SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **05M**

Justice

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ROBERT DELUISE,

Plaintiff,

- v -

333 EAST 46TH ST. APARTMENT CORP., ORSID REALTY CORP.,

Defendant.

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INDEX NO. 151481/2022

MOTION DATE 01/12/2026

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

333 EAST 46TH ST. APARTMENT CORP., ORSID REALTY CORP.

Plaintiff,

-against-

333 EAST 46TH ST. PARKING CORP.

Defendant.

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Third-Party
Index No. 595836/2023

The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion for SUMMARY JUDGMENT.

Third-Party Defendant 333 East 46th Parking Corp. ("Parking Corp.") moves for summary judgment pursuant to CPLR § 3212. Parking Corp. seeks an order dismissing the third-party complaint in its entirety, with prejudice, and awarding it attorneys' fees, costs, and disbursements incurred in this action, as provided by the commercial lease between Parking Corp. and Defendant/Third-Party Plaintiff 333 East 46th St. Apartment Corp. ("Apartment Corp."). Defendants/Third-Party Plaintiffs 333 East 46th St. Apartment Corp. and Orsid Realty Corp. (collectively, "Third-Party Plaintiffs") oppose the motion.

BACKGROUND AND PROCEDURAL HISTORY

This personal injury action arises out of a trip-and-fall accident that occurred on July 23, 2021. On that date, Plaintiff Robert Deluise ("Plaintiff") – who was at the time an employee of Third-Party Defendant Parking Corp. – allegedly tripped and fell due to a broken or uneven condition on the sidewalk abutting the premises at 333 East 46th Street, New York, New York. The premises is a mixed-use building owned by Apartment Corp. and managed by Orsid Realty

Corp.. Parking Corp. leases and operates the building's ground-floor parking garage pursuant to a written commercial lease.

Plaintiff commenced this action against Apartment Corp. and Orsid Realty Corp. (the building's owner and managing agent), alleging that they were negligent in maintaining the sidewalk. It is undisputed that Plaintiff did not assert any direct claim against his employer, Parking Corp., as Plaintiff's exclusive remedy against his employer is provided by the Workers' Compensation Law. In response to the lawsuit, Apartment Corp. and Orsid Realty Corp. commenced a third-party action against Parking Corp. The third-party complaint seeks common-law contribution and indemnification, as well as contractual indemnification and damages for breach of the lease (including failure to procure insurance and an obligation to pay attorneys' fees).

The parties proceeded with discovery. Plaintiff served a Bill of Particulars on January 16, 2024, and depositions were conducted. Plaintiff was deposed on October 29, 2024, and a representative of the Defendants/Third-Party Plaintiffs (the building superintendent) was deposed on May 2, 2025. Notably, the deposition of Third-Party Defendant Parking Corp. was never taken – Third-Party Plaintiffs waived that deposition and filed the note of issue certifying discovery as complete. Third-Party Plaintiffs did not move to vacate or extend the note of issue within the applicable time, and the case was placed on the trial calendar.

Parking Corp. now moves for summary judgment. The motion was made after the filing of the Note of Issue and is timely. The motion seeks to dismiss all claims against Parking Corp. in the third-party action, and also requests an award of attorneys' fees and costs pursuant to a prevailing-party provision in the lease. Third-Party Plaintiffs oppose the motion, arguing that material issues of fact preclude summary judgment and that Parking Corp.'s failure to appear for deposition warrants denial or postponement of the motion. Parking Corp. submitted a reply. The motion is now before the court for decision.

ARGUMENTS

Parking Corp. argues that it bears no liability for Plaintiff's sidewalk accident as a matter of law. It asserts that under New York City Administrative Code § 7-210, the owner of real property (here, Apartment Corp.) — not a commercial tenant like Parking Corp. — has the duty to maintain the abutting sidewalk in a safe condition. Parking Corp. contends it had no statutory duty to repair the sidewalk flag where Plaintiff fell, and that nothing in its lease obligated it to maintain or repair the public sidewalk beyond a limited duty to remove snow and ice at the garage entrances. In support, Parking Corp. submits the lease, which defines the "Premises" as the interior garage only, and contains no provision imposing on the tenant responsibility for structural sidewalk maintenance. To the contrary, the lease expressly requires only that the tenant remove snow/ice from the sidewalk immediately adjacent to the garage entrances, and imposes no general duty to repair the sidewalk surface.

