SHORT FORM ORDER

INDEX No. 602887/2020
CAL. No. 202301115OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

PRESENT:

Hon. VINCENT J. MARTORANA
Justice of the Supreme Court

MOTION DATE 12/28/23 (003 & 005)
MOTION DATE 1/18/24 (004 & 006)
ADJ. DATE 4/4/24
Mot. Seq. # 003 MotD
Mot. Seq. # 004 MotD
Mot. Seq. # 005 MD
Mot. Seq. # 006 MotD

---X

RALPH BERTUCCIO,

Plaintiff,

- against -

BLOWOUT ENTERPRISES, LLC, PAUL D. DELVECCHIO, JR., a/k/a DJ PAULY, d/b/a BLOWOUT ENTERTAINMENT, MORE THAN MUSIC & ENTERTAINMENT, LTD., MARLANE, INC., d/b/a FUSION PRODUCTIONS and PRESIDENT CATERERS OF PLAINVIEW, LTD.,

Defendants.

---X

SIBEN & SIBEN ESQS.
Attorney for Plaintiff
90 East Main Street
Bay Shore, New York 11706

HOFFMAN ROTH & MATLIN, LLP
Attorney for Defendants/Third-Party Plaintiffs Blowout Enterprises, LLC and Paul D. Delvecchio, Jr.
505 8th Avenue, Suite 1704
New York, New York 10018

---X

BLOWOUT ENTERPRISES, LLC, PAUL D. DELVECCHIO, JR.,

Third-Party Plaintiffs,

- against -

STACY WOFSY and TEMPLE CHAVERIM,

Third-Party Defendants,

---X

TYSON & MENDES LLP
Attorney for Defendants More Than Music & Entertainment , Ltd. and Marlane, Inc. d/b/a Fusion Productions
420 Lexington Avenue, Room 2800
New York, New York 10170

TEMPLE CHAVERIM, Second Third-Party Plaintiff, - against - PRESIDENT CATERERS OF PLAINVIEW, LTD., Second Third-Party Defendant,	KERLEY, WALSH, MATERA & CINQUEMANI, PC Attorney for Defendant/Second Third-Party Defendant President Caterers of Plainview, Ltd. and Second Third-Party Plaintiff/Third-Party Defendant/Third Third-Party Defendant Temple Chaverim 2174 Jackson Avenue Seaford, New York 11783
MORE THAN MUSIC & ENTERTAINMENT, LTD. and MARLANE, INC., d/b/a FUSION PRODUCTIONS, Third Third-Party Plaintiffs, - against - STACY WOFSY and TEMPLE CHAVERIM, Third Third-Party Defendants.	WADE CLARK MULCAHY LLP Attorney for Third-Party Defendant/Third Third-Party Defendant Stacy Wofsy 180 Maiden Lane, Suite 901 New York, New York 10038

Upon the following papers read on the motions for summary judgment: (1) Notice of Motion and supporting papers by Blowout Enterprises and Paul Delvecchio, filed November 27, 2023; (2) Notice of Motion and supporting papers by President Caterers of Plainview Ltd. and Temple Chaverim, filed November 28, 2023; (3) Notice of Motion and supporting papers by Stacy Wofsy, filed November 28, 2023; (4) Notice of Motion and supporting papers by More than Music & Entertainment, Ltd., and Marlane, Inc., filed November 28, 2023; (5) Answering Affidavits and supporting papers by Blowout Enterprises and Paul Delvecchio, filed January 11, 2024; (6) Answering Affidavits and supporting papers by More than Music & Entertainment, Ltd., and Marlane, Inc., filed January 11, 2024; (7) Answering Affidavits and supporting papers by Stacy Wofsy, filed January 11, 2024; (8) Answering Affidavits and supporting papers by plaintiff, filed January 11, 2024; (9) Answering Affidavits and supporting papers by Blowout Enterprises and Paul Delvecchio, filed March 28, 2024; (10) Replying Affidavits and supporting papers by President Caterers of Plainview Ltd. and Temple Chaverim, filed April 3, 2024; (11) Replying Affidavits and supporting papers by Blowout Enterprises and Paul Delvecchio, filed April 3, 2024; and (12) Replying Affidavits and supporting papers by More than Music & Entertainment, Ltd., and Marlane, Inc., filed April 3, 2024, it is

ORDERED that these motions are consolidated for the purpose of this determination; and it is further

