SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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KAREN YATES,

Plaintiff,

- v -

568 BROADWAY PROPERTY LLC,SCF MANAGEMENT LLC,ACHS MANAGEMENT CORP., SATO CONSTRUCTION CO., INC.,ROCK GROUP NY CORP., RHG MANPOWER INC.,MUGHAL GENERAL CONSTRUCTION, INC.,VIDARIS, INC.,

Defendant.

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INDEX NO. 158402/2020

MOTION DATE 03/11/2025, 04/22/2025

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 155, 157, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 186

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 156, 158, 183, 184, 185

were read on this motion to/for JUDGMENT - SUMMARY.

In this action, plaintiff sustained injuries from the collapse of a sidewalk shed. In motion sequence 003, defendant general contractor Sato Construction Co. d/b/a Flag Waterproofing and Restoration Co. (“Sato/Flag”) and subcontractor Rock Group NY Corporation (“Rock”) move for summary judgment pursuant to CPLR 3212 on their crossclaims against defendant sub-subcontractor RHG Manpower, Inc. (“RHG”) seeking contractual indemnification, common law indemnification, breach of contract, and dismissing RHG’s crossclaims against them. In motion

sequence 004, RHG moves for summary judgment pursuant to CPLR 3212 dismissing all counterclaims and crossclaims brought against it by Sato/Flag and Rock.

Relevant Background

On November 19, 2017, plaintiff and three other individuals, Katherine LeFavre, Claire Bevan, and Harsha Laxman, were injured when a sidewalk shed collapsed adjacent to 568 Broadway, New York, New York ("the Property") (NYSCEF Doc 109, [Movants' Statement of Material Facts] SOMF ¶ 1). The Property is owned by defendant 568 Broadway Property, LLC ("568 Broadway") (*id.* ¶ 2).

Approximately a year prior to the incident, on October 5, 2016, 568 Broadway entered into an agreement with Sato/Flag to serve as the general contractor and perform façade restoration work on the Property (*id.* ¶ 5). On September 30, 2016, Sato/Flag entered into a subcontract agreement with Rock to install and dismantle a sidewalk shed at the property (*id.* ¶ 7). On January 3, 2017, Rock subcontracted the installation and entered into an agreement with defendant Maga Contracting Corporation ("Maga") to install the subject sidewalk shed (*id.* ¶ 8). On March 21, 2017, Sato/Flag entered into an agreement with defendant Mughal General Construction ("Mughal") to perform the façade restoration work (*id.* ¶ 6).

Sato/Flag and Rock allege that on August 18, 2017, Rock entered into a subcontract with RHG ("the Agreement") to dismantle the shed (NYSCEF Doc 108, Sejour affirmation ¶ 46). The purchase order provides that RHG was to install and dismantle the shed, hoists, and scaffolding throughout New York City (NYSCEF Doc 122, Sejour affirmation exhibit L). Sato/Flag and Rock allege that on October 5, 2017, RHG partially dismantled the shed on the Broadway side pursuant to orders from Rock, leaving only a portion of the shed for bracing purposes (NYSCEF

Doc 108, Sejour affirmation ¶¶ 51, 52). Sato/Flag and Rock further allege that on October 9, 2017, RHG issued Rock an invoice for the dismantling (*id.* at ¶ 52).

The shed collapsed on November 19, 2017 causing plaintiff, LeFarve, Bevan, and Laxman to sustain injuries (NYSCEF Doc 109, SOMF ¶ 1). The exact cause of the shed collapse is unknown. Plaintiff, LeFarve, Bevan, and Laxman brought direct actions to recover damages for their injuries, all of which settled at mediation on September 6, 2022, as well as all cross-claims and third-party claims (NYSCEF Doc 108, Sejour affirmation, ¶ 14. The only claims to survive mediation are Sato/Flag's and Rock's crossclaims against RHG and RHG's crossclaims against Sato/Flag and Rock (*id.*).

Testimony of Phillip DiLorenzo

Phillip DiLorenzo is the Executive Vice President of Sato/Flag and is responsible for general management and oversight (NYSCEF Doc 118, Sejour affirmation exhibit H, DeLorenzo tr. 33:16-25). DiLorenzo testified that Sato/Flag is responsible for construction means, methods, and techniques of the installation and dismantling work pursuant to the contract with Rock, and that Sato/Flag is responsible for any errors made by the subcontractor (*id.* at 130:22-25, 131:3, 132:23-25, 133:3, 204:20-25, 205:4-8).

