Perez-Villegas v 737 Third Ave. LLC
2025 NY Slip Op 35297(U)
June 27, 2025
Supreme Court, Queens County
Docket Number: Index No. 707660/2020
Judge: Peter J. Kelly
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NEW YORK SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PETER J. KELLY IA Part 2
Justice

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JUNY PEREZ-VILLEGAS, Index No.: 707660/2020

Plaintiff, Motion Date: 02/26/2025

-against- Motion Seq. No. 1 & 2

737 THIRD AVENUE LLC, SAGE REALTY CORPORATION, THE WILLIAM KAUFMAN ORGANIZATION LTD, and WKO DESIGN BUILD LLC,

Defendants.

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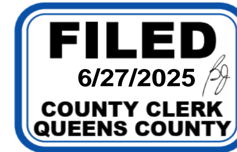
737 THIRD AVENUE LLC, SAGE REALTY CORPORATION, THE WILLIAM KAUFMAN ORGANIZATION LTD and WKO DESIGN BUILD LLC,



Third-Party Plaintiffs,

-against-

DEMO PLUS CONTRACTING, CORP.,

Third-Party Defendant.

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The following numbered papers read on these motions: (1) the motion by the defendants/third-party plaintiffs 767 Third Avenue LLC, Sage Realty Corporation, The William Kaufman Organization LTD, and WKO Design Build LLC, (a) for summary judgment dismissing the complaint insofar as asserted against them, and (b) for summary judgment on their third-party claims for contractual and common-law indemnification asserted against the third-party defendant Demo Plus Contracting Corp.; and (2) the separate motion by the third-party defendant Demo Plus Contracting Corp., (a) for summary judgment dismissing the complaint, and (b) for summary judgment dismissing the third-party claims for contractual and common-law indemnification asserted against it.

	Papers Numbered
Seq #1	
Notice of Motion – Affidavits – Exhibits	EF 27-46

[* 1]

Answering Affidavits – Exhibits .... EF 67-69
EF 73-74
Reply Affidavits .... EF 75
Seq #2
Notice of Motion – Affidavits – Exhibits .... EF 47-62
Answering Affidavits – Exhibits .... EF 63
EF 70-71
Reply Affidavits .... EF 65, 72

Upon the foregoing papers it is ordered that the motions are consolidated for the purpose of a single order and are determined as follows:

This Labor Law action is based on injuries that the plaintiff allegedly sustained on June 8, 2019, while working on a construction project in Manhattan. The plaintiff was a cleaner for the third-party defendant Demo Plus Contracting Corp (Demo Plus) and testified as follows: In the days leading up to her accident, the plaintiff and her co-workers were removing sheetrock and demolition debris from the fourth floor of a building. At job sites, Demo Plus performed both demolition and cleanup, but the plaintiff indicated that her role was limited to removing debris from center piles around the work site and placing the debris into demo carts located throughout the site. According to the plaintiff, she was carrying a large piece of sheetrock from the center pile to the demo cart when her left foot struck a piece of metal, causing her to trip and sustain injuries to her back and lower body. The plaintiff indicated that she did not observe this piece of metal when she made her previous trip between the center pile and the demo cart.

The plaintiff subsequently commenced this action against the defendants/third-party plaintiffs 767 Third Avenue LLC (767 LLC), Sage Realty Corporation (Sage Realty), The William Kaufman Organization LTD (Kaufman), and WKO Design Build LLC (WKO), asserting causes of action for common-law negligence and alleged violations of Labor Law §§ 200, 240 (1), and 241 (6). 767 LLC, Sage Realty, Kaufman, and WKO (collectively the defendants) answered the complaint and commenced a third-party action against Demo Plus, asserting, among other claims, causes of action for contractual and common-law indemnification. Discovery having been completed, the defendants and Demo Plus now separately move for summary judgment.

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]). Once the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts

to the opposing party, who "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party (*see Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). A moving party's failure to meet its prima facie burden requires denial of the motion, regardless of the sufficiency of the papers submitted in opposition (*see Winegrad v City of New York*, 64 NY2d 851, 853 [1985]).