ORDERED that the motion by defendants/third-party plaintiffs Blowout Enterprises, LLC, and Paul Delvecchio, essentially for summary judgment dismissing the complaint and cross claims against them, and summary judgment in their favor on their third-party claim against Stacy Wofsy for contractual indemnification, is granted to the extent of dismissing the complaint and cross claims against them, and is otherwise denied; and it is further

ORDERED that the motion by defendant President Caterers of Plainview Ltd. and third-party defendant Temple Chaverim for summary judgment dismissing the complaint and the cross claims against President Caterers of Plainview Ltd., summary judgment dismissing the third-party complaint and cross claims against Temple Chaverim, and summary judgment in their favor on their common-law indemnification claims is granted to the extent of dismissing the complaint and cross claims against President Caterers of Plainview Ltd. and dismissing the third-party complaint and cross claims against Temple Chaverim, and is otherwise denied; and it is further

ORDERED that the motion by third-party defendant/third third-party defendant Stacy Wofsy for summary judgment dismissing the third third-party complaint and the cross claims against her, and for a declaration that she "does not owe common[-]law or contractual indemnification to [More than Music & Entertainment, Ltd., and Marlane, Inc.] and is thus not in breach of any contract" is granted to the extent of dismissing the cross claims against her for common-law indemnification and contribution and dismissing the third third-party complaint against her, and is otherwise denied; and it is further

ORDERED that the motion by defendants/third third-party plaintiffs More than Music & Entertainment, Ltd., and Marlane, Inc., for summary judgment dismissing the complaint and cross claims against them, and for summary judgment in their favor on their claim for contractual indemnification against Stacy Wofsy, is denied.

On October 13, 2018, a bat mitzvah was held for the daughter of third-party defendant Stacy Wofsy at the premises of third-party defendant Temple Chaverim. Wofsy hired nonparty Lawrence Scott Events to manage the party. Plaintiff, Ralph Bertuccio, was an employee of Lawrence Scott Events. Wofsy also contracted with defendant Blowout Enterprises, LLC, of which defendant Paul Delvecchio was the president, for Delvecchio to perform certain DJ services; defendant President Caterers of Plainview Ltd. (President Caterers) to perform certain catering services; and defendants More than Music & Entertainment, Ltd., and Marlane, Inc. (collectively, MTM), to perform certain audio/visual services. During the bat mitzvah, a speaker allegedly fell on plaintiff.

Plaintiff then commenced this action against defendants for negligence. Blowout Enterprises and Delvecchio cross-claimed against MTM for contribution and common-law indemnification. MTM cross-claimed against Blowout Enterprises, Delvecchio, Wofsy, Temple Chaverim, and President Caterers for common-law indemnification, contractual indemnification, contribution, and failure to procure insurance. Blowout Enterprises and Delvecchio commenced a third-party action against Wofsy and Temple Chaverim for common-law indemnification and, against only Wofsy, for contractual indemnification, failure to procure insurance, and a judgment declaring that Wofsy is required to indemnify them. Temple Chaverim cross-claimed against Wofsy for common-law indemnification. Wofsy counterclaimed against Blowout Enterprises and Delvecchio for contribution and common-law indemnification, and cross-claimed against Temple Chaverim for contractual indemnification, common-law indemnification, and contribution. Temple Chaverim commenced a second third-party action against President Caterers for contribution, contractual indemnification, common-law indemnification, and failure to procure insurance. President Caterers counterclaimed against Temple Chaverim, and cross-

claimed against Blowout Enterprises, Delvecchio, MTM, and Wofsy, for contribution and common-law indemnification. MTM commenced a third third-party action against Wofsy and Temple Chaverim for common-law indemnification and, against only Wofsy, for contractual indemnification and a judgment declaring that Wofsy is obligated to defend and indemnify them. Wofsy counterclaimed against MTM for breach of contract. By stipulation dated April 25, 2023, Temple Chaverim discontinued its third-party claims against President Caterers. Thereafter, by order dated November 27, 2023, this Court dismissed the third third-party complaint against Temple Chaverim.

Blowout Enterprises and Delvecchio seek, essentially, summary judgment dismissing the complaint and cross claims against them, and summary judgment in their favor on their third-party claim against Wofsy for contractual indemnification. President Caterers and Temple Chaverim seek summary judgment dismissing the complaint and the cross claims against President Caterers, summary judgment dismissing the third-party complaint and cross claims against Temple Chaverim, and summary judgment in their favor on their common-law indemnification claims. Wofsy seeks summary judgment dismissing MTM's third-party complaint and the cross claims against her, and for a declaration that she "does not owe common[-]law or contractual indemnification to [MTM] and is thus not in breach of any contract." MTM seeks summary judgment dismissing the complaint and cross claims against it, and summary judgment in its favor on its claim for contractual indemnification against Wofsy.