He further testified that the Department of Buildings ("DOB") requires daily inspections of sidewalk sheds, but that no one from Sato/Flag inspected the sidewalk shed (*id.* at 156:4-7, 12, 313:5-9). He explained that the daily inspections are to be done by whichever entity is utilizing that shed, in this case, Mughal (*id.* at 315:13-18, 316:12-16).

He also testified that Sato/Flag did not inspect to ensure Rock completed the plans in accordance with the Department of Buildings plans, as it is Rock's responsibility (*id.* at 93:10-

17, 313:11-25, 314:2-9). He further testified that he believed the shed was designed to handle the capacity of store scaffolding (*id.* at 356:2-18).

Testimony of Frank Jurasits

Frank Jurasits is the director of operations at Sato/Flag (NYSCEF Doc 120, Sejour affirmation exhibit J, Jurasits, tr. at 11:14-20). He testified that Sato/Flag had several project managers working at the Property, and it was the project manager's job to be on site everyday supervising the work (*id.* at 12:17-23).

However, he testified that Rock obtained the permit to erect the shed and was responsible for engineering, designing, and inspecting it, as well as submitting the subsequent certification and inspection paperwork with the DOB (*id.* at 265:13-19, 267:2-12, 278:23-25). He testified that Rock had an obligation to inspect the shed if its subcontractor could not (*id.* at 266:6-9). He further testified that Mughal and Pablo Auquilla from Mughal were responsible for the daily inspections of the sidewalk shed, (*id.* at 95:7-11). He further testified that the part of the Broadway section of the sidewalk shed that was supposed to be removed remained after the dismantling (*id.* at 131:14-21).

Testimony of Prabhjit Singh

Singh is the General Manager of Rock (NYSCEF Doc 116, Sejour affirmation exhibit F, Singh tr. 9:19-20). He testified that Rock certified that the shed was constructed according to DOB code (NYSCEF Doc 117, Sejour affirmation exhibit G, Singh tr. at 305:23-25). He further testified that it is Rock's responsibility to inspect the sidewalk shed every six months after it is installed to make sure "everything is okay" (NYSCEF Doc 116, Sejour affirmation exhibit F, Singh tr. at 80:6-11). However, he testified that Maga or RHG were responsible for performing the six-month inspections when Rock would tell them to (NYSCEF Doc 117, Sejour affirmation

exhibit G, Singh tr. at 239: 10-23). He further testified that sidewalk sheds must be inspected daily, but that the responsibility to do so lies with "whoever takes over" and "is maintaining" the shed (*id.* at 106:16-23). As such, he testified that Rock was not responsible for the daily inspections, rather, it was Sato/Flag or the Owner (*id.* at 106:23-25, 107:2-4).

He also testified that when Sato/Flag informed Rock that the shed needed to be dismantled, Rock did not visit the site, contact an engineer, or alert the DOB, but just ordered RHG to send manpower to dismantle the shed without any additional instruction (NYSCEF Doc 116, Sejour affirmation exhibit F, Singh tr. at 175: 2-25, 180:13-17, 181:12-13). He stated that Rock did not provide direction to RHG as to means and methods used to dismantle the shed (*id.* at 181:22-25). He further testified that Rock relied on RHG to ensure that everything leftover from the dismantling is tied down and believed that RHG would be performing the inspection after the modification (*id.* at 179: 8-12, NYSCEF Doc 117, Sejour affirmation, exhibit G, Singh tr. at 314:16-25).

Singh further testified that the DOB requires a six-month inspection after the dismantling to ensure "nothing is out of plan", which Rock was required to perform as the permitholder (NYSCEF Doc 117, Sejour affirmation, exhibit G, Singh tr. at 319: 9-20, 320:3-6). He testified that RHG inspected the shed after the dismantling and communicated to Rock that the shed was up to code (*id.* at 440:11-16, 22-24). He testified that someone from Rock then drafted a letter dated October 5, 2017 to the DOB stating that the shed is in safe condition and is compliant with DOB codes and specifications (*id.* at 321:7-16, 441:13-15). He testified that Rock certified that the modification was done correctly (*id.* at 322:5-10). He testified that prior to the collapse, materials were improperly stored on the top of the shed and that Rock would have alerted Sato/Flag to remove such materials had Rock seen them during an inspection (*id.* at 415:5-7,

416:5-7, 12-19). He also testified that if the shed was to be used for storage, he would have had the engineer design a shed accordingly (*id.* at 435:3-11).