The defendants' motion

In support of their motion, the defendants submit, among other things, the pleadings, the transcripts from the depositions of the plaintiff, the transcript from the deposition of Dermot O'Sullivan, the vice president and general manager for WKO, the transcript from the deposition of Yvette Rivera, a property operations manager for Sage Realty, the transcript from the deposition of Bennedetto DiPasquale, a former project manager for Demo Plus, the subcontract between WKO and Demo Plus (the Demo Plus subcontract), and a hold harmless agreement executed by Demo Plus's principal (the hold harmless agreement). Based on these submissions, the defendants assert that they are entitled to summary judgment dismissing the plaintiff's Labor Law § 240 (1) claim because her accident was not caused by a gravity-related risk. In addition, the defendants assert that they are entitled to summary judgment dismissing the plaintiff's Labor Law § 241 (6) claim because each of the alleged Industrial Code provisions which form the basis for the plaintiff's claim are either inapplicable to her accident or were not violated. Finally, the defendants contend that the plaintiff's Labor Law § 200 and common-law negligence claims are subject to dismissal because they did not control the means and methods of the plaintiff's work, and they lacked actual or constructive notice of the piece of metal which caused her accident.

Turning to their third-party claims, the defendants argue that they are entitled to summary judgment on their contractual indemnification claim against Demo Plus because the Demo Plus subcontract and hold harmless agreement contain indemnification provisions that were triggered by the plaintiff's accident. Similarly, the defendants argue that because they were not negligent, they are also entitled to summary judgment on their third-party common-law indemnification claim against Demo Plus.

Labor Law § 240 (1)

The branch of defendant's motion to dismiss the cause of action related to Labor Law § 240 (1) is granted without opposition as such section is inapplicable to the facts of the matter.

Labor Law § 241 (6)

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate safety measures to persons employed in or lawfully frequenting all areas in which construction, excavation or demolition work is being performed (*Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253, 1258 [2d Dept 2019], *see Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept 2015]). "To establish liability under Labor Law § 241 (6), a plaintiff or a claimant must demonstrate that his [or her] injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case" (*Aragona v State of New York*, 147 AD3d 808, 809 [2d Dept 2017]).

In her complaint and bills of particulars, the plaintiff bases the Labor Law § 241 (6) cause of action on alleged violations of sections 23-1.5, 23-1.7 (b), (d), (e), and (f), 23-1.8 (c), 23-1.11, 23-1.15, 23-1.16, 23-1.22 (c), 23-1.28, 23-2.1 (a) (1) and (2), 23-3.3 (b) and (c) (1), 23-5.1, 23-5.3 (d) and (e), and 23-6.1 (j) of the Industrial Code, as well as various OSHA regulations.

As to the first alleged violation, the defendants correctly contend that section 23-1.5 is too general to support a cause of action under Labor Law § 241 (6) (*see Gomez v 670 Merrick Rd. Realty Corp.*, 189 AD3d 1187, 1191 [2d Dept 2020]; *Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 1091 [2d Dept 2016]; *Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221, 1224 [2d Dept 2011]). Furthermore, the plaintiff's account of how her accident occurred is sufficient to demonstrate, prima facie, that sections 23-1.7 (b), (d), (e) (1), and (f), 23-1.8 (c), 23-1.11, 23-1.15, 23-1.16, 23-1.22 (c), 23-1.28, 23-2.1 (a) (1) and (2), 23-3.3 (b) and (c) (1), 23-5.1, 23-5.3 (d) and (e), and 23-6.1 (j) are inapplicable to her accident (*see Turgeon v Vassar Coll.*, 172 AD3d 1134, 1135 [2d Dept 2019]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]; *Karwowski v Grolier Club of City of New York*, 144 AD3d 865, 867 [2d Dept 2016]).

In regard to the alleged violation of section 23-1.30, it appears that the defendants do not directly address the alleged insufficiency of the illumination required to work in construction, demolition and excavation operations. Instead, defendants appear to be claiming that the proximate cause of plaintiff's injuries was plaintiff's failure to monitor her surroundings and unrelated to the efficacy or

inefficacy of the lighting conditions. In any event, the plaintiff's testimony regarding the lack of interior or temporary lighting raises an issue of fact as to whether a violation of section 23-1.30 contributed to her accident (*see McKinney v Empire State Dev. Corp.*, 217 AD3d 574, 576 [1st Dept 2023]; *Lucas v KD Dev. Const. Corp.*, 300 AD2d 634, 635 [2d Dept 2002]).

Turning to the alleged violation of section 23-1.7 (e) (2), the defendants contend that this provision is inapplicable because the piece of metal that the plaintiff tripped over was integral to her work, as she was actively cleaning and removing debris from the work site. Indeed, where an object that a plaintiff tripped over is an "integral part of the construction," section 23-1.7 (e) (2) is inapplicable (*see O'Sullivan v IDI Const. Co., Inc.*, 7 NY3d 805, 806 [2006]). Here, Plaintiff was part of a team that was actively removing all of the demolition debris from the site and describes the object that she tripped on as being "on the floor, like it was just thrown." Thus, even when viewing the alleged accident in the light most favorable to the plaintiff, it appears that whatever was tripped on was an integral part of the construction, as it was consistent with the work being performed by the plaintiff (*see Kefaloukis v Mayer*, 197 AD3d 470, 472 [2d Dept 2021]; *Cody v State*, 82 AD3d 925, 928 [2d Dept 2011]).

Finally, the defendants' moving papers do not address the alleged violation of 23-1.7 (a) (2). The defendants therefore failed to meet their prima facie burden with respect to this provision.

Based on the manner in which the defendants met their prima facie burden, the plaintiff is only required to oppose so much of this branch of the defendants' motion which addressed the alleged violations of sections 23-1.7 (b), (d), (e) (1), and (f), 23-1.8 (c), 23-1.11, 23-1.15, 23-1.16, 23-1.22 (c), 23-1.28, 23-2.1 (a) (1) and (2), 23-3.3 (b) and (c) (1), 23-5.1, 23-5.3 (d) and (e), and 23-6.1 (j) of the Industrial Code (*see Winegrad*, 64 NY2d at 853). Yet as is relevant here, the plaintiff's opposition only addresses sections 23-1.7 (e) (1) and 23-2.1 (a) (1) and (2). The plaintiff's argument as to these provisions focuses on whether the area where her accident occurred is a "passageway" within the meaning of these provisions. However, this argument is belied by the plaintiff's own testimony, as she explained that her fall occurred in one of the rooms on the fourth floor of the building. This argument is therefore insufficient to raise an issue of fact.

<u>Labor Law § 200 and Common-Law Negligence</u>

Defendants' submissions were sufficient to establish that they did not supervise or control the manner of plaintiff's work nor that they created or had prior notice of a dangerous conditions which caused the accident.

The plaintiff does not oppose this branch of the defendants' motion. The defendants are therefore entitled to summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims.

The third-party claim for contractual indemnification

A party's right to contractual indemnification is dependent on the specific language of the contract (*see O'Donnell v A.R. Fuels, Inc.*, 155 AD3d 644, 645 [2d Dept 2017]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]; *see Shea v Bloomberg, L.P.*, 124 AD3d 621, 622 [2d Dept 2015]). "In addition, 'a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor'" (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2d Dept 2010], quoting *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]). Here, the defendants rely on two documents in support of their contractual indemnification claim against Demo Plus. First, the Demo Plus subcontract required Demo Plus to:

> "indemnify, defend and hold harmless [WKO] and all partners, members, principals, officers, directors, shareholders, lenders, trustees, employees and Agents of the foregoing from and against all liabilities, damages, and penalties, including reasonable legal and professional costs and fees, arising out of, or in connection with any act, negligence, omission or breach of any of the terms of this Agreement by [Demo Plus], its Agents, servants, employees, sub-contractors or independent contractors (except for losses arising from grossly negligent actions of [WKO])" (NY St Cts Elec Filing [NYSCEF] Doc No. 40).

Pursuant to the hold harmless agreement, Demo Plus agreed to:

> "indemnify and defend and hold harmless [Sage Realty] on its behalf of all parties or entities having an ownership interest in the premises: . . . 767 Third Avenue, New York NY . . . from and against any and all losses, suits, actions . . . 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 [Demo Plus], or of anyone acting under its direction or control or in connection with, arising out of or related to the performance of the Work by [Demo Plus] or the services rendered by [Demo Plus] to or on behalf of or for the

benefit of the Owner or arising out of or related to this Agreement " (NY St Cts Elec Filing [NYSCEF] Doc No. 41).

In the defendants' view, these documents, when read together, require Demo Plus to defend and indemnify the defendants against the plaintiff's claims. The defendants further contend that because this indemnification language in the Demo Plus subcontract and hold harmless agreement is broad, the plaintiff's accident triggered the indemnification provisions therein.

The court does not agree that the Demo Plus subcontract and hold harmless agreement require Demo Plus to defend and indemnify each of the defendants. "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]; *see Torres v Accumanage, LLC*, 210 AD3d 718, 720 [2d Dept 2022]). Here, the Demo Plus subcontract only refers to defendant WKO Design Build LLC or its agents as parties to be indemnified. Similarly, the hold harmless agreement only refers to Sage Realty as a party to be indemnified. In the absence of any evidence which expressly places an affirmative obligation on Demo Plus to defend and indemnify 767 LLC and Kaufman, these defendants are not entitled to summary judgment on their contractual indemnification claim against Demo Plus (*see Leon-Rodriguez v R.C. Church of Saints Cyril and Methodius*, 192 AD3d 883, 887 [2d Dept 2021]; *Zukowski v Powell Cove Estates Home Owners Assn., Inc.*, 187 AD3d 1099, 1102 [2d Dept 2020]).

However, the defendants' submissions are sufficient to establish prima facie entitlement to summary judgment on the third-party contractual indemnification claims asserted by WKO and Sage Realty. Based on the plaintiff's testimony regarding the work she was performing prior to her accident, the instructions she received from her foreman, and the manner in which her accident occurred, the court finds that the broad indemnification provisions in the Demo Plus subcontract and hold harmless agreement were triggered by the plaintiff's accident (*see Skerrett v LIC Site B2 Owner, LLC*, 199 AD3d 956, 959 [2d Dept 2021]). Moreover, by demonstrating prima facie entitlement to summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims, the defendants also demonstrated that WKO and Sage Realty are free from negligence.

To the extent that Demo Plus opposes this branch of the defendants' motion, its submissions are insufficient to raise an issue of fact. Demo Plus first asserts that the indemnification provisions at issue only contain a negligence trigger. The court disagrees, as the terms of the Demo Plus subcontract and hold harmless agreement do not limit indemnification to a finding of negligence on the part of Demo Plus. Although the Demo Plus subcontract includes Demo Plus's negligence as a potential

trigger for indemnification of WKO, it also includes any act or omission of Demo Plus's employees as additional potential triggers. Similarly, the hold harmless agreement refers to any action, omission, fault, or negligence arising out of or related to Demo Plus's work. Insofar as the plaintiff was a Demo Plus employee performing work pursuant to the Demo Plus subcontract and hold harmless agreement when her accident occurred, her accident triggered the indemnification provisions set forth therein.

Demo Plus also appears to assert that there is an issue of fact as to whether WKO and Sage Realty were negligent. However, this argument contradicts Demo Plus's previous contentions, and in any event, lacks merit. "'[T]he [party] seeking [contractual] indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability'" (*Winter v ESRT Empire State Bldg., LLC*, 201 AD3d 844, 845 [2d Dept 2022] [internal quotation marks omitted], quoting *Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 616 [2d Dept 2011]). In moving for summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims, the defendants demonstrated that WKO and Sage Realty were free from negligence. Thus, to properly oppose the branch of the defendants' motion for summary judgment on WKO and Sage Realty's third-party contractual indemnification claim and raise an issue of fact as to WKO and Sage Realty's negligence, Demo Plus was also required to oppose the branch of the defendants' motion which sought summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims. Critically, however, Demo Plus failed to do so. To the contrary, in support of its separate motion for summary judgment, Demo Plus agreed with the defendants' contention that the plaintiff's Labor Law § 200 claim asserted against the defendants is subject to dismissal (*see* NY St Cts Elec Filing [NYSCEF] Doc No. 65). This, in effect, is an implicit concession that the defendants, including WKO and Sage Realty, were not negligent.

In any event, Demo Plus fails to point to any evidence which would demonstrate or otherwise suggest that WKO and Sage Realty were negligent. Demo Plus's submissions are therefore insufficient to raise an issue of fact.

The third-party claim for common-law indemnification

"In order to establish a claim for common-law indemnification, a party must prove not only that it was not negligent, but also that the proposed indemnitor's actual negligence contributed to the accident, or, in the absence of any negligence, that the indemnitor had the authority to direct, supervise, and control the work giving rise to the injury" (*Mohan v Atlantic Ct., LLC*, 134 AD3d 1075, 1078-1079 [2d Dept 2015]). Here, in support of this branch of their motion, the defendants merely assert that they were not negligent. The defendants do not argue that Demo Plus's

negligence contributed to the plaintiff's accident. Nor do the defendants directly assert that Demo Plus had the authority to direct, supervise, and control the work giving rise to the plaintiff's injury. This branch of the defendants' motion is therefore denied, regardless of the sufficiency of Demo Plus's opposition papers (*see Winegrad*, 64 NY2d at 853).

Demo Plus's motion

In support of its separate motion, Demo Plus submits, among other things, the pleadings and the transcripts from the depositions of the plaintiff, O'Sullivan, Rivera, and DiPasquale. Based on these submissions, Demo Plus adopts the arguments advanced by the defendants in support of the branch of their motion for summary judgment dismissing the plaintiff's Labor Law §§ 240 (1), 241 (6) and 200 claims. Demo Plus also argues that the plaintiff's Labor Law § 200 and common-law negligence claims are subject to dismissal because the piece of metal that caused her accident was an open and obvious condition. Demo plus also contends that it is entitled to summary judgment dismissing the defendants' third-party claims for contractual and common-law indemnification because dismissal of the plaintiff's claims against the defendants renders the defendants' third-party claims moot.

The plaintiff's claims

As an initial matter, because the defendants are entitled to summary judgment dismissing the plaintiff's Labor Law §§ 240 (1) and 200 claims, analysis of Demo Plus's contentions on these claims is unnecessary. Moreover, although certain portions of the plaintiff's Labor Law § 241 (6) claim remain, further analysis of this claim is unnecessary. Demo Plus's moving papers merely incorporate the arguments raised by the defendants on the corresponding branch of their separate motion for summary judgment and fail to set forth an independent basis for summary judgment.

The third-party claims for contractual indemnification

To establish prima facie entitlement to summary judgment dismissing a claim for contractual indemnification, a moving party must show that it was not contractually obligated to indemnify the party asserting the indemnification claim (*see Assevero v Hamilton & Church Props., LLC*, 131 AD3d 553, 558 [2d Dept 2015]). This may be accomplished by showing that the indemnification clause at issue was not triggered or is otherwise inapplicable under the circumstances (*see Tolpa v One Astoria Sq., LLC*, 125 AD3d 755, 756 [2d Dept 2015]; *cf. Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 995-996 [2d Dept 2009]).

In support of this branch of its motion, Demo Plus merely asserts that the defendants "have failed to set forth the requisite criteria for summary judgment on the issue of indemnification" (NY St Cts Elec Filing [NYSCEF] Doc No. 49). As noted previously, pointing to gaps in the defendants' proof, rather than affirmatively demonstrating the merits of Demo Plus's defenses, is insufficient to meet Demo Plus's prima facie burden with respect to the third-party contractual indemnification claim (*see Iannucci*, 161 AD3d at 960).

Nevertheless, upon a review of the record (*see* CPLR 3212 [b]), the court finds that summary judgment dismissing the third-party claim for contractual indemnification is warranted in part, but the court relies upon reasoning different from the arguments set forth in support of Demo Plus's motion. As noted previously, neither the Demo Plus subcontract nor the hold harmless agreement expressly require Demo Plus to indemnify 767 LLC or Kaufman. Thus, to the extent that 767 LLC and Kaufman assert contractual indemnification claims against Demo Plus, these claims are subject to dismissal (*see KTG Hosp., LLC v Cobra Kitchen Ventilation, Inc.*, 201 AD3d 710, 712 [2d Dept 2022]).

<u>The third-party claim for common-law indemnification</u>

To the extent that Demo Plus seeks summary judgment dismissing the defendants' third-party common-law indemnification claim, Demo Plus's moving papers do not substantively address this claim. This branch of Demo Plus's motion is therefore denied, regardless of the sufficiency of the defendants' opposition papers (*see Winegrad*, 64 NY2d at 853).

Accordingly, it is

ORDERED that the branch of the defendants' motion for summary judgment dismissing the plaintiff's Labor Law §§ 240 (1), 200, and common-law negligence claims is granted; and it is further,

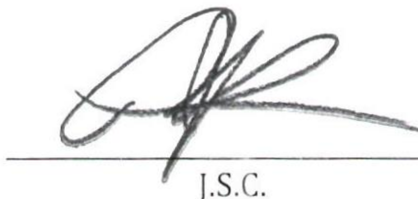
ORDERED that the branch of the defendants' motion for summary judgment dismissing so much of the plaintiff's Labor Law § 241 (6) claim asserted against them as is predicated on alleged violations of sections 23-1.7 (b), (d), (e) (1), and (f), 23-1.8 (c), 23-1.11, 23-1.15, 23-1.16, 23-1.22 (c), 23-1.28, 23-2.1 (a) (1) and (2), 23-3.3 (b) and (c) (1), 23-5.1, 23-5.3 (d) and (e), and 23-6.1 (j) of the Industrial Code is granted; and it is further,

ORDERED that the branch of the defendants' motion for summary judgment on WKO and Sage Realty's third-party claim for contractual indemnification is granted; and it is further,

ORDERED that the branch of Demo Plus's motion for summary judgment dismissing 767 LLC and Kaufman's third-party claim for contractual indemnification asserted against it is granted; and it is further,

ORDERED that all other relief not expressly granted herein is denied.

Dated: June 27, 2025



J.S.C.