On a motion for summary judgment, the movant has the burden to show, through evidence in admissible form (***Bush v St. Clare's Hosp.***, 82 NY2d 738, 602 NYS2d 324 [1993]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]), that it is entitled to judgment as a matter of law and that there are no disputed issues of material fact (CPLR 3212; ***Matter of New York City Asbestos Litig.***, 33 NY3d 20, 99 NYS3d 734 [2019]). If the movant meets its burden, then the non-movant must show that there is a material issue of fact to be resolved at trial (***Matter of Eighth Jud. Dist. Asbestos Litig.***, 33 NY3d 488, 105 NYS3d 353 [2019]). If the movant does not meet its burden, then the motion must be denied without consideration of any opposing papers (***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). On summary judgment, the Court must view the evidence in the light most favorable to the non-moving party (*id.*).

"A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party" (***Burger v Brickman Group Ltd., LLC***, 174 AD3d 568, 569, 104 NYS3d 189 [2d Dept 2019]; *see* ***Pinto v Walt Whitman Mall, LLC***, 175 AD3d 541, 107 NYS3d 373 [2d Dept 2019]), as "the duty to avoid harm to others is distinct from the contractual duty of performance" (***Landon v Kroll Lab. Specialists, Inc.***, 22 NY3d 1, 6, 977 NYS2d 676 [2013], *rearg denied* 22 NY3d 1084, 981 NYS2d 667 [2014]).

> "There are three circumstances[, known as the ***Espinal*** exceptions,] under which a party who enters into a contract to render services may be said to have assumed a duty of care, and thus be potentially liable in tort to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies upon 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"

(***Huttie v Central Parking Corp.***, 40 AD3d 704, 705-706, 835 NYS2d 701 [2d Dept 2007] [quotation marks, citations, and alterations omitted]; *see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Grogan v Simon Prop. Group, Inc.***, 192 AD3d 769, 144 NYS3d 206 [2d Dept 2021]). A passive omission that did not create or exacerbate a dangerous condition is not a force or instrument of harm (***Stiver v Good & Fair Carting & Moving, Inc.***, 9 NY3d 253, 848 NYS2d 585 [2007]; ***Church v Callahan Indus.***, 99 NY2d 104, 752 NYS2d 254 [2002]). A summary judgment movant need only address the ***Espinal*** exceptions pleaded in the complaint or alleged in the bill of particulars to meet its prima facie burden (***Nesbitt v Advanced Serv. Solutions***, 224 AD3d 841, 206 NYS3d 153 [2d Dept 2024]).

Blowout Enterprises and Delvecchio have shown that their duty of care was based on the contract between Wofsy and Blowout Enterprises for Delvecchio to perform at the bat mitzvah. They have also addressed plaintiff's allegation that they launched a force or instrument of harm by showing that they did not own, maintain, set up, or knock over the speaker (*see* ***Caldwell v 4 NYP Ventures***, 220 AD3d 459, 197 NYS3d 495 [1st Dept 2023] [a defendant "did not assemble the shelving unit that collapsed and thus, (it) did not launch an instrument of harm"]). For the same reasons, they cannot be liable in contribution or common-law indemnification (***Sotarriba v 346 W. 17th St. LLC***, 179 AD3d 599, 118 NYS3d 90 [1st Dept 2020]; *see generally* ***Stone v Williams***, 64 NY2d 639, 485 NYS2d 42 [1984]). Blowout Enterprises and Delvecchio have also shown that they did not enter into a contract with any other party, defeating the cross claims against them for contractual indemnification and failure to procure insurance (***Pantaleo v Bellerose Senior Hous. Dev. Fund Co., Inc.***, 147 AD3d 777, 46 NYS3d 189 [2d Dept 2017]). No party has raised a material issue of fact in opposition. Thus, so much of Delvecchio and Blowout Enterprises' motion that seeks summary judgment dismissing the complaint and cross claims against them is granted.