Testimony of Dan Odigie

Dan Odigie is a Civil Engineer and owner of Dan Engineering Services (NYSCEF Doc 177, Connor affirmation exhibit O, Odigie tr. at 10:1-6, 11:1-4). He testified that Rock hired him to design the plans for the shed (*id.* at 51:3-8). He testified that it was his understanding that Rock Group was to be installing the shed and would be responsible for inspecting materials used to build the shed (*id.* at 129:8-22, 135:2-6).

He testified that he was not told that the shed was going to bear a load and that it was not his job to perform an inspection once the shed was completed (*id.* at 139:19-25, 140:3-5, 153:10-16). He did explain, however, that any modifications or amendments had to be submitted to the DOB and that he was also supposed to be informed if there was any modification of the scaffolding because it could affect its structural stability (*id.* at 126: 5-10, 186:10-25, 188: 5-12, 191:9-12).

Testimony of Mohammad Ramzan

Mohammad Ramzan is the owner of Mughal (NYSCEF Doc 174, Connor affirmation exhibit L, Ramzan tr. at 59:24-25). Ramzan testified that Pablo Auquilla ("Auquilla") was the foreman and inspected the sidewalk shed daily (*id.* at 95: 16-21, 119: 13-16). He testified that it was Auquilla's responsibility to perform the daily inspection and fill out inspection sheets (*id.* at 118:18-23,119:15-21). Ramzan further testified that if Auquilla saw anything that required repairs or maintenance, he would let Frank Jurasits of Sato/Flag know (*id.* at 121: 9-12). He also testified that scaffolds were stored on the shed as per instructions from Sato/Flag (*id.* at 128: 6-7,

10-13,18). Ramzan further testified that he made complaints to Sato/Flag about portions of the Broadway side of the shed being loose (*id.* at 131:5-16).

Testimony of Pablo Auquilla

Auquilla was the foreman for Mughal at the time of the incident (NYSCEF Doc 175, Connor affirmation, exhibit M, Auquilla tr. at 48:15-16). Auquilla testified that sidewalk sheds needed to be inspected every day (*id.* at 22:6-11). He testified that every day he took photographs of the sidewalk shed because there would be some loose screws (*id.* at 78: 4-13). He would send the photographs to Frank Jurasits who instructed him to put the screws back (*id.* at 79:3-20).

He testified that he was the only one performing daily sidewalk shed inspections, and that he was aware he was the only one, but that the records were being reviewed by Sato/Flag (*id.* at 84:2-10). He further testified that Frank Jurasits of Sato/Flag gave him permission to store scaffolds on the top of the sidewalk shed (*id.* at 88:25, 89:2-12). He explained that he was not told that the shed could not handle the weight (*id.* at 89:19-23). He further testified that the final inspection of the shed on November 17th showed no issues with stability or security (*id.* at 145:8-11).

Testimony of Gil Menashe

Gil Menashe is the owner of RHG (NYSCEF Doc 176, Connor affirmation exhibit N, Menashe tr. 12:2-3). He testified that RHG only provides manpower for jobs, and that RHG was only on the jobsite prior to the collapse for a single day (*id.* at 44:17-19, 76:22-25, 119:2). With respect to the single day at the jobsite, he testified that someone from Rock contacted him to send a crew to the Premises to clean up material after the sidewalk shed was built, but he does not recall the exact date (*id.* at 124:10-14, 125:4-5,10-14, 127:7-9, 129:7-25). He further testified that there is nothing in writing confirming what his crew did on that day (*id.* at 127:14-16). He

explained that he has worked with Rock Group in the past and there is no history of written correspondence between them (*id.* at 117:2-4, 118:6-8). He further testified that RHG did not dismantle the shed and that his crew did not return to the Premises until after the collapse on the date of the accident (*id.* at 130:2-5, 135:5-10).

Menashe stated that although it is his signature on the contract with Rock, he does not remember signing it (*id.* at 106:13-17, 107:5-6). He stated that he typically initials every page on a contract, but this contract does not contain initials (*id.* at 108:2-7). He further testified that he disputes the authenticity of the invoice from RHG to Rock and believes that someone from Rock group created it because RHG's invoices have an address on it and the one in dispute does not (*id.* at 120:7-12, 21-22, 121:7-9).

Menashe also testified that "the scaffolding company", in this case, Rock, was responsible for supervising RHG's workers and obtaining the permit, and that his laborers were not qualified to perform inspections of sidewalk sheds (*id.* at 53:4-10, 70:17-19, 126:17-19). He testified that he was not contacted by Rock after the work was performed that there was an issue or the work was not done properly (*id.* at 131:17-20).

The Sato/Flag Subcontract with Rock

The Sato/Flag subcontract with Rock provides that Rock will indemnify and hold Sato/Flag harmless and that Rock will obtain commercial general liability insurance and name Sato/Flag as an additional insured (NYSCEF Doc 124, Sejour affirmation, exhibit N). Section 10 of the Sato/Flag subcontract with Rock provides, in relevant part,

> "To the fullest extent permitted by law, Sub-contractor hereby agrees to Indemnify, defend, and hold harmless Sato Construction Co, Inc. DBA Flag Waterproofing & Restoration Company(Contractor), the owner, and all other Indemitees…from and against any and all losses, suits, actions, legal or administrative proceedings, claims, demands, damages, liabilities, interest legal fees, costs, and expenses of whatever kind or nature whether arising before or after completion of the work hereunder and in any

> manner directly or indirectly caused, occasioned or contributed to in whole or in part, by reason of any action, omission, fault, or negligence whether active or passive of sub-contractor, or of anyone acting under its direction or control or on its behalf in connection with or Incidents to the performance of this contract and excluding only the liability created by Contractor's"
>
> The Sub-contractor shall provide, maintain, and pay for…Commercial General Liability Insurance written on an 'occurrence" basis protecting the Sub-Contractor, their respective servants, agents, or employees against damages arising from bodily injury (including death) and from claims for property damage which may arise directly or indirectly out of the operations of the Sub-Contractor, their subcontractors, servants, agents, or employees under this Contract.
>
> The policy of insurance shall cover all liability arising out of products whether manufactured or supplied by the Sub-Contractor; completed operations…personal injury; Broad Form Property Damage Including an explosions, collapse, and underground hazards; independent contractors; and liability assumed by the sub-contractor under and applicable to this contract (contractual liability) and shall include the Contractor as an additional insured…"

The Rock/RHG Subcontract ("The Agreement")

The Rock/RHG subcontract provides that RHG will indemnify and hold Rock harmless, RHG will obtain commercial general liability insurance and name Rock as an additional insured, and that RHG is responsible for all permits and that the completed work will comply with applicable laws, codes, and regulations (NYSCEF Doc 121, Sejour affirmation, exhibit K).

With respect to permits and compliance, section 2 of the Agreement states that "[i]t is the responsibility of the Subcontractor to insure that any permits, plans, designs, specifications or other documents prepared as part of or relating to the Services are prepared in accordance with and meet the requirements of all applicable laws, ordinances regulation and other governmental requirements." Similarly, section 6 of the Agreement provides that the "[s]ubcontractor warrants and represents to Contractor that the Work, when completed, will comply fully with all required and applicable building and safety codes, regulations and

construction requirements, without regard to any errors, omissions or deficiencies in the drawings and specifications…"

Furthermore, regarding indemnity, sections 38 and 39 of the Agreement state that

"To the fullest extent permitted by law, the Subcontractor agrees to indemnify, defend and hold harmless the Contractor as well as all parties Contractor is required to name as additional insureds in connection with the subject jobsite, their officers, directors, agents, employees and partners (hereafter collectively "indemnitees") from any and all claims, suits, damages, liabilities, professional fees, including attorneys' fees, costs, court costs, expenses and disbursements related to death, personal injuries or property damage (including loss of use thereof) brought against any of the Indemnitees by any person or entity, arising out of or in connection with or as a result or consequence of the performance of the Work of the Subcontractor, as well as any additional work, extra work or add-on work, whether or not caused in whole or in part by the Subcontractor or any person or entity employed, either directly or indirectly by the Subcontractor including any subcontractors thereof and their employees." Indemnification under this Agreement shall operate whether or not Subcontractor has placed and maintained the insurance required under this agreement. The Subcontractor shall cause all subcontract agreements it enters into to include this indemnification clause so as to ensure that Contractor and all Indemnitees hereunder shall have the same protection from sub subcontractors as is afforded by the Subcontractor."

With respect to additional insureds, section 42 of the Agreement provides that

"It is expressly agreed, as a material condition to this Master Subcontract Agreement, that Subcontractor's insurance shall include contractual liability coverage and additional insured coverage for the benefit of the Owner, Prime Contractor and contractor and anyone else the Contractor is required to name as an additional insured and shall specifically include coverage for ongoing and completed operations on each of its insurance policies."

Further, Schedule B Insurance Rider of the Agreement provides that

"Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability. 1) Commercial General Liability (CGL) coverage with limits of insurance of not less than $1,000,000 each occurrence and $1,000,000 Annual Aggregate…Contractor, Owner and all other parties who Contractor is required to name as additional insureds by any contract, shall be included as insureds on the CGL…". The coverage provided to the additional insureds under the policy issued to the Subcontractor shall be at least as broad as the coverage provided to the Subcontractor under the policy."

Lastly, Section 11 of the Agreement provides that "Contractor has entered into a contract with Prime Contractor (or Owner) and the terms of the Prime Contract are incorporated into this Agreement by reference."

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Contractual Indemnification

"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" (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87-88 [1st Dept 2018] quoting *Drzewinski v Atlantic Scaffold and Ladder Co.*, 70 NY2d 774, 777 [1987]). On a contractual-indemnification motion, the movant meets its prima-facie burden by (i) producing the agreement and (ii) demonstrating, with admissible evidence, that the claim arose from the indemnitor's work and that the indemnitee was not actively

negligent (*see Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, 100 AD3d 431, 433 [1st Dept 2012]); *see also Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530-531 [1st Dept 2013]).

In support of its motion, Sato/Flag and Rock first argue the Agreement contractually obligates RHG to indemnify them for the personal injuries sustained by plaintiff and the three other injured individuals. They similarly argue that the Agreement requires RHG to obtain insurance covering Sato/Flag and Rock for personal injuries. Finally, they argue that RHG has not fulfilled either of these contractual obligations and that RHG's alleged dismantling of the shed caused a stability issue leading to its collapse.

In opposition and in support of its cross-motion, RHG argues that Sato/Flag and Rock failed to meet their prima facie burden of showing that the accident arose out of RHG's alleged work, which is a prerequisite to trigger the indemnity clause. RHG argues that the cause of the collapse is unknown, and RHG cannot be held liable absent proof from Sato/Flag that the collapse arose out of RHG's alleged work. Further, RHG argues in its cross motion that it is not in privity of contract with Sato/Flag, such that Sato/Flag cannot enforce the indemnity clause in the Agreement.

The Court will first address the privity issue. RHG argues that it lacks privity of contract with Sato/Flag and thus Sato/Flag cannot enforce the indemnity provision. Contractual indemnification is warranted 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]). 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]).

Sections 38 and 39 of the Agreement state, in relevant part, that

> "To the fullest extent permitted by law, the Subcontractor agrees to indemnify, defend and hold harmless the Contractor as well as all parties Contractor is required to name as additional insureds…from any and all…personal injuries…brought against any of the Indemnitees… arising out of or in connection with or as a result or consequence of the performance of the Work of the Subcontractor… whether or not caused in whole or in part by the Subcontractor or any person or entity employed, either directly or indirectly by the Subcontractor including any subcontractors thereof and their employees. Indemnification under this Agreement shall operate whether or not Subcontractor has placed and maintained the insurance required under this agreement. The Subcontractor shall cause all subcontract agreements it enters into to include this indemnification clause so as to ensure that Contractor and all Indemnitees hereunder shall have the same protection from sub subcontractors as is afforded by the Subcontractor."

Section 42 of Agreement further states that

> "It is expressly agreed, as a material condition to this Master Subcontract Agreement, that Subcontractor's insurance shall include contractual liability coverage and additional insured coverage for the benefit of the Owner, Prime Contractor and Contractor and anyone else the Contractor is required to name as an additional insured and shall specifically include coverage for ongoing and completed operations on each of its insurance policies with the sole exception of Workers Compensation statutory coverage".

In addition, Schedule B Insurance Rider of the Agreement provides that "The coverage provided to the additional insureds under the policy issued to the Subcontractor shall be at least as broad as the coverage provided to the Subcontractor under the policy." Further, Section 11 of the Agreement provides that "Contractor has entered into a contract with Prime Contractor (or Owner) and the terms of the Prime Contract are incorporated into this Agreement by reference".

When read together, sections 11, 38, 39, 42, and the Schedule B Insurance Rider demonstrate that the intent of the contract was for Sato/Flag, "Prime Contractor," to be named as

an additional insured and be provided indemnification (*see Bellomo v Tishman Const. Corp.*, 2020 N.Y. Slip Op. 31455[U], 19 [N.Y. Sup Ct, New York County 2020]). However, while the indemnification is applicable as to Sato/Flag, it has yet to be determined if the indemnification clause has been triggered.

Turning now to the contractual indemnity claims, Rock's contractual indemnification claim against RHG must be denied because Rock failed to meet its burden of showing that the accident arose out of RHG's alleged work. RHG's reliance on Singh's testimony to show that the accident resulted from RHG's alleged work is insufficient, as his testimony lacks any connection between the collapse of the shed to RHG's alleged work. The record reflects that the accident occurred 45 days after RHG allegedly performed any work on the Property, and Sato/Flag and Rock fail to offer any explanation as to the gap in time between RHG's alleged work and the shed collapse. The record is quite clear that the exact cause of the incident remains unknown and the only mention of the collapse in the moving papers is the vague statement that there was an issue with the stability of the shed after RHG allegedly performed a modification/partial dismantling. For the same reason, Sato/Flag's contractual indemnification claims against RHG also must fail and the burden does not shift to RHG to raise issues of fact, who among other things, disputes the validity of the Agreement and performance of the dismantling work.

The Court notes, however, that assuming RHG performed the dismantling work, RHG correctly relies on *Brown v Two Exch. Plaza Partners*, 146 AD2d 129 [1st Dept 1989], affd, 76 NY2d 172 [1990], in which plaintiff suffered injuries after the scaffold he was standing on collapsed. The general contractor, Fuller, sued the subcontractor responsible for building the scaffolding, Heydt, to enforce the indemnity provision in the contract on the grounds that the collapse "arose out of" Heydt's work. The Appellate Division First Department held, and the

Court of Appeals affirmed, that since the scaffolding work was completed, and was inspected and accepted by Fuller,

> "to say…that plaintiff's accident arose out of, in connection with or as a consequence of Heydt's erection or straightening of the scaffold, without any showing of a particular act or omission in the performance of such work causally related to the accident, would be to make Heydt a virtual insurer of the scaffold. Heydt would be responsible for an unexplained collapse of the scaffold at a time when it had no control over its use or responsibility for its maintenance, and, as contemplated by its contract with Fuller, was not even present at the site. Clearly, it was not the intent of the indemnification clause to broaden Heydt's responsibility to such an extent…" *Brown*, 146 AD2d at 135-36.

The facts at bar are similar to those in *Brown*, for just as Fuller accepted the work of Heydt, Rock accepted the work of RHG. Singh testified that after the alleged dismantling by RHG, Rock inspected the shed and drafted a letter to the DOB stating that the shed is in safe condition, is compliant with DOB codes and specifications, and the modification was done correctly.

Furthermore, as in *Brown*, RHG had no control over the shed at the time of its collapse and was not present at the site, as the alleged dismantling occurred on October 5th and the collapse did not occur until November 19th. Finally, also as in *Brown*, there is no "showing of a particular act or omission in the performance of such work causally related to the accident" (*Dasilva v Structural Presevation Sys., LLC*, 2014 N.Y. Slip Op. 32659[U] [N.Y. Sup Ct, Bronx County 2014], *affd sub nom. DaSilva v Everest Scaffolding, Inc.*, 2016 N.Y. Slip Op. 00748 [1st Dept 2016]). Therefore, Sato/Flag and Rock's summary judgment claim for contractual indemnification from RHG must be denied and RHG's motion for summary judgment dismissing the contractual indemnity claim is granted.

Common Law Indemnification

Similarly, summary judgment as to Sato/Flag and Rock on their common-law indemnification must be denied because they failed to meet their burden of proving they were

not negligent. "Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010] citing *Correia v. Professional Data Mgt.,* 259 A.D.2d 60, 65, 693 N.Y.S.2d 596 [1999]). "A party cannot obtain common-law indemnification unless it has been 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, 377-78 [2011]).