Parking Corp. further argues that the location of the alleged defect is not within its leased Premises nor even directly in front of the garage entrance, but rather in front of a different portion of the building. In the summary judgment record, both Plaintiff and Third-Party Plaintiffs' own witness (building superintendent Ruben Cuello) testified unequivocally that Plaintiff's accident

occurred on a section of sidewalk between a city street tree and the retaining wall of the building's residential portion – *not* in front of the garage driveway or entrance used by Parking Corp. Parking Corp. also provides photographs of the site marked at the depositions confirming the location. Given these facts, Parking Corp. asserts it neither controlled nor had any responsibility for the sidewalk area where Plaintiff fell. It emphasizes that it did not create the alleged sidewalk defect and made no "special use" of that portion of the sidewalk (such as installing any structure or feature there for its benefit). Absent proof of affirmative negligence by the tenant, Parking Corp. contends it cannot be held liable in tort for a sidewalk defect on the public way.

In addition, Parking Corp. contends that Third-Party Plaintiffs' common-law indemnification and contribution claims are barred by the Workers' Compensation Law. It is undisputed that Plaintiff was Parking Corp.'s employee acting in the course of his employment when the accident occurred. Under Workers' Compensation Law § 11, an employer may not be impleaded for contribution or indemnity due to an employee's injuries, except in the case of a grave injury or where there is an express written indemnification agreement. (No grave injury is alleged here). Parking Corp. notes that Plaintiff's inability to sue his employer directly is precisely why Plaintiff only sued the owner and managing agent. Thus, to the extent Third-Party Plaintiffs seek common-law contribution or indemnification from Parking Corp., those claims are statutorily barred.

With respect to contractual obligations, Parking Corp. acknowledges the lease contains an indemnification clause, but argues it is not triggered under the circumstances of this accident. Parking Corp. maintains that the indemnity provision (Section 23.9 of the lease) requires the tenant to indemnify the landlord only for liabilities connected to the tenant's use or occupancy of the "Premises" or arising from acts or omissions of the tenant. Parking Corp. argues that an alleged sidewalk defect in an area of the sidewalk outside the garage's entrances does not arise from the use of the leased Premises and was not caused in any way by the tenant. Accordingly, Parking Corp. contends it has no contractual duty to indemnify Apartment Corp. or Orsid for this incident. Parking Corp. also points out that it complied with the lease's insurance procurement clause by maintaining the required liability insurance policies covering the garage business (copies of which are in the record). Therefore, Third-Party Plaintiffs' cause of action for failure to procure insurance is moot or without merit, as Parking Corp. did obtain the agreed-upon coverage.

Finally, Parking Corp. asserts that Third-Party Plaintiffs cannot avoid summary judgment by complaining about the lack of a deposition of Parking Corp.'s witness. Parking Corp. notes that Third-Party Plaintiffs never deposed the Parking Corp. (despite naming it as a third-party defendant in 2023) and, in fact, affirmatively waived any deposition of Parking Corp. when they allowed the case to be certified for trial. At no time did Third-Party Plaintiffs move to compel a deposition or to stay summary judgment pending further discovery. By failing to pursue the deposition and by filing the note of issue, Third-Party Plaintiffs confirmed that discovery was complete. Thus, Parking Corp. argues, Third-Party Plaintiffs cannot now claim that the motion is premature under CPLR § 3212(f) or that they are entitled to additional discovery. In any event, Parking Corp. contends that Third-Party Plaintiffs have not identified any material evidence that further discovery would produce, and that the existing record is sufficient to determine the motion.

In sum, Parking Corp. argues it has established a prima facie entitlement to judgment as a matter of law on all third-party claims. It requests that the third-party complaint be dismissed in its entirety, and that Parking Corp. be awarded its attorneys' fees and costs pursuant to the lease's prevailing-party provision (Section 23.9.2 of the lease). Parking Corp. points to a lease clause stating that if either party institutes any legal action in connection with the lease, the *prevailing party* is entitled to recover its reasonable attorneys' fees and expenses. Having been forced to defend this third-party action, Parking Corp. seeks an award of fees should it prevail on this motion.

Third-Party Plaintiffs oppose the motion, arguing that Parking Corp. has not met its burden for summary judgment and that genuine issues of material fact require a trial. First, Third-Party Plaintiffs contend that the exact location of Plaintiff's fall – and whether it was in front of the garage or elsewhere – is disputed by the evidence. In support, they highlight a Workers' Compensation Board "First Report of Injury" form pertaining to Plaintiff's accident. This contemporaneous report (apparently prepared in connection with Plaintiff's workers' compensation claim) describes the incident as follows: *"tripped on broken sidewalk in front of the garage"* (emphasis in original). Third-Party Plaintiffs argue that this document flatly contradicts Parking Corp.'s characterization of the accident location. If, as the First Report indicates, Plaintiff tripped on a defective sidewalk *in front of the garage*, then the defect may have been within or immediately adjacent to Parking Corp.'s leased area. Third-Party Plaintiffs assert that under those circumstances, the lease's indemnification clause would be triggered, obligating Parking Corp. to indemnify the owner for the claim. At the very least, they contend, the conflict between the deposition testimony (placing the fall away from the garage entrance) and the Workers' Compensation record (stating it was "in front of the garage") raises a triable issue of fact as to where the accident occurred. Because the accident location is critical to determining Parking Corp.'s responsibility, Third-Party Plaintiffs argue that summary judgment is inappropriate. They emphasize that Parking Corp., as the movant, *failed to address or even acknowledge* the Workers' Compensation report in its moving papers. In their view, by ignoring evidence favorable to Third-Party Plaintiffs, Parking Corp. has not carried its prima facie burden of eliminating all material factual issues.

Second, Third-Party Plaintiffs contend that the motion **is** procedurally premature and that Parking Corp.'s non-compliance with discovery should preclude summary judgment. They argue that Parking Corp. "willfully failed" to produce any witness for a deposition despite due demand. Third-Party Plaintiffs assert that they were deprived of the opportunity to question Parking Corp. (for example, about who completed the Workers' Compensation form and under what basis that form stated the accident was in front of the garage). They cite CPLR § 3212(f) and Appellate Division, First Department precedents for the proposition that summary judgment should be denied or deferred when essential facts may exist but cannot yet be presented because the moving party has not been deposed. Third-Party Plaintiffs point out that the identity and knowledge of the person who filled out the "First Report of Injury" (presumably an agent of Parking Corp., the employer) is exclusively within Parking Corp.'s control. Without deposing Parking Corp., they argue, they have no way to explore this evidence or other facts concerning the accident. They contend that this is "exactly the type of instance" where further discovery is warranted before granting summary relief. Third-Party Plaintiffs thus urge the Court to deny the motion as premature or, alternatively, to adjourn it to allow Parking Corp.'s deposition.

Third-Party Plaintiffs also respond to Parking Corp.'s legal arguments. They acknowledge that Workers' Compensation Law § 11 generally bars common-law indemnification or contribution claims against an employer absent a grave injury. However, they note that in this case their primary theory against Parking Corp. is contractual indemnification pursuant to the lease. WCL § 11 expressly permits a third-party action against an employer where the employer had a written agreement to indemnify the claimant. Here, such an agreement exists in the lease. Third-Party Plaintiffs argue that if the facts show Plaintiff's accident occurred "in front of the garage" as the First Report states, then the lease's indemnification clause would apply and require Parking Corp. to indemnify Apartment Corp. for any liability to Plaintiff. They contend that Parking Corp. cannot avoid its contractual obligations by artificially narrowing the definition of the "Premises" or the scope of indemnity. In their view, an injury to Parking Corp.'s own employee while walking out of the garage (even on the adjacent sidewalk) is sufficiently connected to the garage's use and occupancy to trigger indemnification. Thus, Third-Party Plaintiffs maintain that a jury should determine whether the accident location falls within the area for which Parking Corp. bore responsibility under the lease.

Additionally, Third-Party Plaintiffs dispute Parking Corp.'s entitlement to attorneys' fees. They argue that Parking Corp. is not a "prevailing party" at this stage, and that its motion for sanctions or fees is baseless. They suggest that if anything, the motion is premature and lacks merit, potentially warranting sanctions against Parking Corp. (Third-Party Plaintiffs cite authority for the proposition that a motion made without basis in law may justify sanctions). In essence, Third-Party Plaintiffs urge that Parking Corp.'s request for fees be denied, and that the case proceed to trial on the contested factual issues of accident location and contractual liability.

In reply, Parking Corp. maintains that Third-Party Plaintiffs have failed to raise a genuine issue of fact. Parking Corp. characterizes the Workers' Compensation "First Report of Injury" as an unsworn hearsay document that cannot create a triable issue in the face of clear, direct evidence to the contrary. Parking Corp. notes that Plaintiff, at his deposition, unambiguously testified that his fall did *not* occur in front of the garage's entrance. Photographs marked by Plaintiff pinpoint the defect's location nearer to the residential portion of the building. Further, Parking Corp. points out that Plaintiff himself denied filing a workers' compensation claim for this accident and stated he never completed any such form. Thus, the "First Report of Injury" was likely filled out by someone other than the Plaintiff, perhaps containing a shorthand or mistaken description of the location. Parking Corp. argues that Third-Party Plaintiffs' "presumptions" based on this form are unfounded and do not contradict the sworn deposition testimony. According to Parking Corp., there is no real conflict in evidence about where the accident occurred – only Third-Party Plaintiffs' speculation based on an unreliable form. Parking Corp. contends that such speculation is insufficient to defeat summary judgment.

Parking Corp. also rebuts the procedural arguments. It emphasizes that Third-Party Plaintiffs had ample opportunity to depose a Parking Corp. representative but chose not to do so. When Plaintiff filed the Note of Issue, Third-Party Plaintiffs did not object or move to strike it for the purpose of taking a late deposition. By acquiescing to the close of discovery, Third-Party Plaintiffs waived any argument that they lack facts needed to oppose the motion. Parking Corp. cites authority that a party's failure to timely move to vacate a note of issue constitutes a waiver

of any outstanding discovery, precluding a claim of prematurity. In sum, Parking Corp. argues that Third-Party Plaintiffs cannot use their own inaction as a sword to delay judgment.

Parking Corp. stands by its prima facie case: that it had no duty to maintain the public sidewalk and no role in causing the defect, and that the lease does not impose liability on it for this accident. It argues that Third-Party Plaintiffs have not produced *admissible* evidence to rebut these showings. Therefore, Parking Corp. asks the Court to grant summary judgment, dismiss all third-party claims, and award Parking Corp. its contractual attorneys' fees as the prevailing party.

DISCUSSION

A party moving for summary judgment bears the heavy burden of establishing a prima facie entitlement to judgment as a matter of law by eliminating all material factual issues from the case. Only if the movant meets this rigorous standard does the burden shift to the opposing party to demonstrate the existence of triable issues of fact requiring a trial. In determining a summary judgment motion, the Court must view the evidence in the light most favorable to the non-moving party and must deny the motion if there is any doubt as to the existence of a triable issue (*see Alvarez v. Prospect Hosp*., 68 NY2d 320, 324 [1986]). However, mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*see Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

Here, Parking Corp. has moved for summary judgment dismissing each cause of action in the third-party complaint. The court will examine, in turn, whether Parking Corp. has made a prima facie showing of entitlement to judgment on each theory of liability, and whether Third-Party Plaintiffs have adduced evidence of any genuine factual dispute. The issues are analyzed in the context of the governing substantive law, including the New York City Administrative Code, the Workers' Compensation Law, and applicable precedent.