Delvecchio and Blowout Enterprises also seek summary judgment in their favor on their cross claim against Wofsy for contractual indemnification. The right to contractual indemnification depends on the particular language of the indemnification clause (***Guiles v Vassar Bros. Hosp.***, 221 AD3d 666, 200 NYS3d 36 [2d Dept 2023]), which is narrowly construed (***New York State Thruway Auth. v Ketco, Inc.***, 195 AD3d 630, 149 NYS3d 502 [2d Dept 2021]). In support of their motion, Delvecchio and Blowout Enterprises submitted only part of the contract with Wofsy, and the submitted portion does not contain any indemnification provision. Accordingly, the motion by Blowout Enterprises and Delvecchio is granted only to the extent of dismissing the complaint and cross claims against them, and is otherwise denied.

Similarly, President Caterers has shown that its duty was based solely on its contract with Wofsy, and that it did not own, maintain, set up, or knock over the speaker. Thus, it cannot be liable in negligence, contribution, or common-law indemnification (*see* ***Caldwell v 4 NYP Ventures***, 220 AD3d 459, 197 NYS3d 495; ***Sotarriba v 346 W. 17th St. LLC***, 179 AD3d 599, 118 NYS3d 90). And for the

same reasons that this Court dismissed MTM's third-party claim for common-law indemnification against Temple Chaverim, so much of the motion as seeks dismissal of Blowout Enterprises and Delvecchio's third-party claim for common-law indemnification against Temple Chaverim is granted. Temple Chaverim and President Caterers have also shown that the contractual indemnification and failure to procure insurance claims against them are meritless. No party has raised a material issue of fact in opposition.

However, President Caterers and Temple Chaverim failed to show, prima facie, that any other defendant was negligent, so summary judgment in their favor on their common-law indemnification claims is premature (*see* ***Brockman v Cipriani Wall St.***, 96 AD3d 576, 947 NYS2d 34 [1st Dept 2012]; ***Perri v Gilbert Johnson Enters., Ltd.***, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]). In particular, Delvecchio testified that the speakers were set up in an acceptable manner. Thus, the motion by President Caterers and Temple Chaverim is granted to the extent of dismissing the complaint and the cross claims against President Caterers of Plainview Ltd. and dismissing the third-party complaint and cross claims against Temple Chaverim, and is otherwise denied.

MTM's motion is denied. MTM provided and set up the speakers. Daniel Rocco, who was at the party with Delvecchio and whose deposition testimony was submitted by MTM as part of its motion, explained that the speakers were not secured and were sliding around as a result thereof. He also said that he notified the company that provided the speakers, which was MTM, that they were "sliding around." Thus, MTM failed to show, prima facie, that it did not launch a force or instrument of harm that injured plaintiff (*see* ***Bolson v UJA-FED Props., Inc.***, 224 AD3d 584, 205 NYS3d 380 [1st Dept 2024] [involving a defendant who allegedly failed to secure flooring]).

MTM has also not shown that it is entitled to summary judgment against Wofsy on its claim for contractual indemnification. The contract between Wofsy and MTM requires Wofsy to indemnify MTM from "all claims, demands, regulatory proceedings, and/or causes of action, and all damages, liabilities, costs . . . and expenses" only if "they arise from any actions, mistakes, or omissions by Purchaser, its agents, servants or guests." MTM failed to show that the incident arose from the acts or omissions of Wofsy, her agents, servants, or guests (*see generally* ***Tonking v Port Auth. of N.Y. & N.J.***, 3 NY3d 486, 787 NYS2d 708 [2004]). Thus, MTM's motion is denied.

Turning to Wofsy's motion, she has shown that she cannot be liable to MTM in contractual indemnification. Wofsy has shown that the incident did not "arise from any actions, mistakes, or omissions by [Wofsy], [her] agents, servants or guests" and, therefore, cannot be liable under the contractual indemnification clause (*see generally id.*). Wofsy has also shown that she did not own, maintain, set up, or knock over the speaker, and, therefore, cannot be liable in common-law indemnification or contribution under ***Espinal*** (*see* ***Caldwell v 4 NYP Ventures***, 220 AD3d 459, 197 NYS3d 495; ***Sotarriba v 346 W. 17th St. LLC***, 179 AD3d 599, 118 NYS3d 90). Moreover, the contract between Wofsy and MTM did not require Wofsy to procure insurance for MTM's benefit. To the extent that Wofsy seeks a declaratory judgment, she has not interposed a claim for such relief. Thus, Wofsy's motion is granted to the extent of dismissing the cross claims against her for common-law

indemnification and contribution and dismissing MTM's third-party complaint against her, and is otherwise denied.

Dated: June 28, 2024
Riverhead, New York

VINCENT J. MARTORANA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION