual Indemnification

Imperial argues that it was not contractually liable to QBC for indemnification. Imperial emphasizes Subsection 6.04 of the management agreement and asserts that to trigger this provision, plaintiff’s claims must have been attributable to Imperial’s acts or omissions, actions or inactions, or negligence. Imperial relies on Lucchi’s testimony that Imperial did not repair any potholes in Parking Lot G and that she was not aware of anything that Imperial may have done to cause or create the pothole.

To the extent that Imperial had any obligation to inspect for potholes, Imperial asserts that the failure to make a diligent inspection only constituted negligence where an inspection would have disclosed the condition. Imperial relies on plaintiff’s testimony that someone walking around Parking Lot G could have missed the pothole. Imperial claims it was not negligent since the pothole could not have been discovered even upon a diligent inspection.

Imperial further insists that the management agreement specifically exempts it from “the rendition of service, supervision, or furnishing of personnel in connection with the personal safety and security of . . . customers” (NYSCEF Doc No. 106, exhibit D, at 20, section 3.24). According to Imperial, it was actually QBC’s responsibility pursuant to its contract with NY IDA to repair potholes and maintain safe surface conditions in the parking lot; thus, it was QBC’s failure to do so that negligently caused plaintiff’s injuries, precluding QBC from recovering under the indemnification provision.

QBC counters that it was Imperial's failure to inform QBC of unusual conditions and damage in Parking Lot G as required by the management agreement that caused plaintiff's injuries (*id.* at 106, section 3.02 [v]). QBC relies on Chassagne's testimony that Imperial was obligated to inspect for potholes and to inform QBC in writing of any potholes it found. QBC insists that the pothole was not latent and was exactly the kind of condition Imperial was obligated to inspect, document, and report. QBC argues that Imperial's failure to perform a proper inspection, such as when the parking lot was empty, and discover the pothole does not exculpate it from responsibility to indemnify pursuant to the management agreement.

QBC maintains that it is free from negligence because it did not create the pothole or have actual or constructive notice of the pothole. QBC intimates that Lucchi's and Chassagne's testimony that QBC did not perform pothole repair in Parking Lot G demonstrates that QBC did not create the defect. QBC insists that it lacked actual or constructive knowledge of the condition due to Imperial's failure to identify the defect and notify QBC pursuant to the maintenance agreement. QBC additionally denies having constructive knowledge of the condition because plaintiff was unaware of how long the pothole existed prior to her accident. QBC cites plaintiff's testimony that the pothole was not large enough to be noticed by someone walking around the parking lot and the fact that the pothole was never measured as proof that the pothole was trivial. For these reasons, QBC insists that it is free of negligence.

Neither party is entitled to summary judgment on the issue of contractual indemnification at this juncture. The courts have long recognized that "[a] party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Turner v Treeline 900 Stewart LLC*, 2019 NY Slip Op 32787[U], **29 [Sup Ct, NY County

2019] [internal quotation marks and citation omitted]; *see also Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). Additionally, "[w]here the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment" (*American Express Bank v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *appeal denied* 77 NY2d 807 [1991] [citation omitted]).

The indemnification provision here is clear and unambiguous (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 88 [1st Dept 2018]). To trigger the indemnification provision, it is sufficient that a claim arise from any action, inaction, negligence, misconduct, error, or omission by Imperial in the performance of its obligations and responsibilities pursuant to the management agreement (NYSCEF Doc No. 106 at 28, section 6.04). The management agreement does not condition a finding of negligence on the part of Imperial to trigger the obligation to indemnify (*id.*). The contractual language here makes it clear that QBC intended to be indemnified by Imperial.

However, there are several triable issues of fact precluding the award of summary judgment to either party. Under the lease agreement with NYC IDA, QBC is specifically responsible for "repairing potholes and other damaged surface conditions," as well as maintaining "the parking surface in safe and good repair and condition" (NYSCEF Doc No. 130 at 59, section 9.01 [b] [v]). Under the management agreement with Imperial, QBC reserves a right to enter the parking lot "at all reasonable hours for the purposes of: (i) making repairs, replacements or improvements" to the parking lot (NYSCEF Doc No. 106 at 18, section 3.13). Lucchi testified that QBC arranged for outside contractors to repair potholes in two scenarios: 1) when Imperial reported the existence of a pothole or 2) when QBC noticed a pothole requiring repair. Lucchi also testified that QBC employees were instructed to report safety issues or issues

they observed in the parking lots. Chassagne testified that on game days, there were five Mets employees present in Parking Lot G assisting staff, employees, and guests. There is an issue of fact here regarding whether QBC or Mets personnel were present in Parking Lot G and whether they were obligated pursuant to the lease agreement to discover the pothole but failed to do so. Alternatively, there is an issue regarding whether QBC detrimentally relied on Imperial's custom and practice of conducting pothole inspections and performing minor repairs to potholes.

Further, plaintiff testified that the pothole would not have been noticeable to someone walking around Parking Lot G. However, after examining a photograph of the pothole at his deposition, Chassagne testified that had he been made aware of the pothole, he would have sent it to QBC for approval to repair using an outside contractor, which was Imperial's custom concerning larger potholes. The courts have held that “[c]onstructive notice will not be imputed where the defect is latent, i.e., where . . . the defect is of such a nature that it would not be discoverable even upon a reasonable inspection . . .” (*Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798, 800 [2d Dept 2003] [internal quotation marks and citations omitted] [“The failure to make a diligent inspection constitutes negligence only if such an inspection would have disclosed the defect”]). The conflicting testimony raises an issue of fact as to whether Imperial violated its obligations under the management agreement by failing to discover the pothole during the course of their regular inspections—a finding that turns on whether the pothole was discoverable.

Finally, Imperial's reliance on Section 3.24 of the management agreement in support of its motion is not supported by the facts in this case. Section 3.24 concerns intentional acts by third parties and exempts Imperial from “the rendition of service, supervision, or furnishing of personnel in connection with the personal safety and security of . . . customers” since Imperial

“does not have the knowledge or expertise as a guard or security service” (NYSCEF Doc No. 106 at 20, section 3.24). This section does not exempt Imperial from acting in support of its obligations under the management agreement. As such, Imperial’s motion on this ground is denied.

ii. Common-Law Indemnification

According to Imperial, QBC is not entitled to common-law indemnification because QBC did not delegate exclusive responsibility for the maintenance and repair of potholes to Imperial, and Imperial owed no duty to plaintiff. Imperial maintains that QBC was solely responsible for the repair of potholes and other damaged surfaces. Additionally, Imperial asserts that because the first-party complaint does not allege that Imperial is liable, the third-party complaint fails to state a cause of action for common-law indemnification.

QBC opposes and insists that QBC exclusively delegated the duties to inspect and inform to Imperial. Imperial’s alleged failure to properly inspect the parking lot and inform QBC of the pothole’s existence denied QBC the reasonable opportunity to repair it, causing plaintiff’s injuries. According to QBC, as an operator of a parking lot, Imperial owed plaintiff a duty to maintain the parking lot in a reasonably safe condition in order to prevent foreseeable accidents. QBC asserts that the contractual language obligating Imperial to “operate, manage, and maintain the Parking facilities . . . for and on behalf of QBC, diligently and in good faith, and in accordance with sound, reputable and prudent management practices” (NYSCEF Doc No. 106, exhibit D at 10, section 3.01), coupled with Chassagne’s testimony that Imperial inspected for potholes, cordoned them off, and tried to repair them demonstrates that Imperial was in control of Parking Lot G and was responsible for maintaining it in a safe condition. Thus, according to QBC, Imperial owed a duty to plaintiff and breached that duty when it failed to properly inspect

for potholes.

QBC insists that QBC/Mets are not independently liable to plaintiff. QBC also indicates that Mets did not owe plaintiff a duty because at the time of the accident, it did not own, lease, operate, maintain, or repair Parking Lot G (NYSCEF Doc No. 126, affidavit of J. Ricco at 2, ¶ 7 [“Sterling Mets, L.P. does not own, lease, operate, manage, maintain, or repair Parking Lot G nor did it do so on October 4, 2015.”]).

QBC further argues that it is of no consequence that plaintiff did not allege negligence against Imperial in the complaint because plaintiff asserted these claims against a third party—the wrongly named Imperial Parking Management Corp. and IPark Management Services, Inc.

Imperial’s motion for summary judgment on this ground is granted since the first-party complaint fails to assert that QBC was vicariously liable for Imperial’s alleged negligence. Common-law indemnification “permit[s] one who is held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer” (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]; see also *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011]). The courts have long held that “[t]o be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work” (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012], citing *McCarthy*, 17 NY3d at 375-378 and *Reilly v DiGiacomo & Son*, 261 AD2d 318 [1st Dept 1999]).

At the outset, Imperial’s assertion that it owed no duty to plaintiff is unavailing. To be held liable for common-law indemnification, it is not required that the third-party owes a duty to

plaintiff since “[t]he key element of a common-law cause of action for 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.” (*Raquet v Braun*, 90 NY2d 177, 183 [1997] [internal quotation marks and citation omitted]).

In support of its argument, that it is not liable to QBC under the doctrine of common-law indemnification because the first-party complaint alleges only that QBC/Mets are liable based on their own wrongdoing Imperial cites *Great Am. Ins. Cos. v Bearcat Fin. Servs., Inc.* (90 AD3d 533 [1st Dept 2011], *lv dismissed* 18 NY3d 951 [2012]) and *Mathis v Central Park Conservancy, Inc.* (251 AD2d 171 [1st Dept 1998]). In these cases, the court dismissed claims for common-law indemnification because the first-party complaints alleged that the first-party defendants were liable solely based on their own wrongdoing (*id.* at 172 [“[a] party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common-law indemnification”]).

The complaint in the instant case erroneously names two other defendants, Imperial Parking Management Corp. and Ipark Parking Management Services., Inc., and alleges that besides QBC/Mets, the erroneously named defendants had a duty to maintain the parking lot in a reasonably safe condition (NYSCEF Doc No. 1 at 7-8, ¶¶ 23-26). While plaintiff attempted to hold other parties liable, she failed to make out a claim that QBC/Mets was vicariously liable for Imperial’s alleged acts or omissions. Based on the foregoing, Imperial is not liable to QBC upon the common-law theory of implied indemnity. Accordingly, Imperial’s motion for summary judgment on this ground is granted, and the cause of action seeking common law indemnification is dismissed.

iii. Breach of contract and failure to procure insurance

The court turns next to the portion of Imperial's motion seeking an order dismissing QBC's third-party claim for breach of contract alleging that Imperial failed to procure insurance pursuant to the management agreement. Imperial insists that it procured the contractually required insurance. Imperial argues that the insurer's refusal to defend and indemnify QBC/Mets does not constitute a breach on Imperial's part.

QBC counters that Imperial ignores the facts because its contractual duty to defend and indemnify QBC/Mets was independent of any obligation to procure insurance coverage. QBC emphasizes the section of the management agreement that states: "The obligations of [Imperial] to indemnify, defend and hold harmless as outlined in this paragraph are to be performed at [Imperial's] cost and expense . . . and are in no way limited to the amount(s) of insurance required under Sections 6.01 and 6.02" (NYSCEF Doc No. 106, exhibit D, at 28, section 6.04). QBC argues that Imperial breached the management agreement by failing to defend and indemnify QBC/Mets regardless of the insurer's obligation and failure to do so.

Here, Imperial has successfully established that it procured the insurance it was required to obtain in the specified amounts pursuant to the management agreement. Imperial attached copies of the certificate of insurance and the complete policy to its moving papers (NYSCEF Doc Nos. 107 & 109). Imperial's insurer denied QBC's claim (NYSCEF Doc No. 139) not based on Imperial's failure to procure insurance but on QBC's/Mets' own alleged negligence (*see Arner v RREEF Am., L.L.C.*, 121 AD3d 450, 451 [1st Dept 2014]).

In its opposition, QBC concedes that it was not Imperial's failure to procure insurance that was the subject of its claim, but rather Imperial's breach of the management agreement, which obligates Imperial to indemnify and defend QBC regardless of whether the insurer does. This claim is duplicative of QBC's first cause of action for contractual indemnification and, to

the extent that QBC's first cause of action has not been dismissed, its claim for Imperial's alleged failure to indemnify, defend, and hold QBC harmless pursuant to the management agreement shall continue. However, QBC's claim against Imperial based on its alleged failure to procure insurance is dismissed.

iv. Contribution

Imperial asserts that QBC is not entitled to contribution because Imperial did not owe QBC a duty of care independent of the management agreement. Imperial further argues that it did not owe a duty of care to plaintiff. Imperial alleges that 1) it did not launch an instrument of harm, nor create or exacerbate the defect; 2) there is no evidence that plaintiff had any knowledge of the parking lot management agreement and could not have detrimentally relied on it; and 3) the management agreement was not a comprehensive or exclusive agreement obligating Imperial to maintain the entire premises

QBC opposes and points to Chassagne's testimony that it was part of Imperial's custom and practice to perform inspections of Parking Lot G daily and on game days. Therefore, based on its custom and practice of inspecting for potholes using a checklist, attempting to fix certain potholes, and advising QBC when a repair required an outside contractor, and QBC's reliance on the inspections and notifications, Imperial created a duty independent of the management agreement. QBC insists that Imperial breached that duty when it failed to discover the pothole and either fix it or apprise QBC of its existence. QBC insists that Imperial owed a duty to plaintiff because it exacerbated the condition by failing to discover and either repair the pothole or notify QBC that it required repair.

The court finds that QBC is not entitled to contribution under the circumstances of this case. CPLR 1401 provides in relevant part that "two or more persons who are subject to liability

for damages for the same personal injury . . . may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.” CPLR 1401 does not permit “contribution between parties whose liability is grounded on economic loss from a breach of contract.” (*Liberman v Cayre Synergy 73rd LLC*, 2011 NY Slip Op 33975[U], **5 [Sup Ct, NY County 2011]). As such, “[t]o prevail on a third-party cause of action for contribution, a third-party plaintiff is required to show that the third-party defendant owed it a duty of reasonable care independent of its contractual obligations,... or that a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries” (*Goldshmidt v Gotlibovsky*, 2023 NY Slip Op 32633[U], ** 10-11 [Sup Ct, NY County 2023] [internal quotation marks and citations omitted]).

Under normal circumstances, a breach of a contractual obligation is not enough to impose tort liability on a contractor to non-contracting third parties. (*Guadalupi v Morelli*, 127 AD3d 1016, 1017 [2d Dept 2015]). However, in *Espinal v Melville Snow Contrs.* (98 NY2d 136 [2002]), the Court of Appeals set out three instances, where a duty of care to a noncontracting third party may be imputed onto the contracting party (*id.* at 140). A contracting party

“may be said to have assumed a duty of care . . . to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches an instrument of harm (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely” (*id.* [internal quotation marks and citations omitted]).

The court finds that Imperial did not breach a duty of care independent of its contractual obligations. QBC bases its entire theory of contractual indemnification discussed herein on the assertion that plaintiff's accident resulted from Imperial's inaction, error, or omission of its obligations and responsibilities under the management agreement (NYSCEF Doc No. 153, Persuad affirmation at 7, ¶ 20). QBC asserts that under the management agreement, “Imperial's

failure to inform Queens Ballpark of such conditions as required constitutes a breach of the Imperial Parking Contract” (*id.* at 7, ¶ 22). When arguing for contractual indemnification, QBC characterizes Chassagne’s testimony as conceding that “pursuant to the Imperial Parking Contract, Imperial was required to inspect Parking Lot G for potholes and inform Queens Ballpark in writing of any potholes found” (*id.* at 8, 23). QBC’s own position regarding Imperial’s duties throughout its submissions evinces its belief that Imperial breached its obligations pursuant to the management agreement. QBC points to no obligations or duties that Imperial allegedly failed to perform that it was not obligated to perform under the management agreement. Thus, QBC has failed to establish that Imperial owed it a duty of reasonable care independent of its contractual obligations.

The court also finds the *Espinal* exceptions inapplicable here. First, no evidence has been presented to demonstrate that Imperial created the pothole. QBC’s argument that Imperial’s failure to properly inspect and notify QBC of the pothole exacerbated the condition through inaction causing it to worsen is unavailing because “a claim that a contractor exacerbated an existing condition requires some showing that the contractor left the premises in a more dangerous condition than he or she found them” (*Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d 810, 811 [2d Dept 2013]; *see Espinal*, 98 NY2d at 143 [2002] [“Exacerbating or creating a dangerous condition may be a more pedestrian--or less elegant--description than launching a force or instrument of harm, but in practical terms the criteria are the same.”]). Here, where it is unknown how long the condition persisted, and QBC argues that the condition is trivial, QBC has not established that Imperial’s alleged failure to properly inspect and report the pothole left the parking lot in a more dangerous condition.

Second, plaintiff did not allege or testify that she detrimentally relied on Imperial's contract with QBC or on Imperial's continued performance of its duties. Since plaintiff did not allege facts in her complaint or testimony that would establish her reliance on the contract, QBC failed to demonstrate that this *Espinal* element applies.

Lastly, QBC has not established that Imperial neglected its duty to maintain the parking lot "clean and free from rubbish and obstructions," (NYSCEF Doc No. 129, at 59, section 9.01 [b]) or to repair "potholes and other damaged surface conditions" (*id.* at section 9.01 [b] [v]) pursuant to the lease agreement with NY IDA. Under the management agreement with Imperial, QBC reserved a right to enter the parking lot "at all reasonable hours for the purposes of . . . making repairs, replacements or improvements" to the parking lot (NYSCEF Doc 106 at 18, section 3.13). Both Lucchi and Chassagne testified that QBC had the final approval over pothole repairs, and Lucchi testified that QBC was responsible for arranging pothole repair by outside contractors. Thus, QBC has not successfully established that it delegated exclusive responsibility for the duties giving rise to plaintiff's injuries to Imperial. Since Imperial did not owe a duty of reasonable care independent of its contractual obligations to QBC or a duty of reasonable care to the plaintiff, the fourth cause of action in the third-party complaint is dismissed.

C. METS' and QBC's Motion Seeking Summary Judgment Dismissing the Complaint and Summary Judgment on their Third-Party Claims against Third-Party Defendants

i. Summary Judgment Dismissing the Complaint

a. Mets' liability

QBC and Mets (collectively "defendants") move for dismissal of the instant action against Mets because Mets did not own or lease Parking Lot G and, as such, does not owe a duty to plaintiff. Additionally, defendants point to the leases and the affidavit of John Ricco, senior vice president and senior strategy officer for Mets, to show that Mets did not participate in the

operation, maintenance, or repair of Parking Lot G. In opposition, plaintiff asserts that the leases and maintenance checklists offered by defendants in support of the instant motion are inadmissible because defendants allegedly failed to authenticate the signatures appearing on the documents. Plaintiff also relies on the special use doctrine to oppose the dismissal of the instant action.

As a threshold matter, the Primary Site Lease and the lease agreement with NY IDA are each acknowledged by a notary public and accompanied by certificates of acknowledgement (NYSCEF Doc No. 128 at 39-41 & NYSCEF Doc No. 129 at 149-150). Pursuant to CPLR 4538, “[a] certificate of acknowledgement is prima facie proof of the authenticity of a signature [T]he prima facie proof of the authenticity of a signature may be rebutted by proof, credible to the trier of fact.” (*Dart Assoc. v Rosal Meat Market, Inc.*, 39 AD2d 564, 564 [2d Dept 1972]). Since plaintiff has offered no proof to rebut the admissibility of these documents, the Primary Site Lease and the lease agreement are admissible.

The management agreement is also admissible because Chassagne authenticated it through sworn deposition testimony (*Young v Crescent Coffee, Inc.*, 222 AD3d 704, 705 [1st Dept 2023]; *Choudhry v Starbucks Corp.*, 213 AD3d 521, 522 [1st Dept 2023]). The management agreement and the deposition transcript are attached to defendants’ motion (NYSCEF Doc Nos. 130, 134). Chassagne was shown the management agreement at his deposition, identified it as the contract in effect in 2015, and testified under oath regarding its relevant sections (*see id.*). Chassagne, as Imperial’s Senior Operations Manager, had sufficient knowledge of the management contract to authenticate it, notwithstanding that he did not sign the lease or express familiarity with the signatures (*Choudhry*, 213 AD3d at 522).

Similarly, the maintenance checklists are admissible over plaintiff's opposition as a business record. "To have a document admitted as a business record, the party offering the record must show (1) it was produced in the ordinary course of business; (2) it was the regular course of business to make such record; and (3) it was made at the time of the act, transaction, occurrence or event or within a reasonable time thereafter" (*Knight v New York & Presbyterian Hosp.*, 219 AD3d 75, 79 [1st Dept 2023]; see CPLR 4518 [a]).

After examining the checklists at his deposition, Chassagne testified that Imperial performed inspections daily and on each game day as part of its custom and practice—in the ordinary course of business—and that the inspections were documented in maintenance checklists prepared and maintained by Imperial, establishing that it was the regular course of business for Imperial to make such a record. Chassagne testified that staff would check off the tasks on the checklists to indicate that they completed their daily routines and that he signed off on the checklists at the end of homestands or periodically, ensuring that his staff had performed the tasks. Thus, the document was created at the time of the inspection or within a reasonable time thereafter. For these reasons, the maintenance checklists are admissible under the business record exception to hearsay.

Considering next Mets' liability relating to plaintiff, "[l]iability can be imposed upon a landowner or a lessee who creates a defective condition on the property, or had actual or constructive notice of the allegedly defective condition" (*Sanchez v 1710 Broadway, Inc.*, 79 AD3d 845, 846 [2d Dept 2010] [internal quotation marks and citation omitted]). The courts have long recognized that "[a]s a general rule, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of that property." (*Allen v Pearson Publ. Empire*, 256 AD2d 528, 529 [2d Dept 1998]). Accordingly, "[w]here none of

these factors are present, a party cannot be held liable for injuries caused by the allegedly defective condition" (*Sanchez*, 79 AD3d at 846 [internal quotation marks and citation omitted]).

Addressing plaintiff's special use argument, the Court of Appeals, in *Kaufman v Silver* (90 NY2d 204 [1997]), recognized that

"[t]he doctrine of special use was fashioned . . . to authorize the imposition of liability upon an adjacent occupier of land for injuries arising out of circumstances where permission [has been] given, by a municipal authority, to interfere with a street solely for private use and convenience in no way connected with the public use. . . . Consequently, where the abutting landowner derives a special benefit from that [public property] *unrelated* to the public use, the person obtaining the benefit is required to maintain the used property in a reasonably safe condition to avoid injury to others" (*id.* at 207 [internal quotation marks and citation omitted] [emphasis in original]; see *Toner v Trader Joe's East, Inc.* (209 AD3d 690 [2d Dept 2022])).

Thus, "the duty to repair and maintain the special structure or instrumentality is imposed upon the adjoining landowner or occupier because the appurtenance was installed at their behest or for their benefit" (*Kaufman*, 90 NY2d at 207). The duty to repair derives from "the express or implied access to, and control of, the special use" (*id.* at 208).

In *Kaufman*, the Court considered whether the special use doctrine, which had previously been applied in cases where the benefit was to property abutting a public way, could apply in a case "where the special use . . . instrumentality [was] located on adjoining private property" (*id.* at 207). The Court held that where plaintiffs failed to provide a sufficient record to establish that defendant exercised control over or was afforded access to make repairs to the ramp at issue, located on private property, "plaintiffs . . . failed to provide a sufficient record basis that would permit the application of the doctrine" (*id.* at 209). Significantly, the court did not categorically hold "that the doctrine of special use is inapplicable to beneficial physical alterations involving adjoining" privately owned properties (*id.*).

The special use doctrine does not apply to QBC, since QBC actually occupied Parking Lot G pursuant to a lease agreement with NYC IDA. As to Mets, the court finds that the record is replete with material issues of fact as to whether Mets derived a special benefit from the use of Parking Lot G and whether Mets had express or implied control and access to Parking Lot G, subjecting it to an obligation to repair. Mets supplied an affidavit from John Ricco, the senior vice president and chief of staff for Mets in support of its motion purporting to demonstrate that “Sterling Mets, L.P. does not own, lease, operate, manage, maintain, or repair Parking Lot G nor did it do so on October 4, 2015” and “[t]herefore . . . Sterling Mets, L.P. had no involvement with Parking Lot G that could in any way constitute a basis for liability in the instant lawsuit.” (NYSCEF Doc No. 126, Ricco affidavit, at 2, ¶¶ 7-8). The Ricco affidavit is self-serving and conclusory. It fails to establish the basis of Ricco’s knowledge or apprise the court of the documents Ricco reviewed to support his statements (*Muslar v Hall* (214 AD3d 77, 81 [1st Dept 2023])).

According to Chassagne’s sworn deposition testimony, he believed the client to be Mets. Chassagne testified that he regularly communicated with and reported to Wigfall, whom he believed to be employed by Mets. Chassagne also testified that in weekly meetings that included Wigfall, they discussed operations, budgeting, and events. Chassagne also testified that Wigfall was present on site and that the relationship with the client was more than a client management relationship.

Chassagne represented that on game days, Mets supervisors were present in the parking lot, checking on player lots, staff, and guests with prepaid passes. Chassagne asserted that Mets had the final approval regarding pothole repair and that he would submit any invoices for pothole repair to Mets. Chassagne recalled that Mets had EMS onsite. Moreover, plaintiff testified that

after her accident, a parking attendant with a New York Met logo on his hat brought her ice. For the foregoing reasons, defendants have not demonstrated entitlement to summary judgment as a matter of law on the issue of Mets' liability, since there are issues of fact here as to whether Mets derived a benefit from the use of Parking Lot G, and whether Mets maintained the requisite access and control over Parking Lot G, obligating it to make repairs.

b. QBC's Liability

Trivial defect doctrine

QBC argues that it is not liable to plaintiff because the pothole was trivial and not actionable. QBC asserts that neither plaintiff nor anyone on her behalf ever measured the pothole and that plaintiff herself admitted that the pothole was not large enough to be observed by someone walking around in the parking lot. Plaintiff counters that in her deposition testimony she approximated that the pothole was approximately four inches wide and two inches deep, which, coupled with the photograph of the pothole attached as an exhibit to plaintiff's opposition, is sufficient to establish that the pothole was not trivial. Plaintiff insists that there is no minimal dimension test and that granting summary judgment based only on the dimensions of the pothole is inappropriate.

In *Trincere v County of Suffolk* (90 NY2d 976 [1997]), the Court of Appeals held that “whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury” (*id.* at 977 [internal quotation marks and citation omitted]). Moreover, “there is no ‘minimal dimension test’ or per se rule that a defect must be of a certain minimum height or depth in order to be actionable and therefore that granting summary judgment to a defendant based exclusively on the dimension[s] of the . . . defect is unacceptable” (*Hutchinson v Sheridan*

Hill House Corp., 26 NY3d 66, 77 [2015] [internal quotation marks and citation omitted]).

Fundamentally, a “court must consider all the facts and circumstances presented before concluding that no issue of fact exists . . . these factors will include, but should not be limited to, the dimension[s] of the defect at issue” (*id.* [internal quotation marks and citations omitted]). The Court held that in keeping with well-established summary judgment standards,

“[a] defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact.” (*id.* at 79).

Here, defendants have failed to make out a prima facie showing that the pothole was physically insignificant. Defendants heavily rely on plaintiff’s deposition testimony that someone walking around the parking lot could easily miss the pothole. However, plaintiff’s testimony is only one factor to consider, where she also characterizes the defect as a crumbling area around a sewer drain of four inches wide and two inches deep (*Fazio v Costco Wholesale Corp.*, 85 AD3d 443, 443 [1st Dept 2011] [“Plaintiff’s testimony that the concrete in the depressed area was eroded, broken up and uneven, with exposed, protruding stone creates an issue of fact whether the defect was trivial”]).

Another factor is Chassagne’s testimony that had he been made aware of the pothole, he would have sent it to QBC for approval to repair using an outside contractor, which was Imperial’s custom concerning larger potholes. While defendants stress that plaintiff never measured the pothole, defendants do not offer any evidence to establish that the pothole was so slight that “no careful or prudent [person] would reasonably anticipate any danger from its existence,” which is a fundamental principal of the trivial defect doctrine (*Hutchinson*, 26 NY3d at 81). Thus, defendants have failed to establish their entitlement to summary judgment as a

matter of law on this issue since there are issues of fact regarding the size of the pothole and the surrounding circumstances.

Actual or constructive notice

QBC further argues that it is not liable to plaintiff because it did not create the alleged condition and had no actual or constructive notice. QBC argues that Imperial failed to inform it of the pothole's existence and that it is unknown how long the pothole existed prior to plaintiff's accident, but that in any case it did not exist for a period long enough that QBC should have discovered and repaired it. Plaintiff argues that, at the very least, there are issues of fact here because the witnesses produced by defendants did not know when the area of the pothole was last inspected, other than what was reported in the maintenance checklist.