Here, Sato/Flag and Rock argue that they are entitled to common-law indemnification because neither Sato/Flag nor Rock performed any work on the shed and any issues regarding its stability must be attributed to RHG. In opposition and in support of its cross motion, RHG once again argues that Rock cannot prove that the accident arose out of RHG's alleged work, as well as that Rock was negligent because Rock was responsible for the design of the shed, periodic inspections, submitting the revised plans to the DOB, and certified that the shed complied with all DOB regulations after the dismantling. RHG also argues in its cross motion that Sato/Flag cannot prove that the accident arose out of RHG's alleged work, and that Sato/Flag was negligent because it was responsible for the means and methods, maintained a presence on the jobsite, allowed materials to be stored on the shed, and was on notice of issues with the shed's stability.

Here, the portion of Sato/Flag and Rock's motion seeking common-law indemnification must be denied. With respect to Sato/Flag, DeLorenzo clearly states in his testimony that Sato/Flag was responsible for the means and methods of the work of Rock. Although "authority to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common-law indemnification" (*McCarthy,* 17 NY3d at 378 [2011]), Jurasits testified

that a project manager was on-site every day. As someone from Sato/Flag was on site-every day and "liability can only be imposed against a party who exercises actual supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] citing *McCarthy*, 17 NY3d at 376, 378 [2011]), it cannot be said at this juncture that Sato/Flag was not negligent.

Further, DeLorenzo's testimony that he believed the shed was designed to handle the capacity of storing scaffolding on top, coupled with Auquilla's testimony that Frank Jurasits of Sato/Flag gave him permission to store scaffolds atop the shed, indicate that Sato/Flag's actions could have contributed to the shed collapse, as Odigie the engineer testified that the shed was not designed to bear a load. In addition, Jurasits testified that he was aware that a portion of the shed on the Broadway side remained after the alleged dismantling and brought it to DeLorenzo's attention, but the record is devoid of any steps taken by Sato/Flag to have it taken down.

With respect to Rock, Singh testified that Rock certified that the sidewalk shed was constructed according to DOB code and that Rock had a responsibility to inspect the sidewalk sheds every six months. He further testified that when Sato/Flag informed Rock that the shed needed to be dismantled, Rock did not have a representative visit the site, contact an engineer, or even alert the DOB. Rather, someone from Rock contacted Menashe of RHG to send manpower to dismantle the shed without any additional instruction. As Odigie testified that Rock's proposed modifications of the shed needed to be approved by an engineer to ensure structural stability and sent to the DOB, neither of which occurred, the dismantling could have impacted the shed's stability.

Furthermore, RHG raises triable issues of fact regarding Sato/Flag's notice of the shed's instability, as Auquilla testified that he informed Jurasits of several loose screws from the shed

and Ramzan testified that he made complaints to Sato/Flag about portions of the Broadway side of the shed being loose. As issues of fact remain, summary judgment as to Sato/Flag and Rock's common-law indemnification claims and RHG's motion to dismiss the common-law indemnity claim must be denied.

Failure to Procure Insurance

It is well settled that "[a] party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2nd Dept 2011] citing *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 738 [2nd Dept 2003]). Here, RHG provided Rock with a Certificate of Liability representing that Rock was added as an additional insured on a Commercial General Liability and Excess Liability insurance policy, both of which were issued by Lloyd's of London. Sato/Flag and Rock argue that because Lloyd's of Londer refused to accept tender of the claim, that RHG did not properly procure insurance. However, a breach of contract does not exist where, as here, RHG "fulfilled its obligation to procure proper insurance" (*Martinez v Tishman Const. Corp.*, 227 AD2d 298, 299 [1st Dept 1996]), and the insurer's refusal to accept tender of the claim "does not alter this conclusion" (*Perez v Morse Diesel Intern., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]). Therefore, Sato/Flag and Rock's claim against RHG for failing to procure insurance is denied and RHG's motion to dismiss the claim is granted.

Accordingly, it is hereby

ORDERED that defendants Sato/Flag and Rock's motion seeking summary judgment pursuant to CPLR 3212 on its contractual indemnification, common law indemnity, and failure to procure insurance claims is denied in its entirety; and it is further

ORDERED that defendant RHG's cross-motion seeking summary judgment pursuant to CPLR 3212 to dismiss the crossclaims asserted against it by defendants Sato/Flag and Rock is granted to the extent that the contractual indemnity and failure to procure insurance claims are dismissed, and the motion is otherwise denied.

The foregoing constitutes the Decision and Order of the Court.

12/9/2025
DATE

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