Defendants failed to satisfy their initial burden of demonstrating that they did not create the pothole or have actual or constructive notice of the pothole, that the pothole was not visible and apparent, and that the pothole did not exist when the area was last inspected (*Gomez v Samaritan Daytop Vil., Inc.*, 216 AD3d 456, 457 [1st Dept 2023]). It is well settled that “[a] defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence.” (*Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [1st Dept 2010][internal quotation marks and citation omitted]). “A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected” (*Gairy v 3900 Harper Ave., LLC*, 146 AD3d 938, 939 [2d Dept 2017], citing *Gordon v American Museum of Nat. Hist.*, 67 NY2d 836, 837 [1986]). The courts have also held that “[a] defendant

can meet its burden of showing that it lacked constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically showing that the alleged condition did not exist when the area was last inspected or cleaned before the plaintiff fell” (*Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept 2020]). The burden then shifts to the plaintiff to raise a triable issue of fact (*id.*).

To the extent that defendants argue that Imperial failed to properly inspect and inform them of the existence of the pothole, there is an issue of fact as to whether QBC itself had a duty to inspect for safety issues pursuant to the lease agreement with NY IDA. Lucchi testified that QBC employees were instructed to report safety issues they observed in the parking lot to the building command center, and Chassagne testified that Mets supervisors were present in Parking Lot G on game days. Moreover, as discussed above, defendants have not made a prima facie showing the pothole was not visible and apparent. QBC’s reliance on Imperial’s checklist in its reply to demonstrate that Imperial inspected the area on the day of the accident and that the inspection did not reveal the defect, is unavailing where QBC consistently challenges the reliability of Imperial’s inspections throughout its submissions. Defendants have not satisfied their initial burden of demonstrating that they did not have actual or constructive notice of the pothole and that the pothole was not visible and apparent; thus, there are unresolved issues of fact precluding summary judgment as to QBC’s liability.

c. Liability under American National Standards Institute (ANSI) 117.1

Plaintiff’s supplemental bill of particulars in the instant action (NYSCEF Doc No 137 at 12), contains, among other claims, the allegation that defendants violated ANSI 117.1, Sections 302, 303, and 502. Defendants allege that none of these standards may serve as the basis for determining standards of care and are improper. Plaintiff has not opposed this portion of

defendants' motion; however, since defendants have not moved to strike this allegation from the supplemental bill of particulars, the court declines to do so sua sponte.

ii. Summary Judgment on Third-Party Claims

a. Contractual indemnification

Defendants have failed to establish their prima facie entitlement to summary judgment on their contractual indemnification claims. The burden on a summary judgment motion is on the moving party to make a prima facie showing that it is entitled to summary judgment as a matter of law, proffering sufficient proof that no material issues of triable fact exist (*Alvarez*, 68 NY2d at 324). As discussed herein, there are several issues of fact that preclude the granting of summary judgment on this issue in favor of either party. At the very least, there is an issue of fact regarding whether the pothole should have come to Imperial's attention in the course of its duties within the plain meaning of the management agreement. For these reasons, defendants/third party plaintiffs are not entitled to summary judgment on contractual indemnification.

b. Common-Law Indemnification

Having previously considered this issue on third-party defendant's summary judgment motion seeking dismissal of this cause of action in the third-party complaint, the court has already disposed of it and granted summary judgment in favor of third-party defendant Imperial, ordering that this cause of action be dismissed. Thus, this portion of defendants' summary judgment motion is denied as moot.

c. Contribution

Similarly, after having considered the issue of contribution on third-party defendant's summary judgment motion, the court found that QBC is not entitled to contribution since Imperial did not owe a duty of reasonable care to the plaintiff or a duty of reasonable care independent of its contractual obligations to QBC. For this reason, the fourth cause of action in the third-party complaint seeking contribution is dismissed; consequently, defendants' motion for summary judgment with respect to contribution is also denied.

V. CONCLUSION

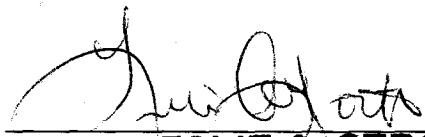
Accordingly, it is hereby

ORDERED that the motion for summary judgment brought by third-party defendant Imperial Parking (U.S.), Inc. (motion sequence 002) is granted to the extent of dismissing the second, third, and fourth causes of action of action against it, and it is otherwise denied; and it is further

ORDERED that the motion for summary judgment brought by defendants Sterling Mets, L.P. and Queens Ballpark Company, L.L.C. (motion sequence 003) is denied; and it is further

ORDERED that all remaining claims shall continue.

7/9/2024
DATE


HON. LESLIE A. STROTH
J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	DENIED