I. Duty to Maintain Sidewalk under NYC Administrative Code § 7-210

New York City Administrative Code § 7-210 (the "Sidewalk Law") imposes upon owners of real property a nondelegable duty to maintain the sidewalks abutting their property in a reasonably safe condition. Under § 7-210, an owner of abutting premises (other than certain owner-occupied one- to three-family residences) is liable for personal injuries caused by its failure to maintain the sidewalk, and the City of New York is relieved of such liability. In this case, Defendant 333 East 46th St. Apartment Corp. is the owner of the property abutting the sidewalk where Plaintiff fell. Pursuant to § 7-210, Apartment Corp. (as property owner) had the duty to keep that sidewalk in safe repair. Tenants or lessees of a premises, by contrast, are generally not statutorily charged with this duty (unless they are also owners of the property or have entirely displaced the owner's maintenance responsibility via contract, as discussed below). The First Department has consistently held that a commercial tenant is not liable to a pedestrian injured by a sidewalk defect simply by virtue of its tenancy, where the tenant did not cause the defect or make special use of the sidewalk. Rather, the primary responsibility under the law lies with the landowner (*see Crimlis v. City of New York*, 200 AD3d 555, 556 [1st Dept 2021][commercial tenant was not liable for a pedestrian's trip-and-fall on an abutting sidewalk defect where the tenant "was not responsible for maintaining the sidewalk," did not "create the defect in the sidewalk" and

"made no special use of the sidewalk"]; *O'Brien v. Prestige Bay Dev. Corp*., 103 AD3d 428, 428, [1st Dept. 2013][tenant had no statutory duty to maintain the public sidewalk under § 7-210, and under the lease had no obligation to maintain it; even if the tenant had originally constructed the sidewalk, no liability attached in the absence of a duty to maintain]).

In the case at bar, Parking Corp. has demonstrated that, as a matter of law, it had no statutory duty to maintain the portion of sidewalk where Plaintiff's accident occurred. Parking Corp. is a tenant (garage operator) and not the owner of the property in question. Absent some special circumstance, it is Apartment Corp. (the owner) that bears the nondelegable duty under Administrative Code § 7-210 to keep the sidewalk safe. There is no evidence that Parking Corp. ever undertook a comprehensive duty to maintain the sidewalks so as to step into the owner's shoes. While it is theoretically possible for a lease to obligate a tenant to perform sidewalk maintenance in a manner "so comprehensive and exclusive as to entirely displace the landowner's duty" (*see Hernandez v. NY Prepaid Wireless, LLC*, 206 AD3d 409, 409-10 [1st Dept 2022]), the lease here decidedly does not do so. To the contrary, the lease limits the tenant's sidewalk obligations to snow and ice removal at the garage entrances. Responsibility for structural maintenance and repair of the sidewalk remains with the owner. Indeed, Third-Party Plaintiffs do not allege that Parking Corp. was contractually bound to fix sidewalk defects like the one at issue – nor do they claim that Parking Corp. ever undertook to do so.

Furthermore, Parking Corp. has made a prima facie showing that it did not affirmatively create the sidewalk hazard or cause it through a special use. The record indicates the sidewalk flag was cracked or broken, possibly due to wear or tree root growth, and there is no indication that Parking Corp. or its business operations contributed to that condition. The sidewalk in question was part of the public walkway along East 46th Street, and there is no evidence that Parking Corp. installed anything in that area or derived any special benefit from it beyond common pedestrian use. Third-Party Plaintiffs have not alleged that Parking Corp. made a "special use" of the sidewalk (such as having a private structure or appurtenance on that sidewalk flag); nor is there evidence of any such use. In short, Parking Corp. has negated any basis for finding that it owed a duty in tort to maintain the defect that allegedly caused Plaintiff's fall.

Third-Party Plaintiffs, in opposition, have not raised a triable issue of fact with respect to Parking Corp.'s lack of duty and lack of negligence. Importantly, Third-Party Plaintiffs do not contend that Parking Corp. actually maintained or repaired the sidewalk, nor that it caused the defect through negligent acts. They essentially concede that Apartment Corp., as owner, had the statutory duty to keep the sidewalk safe. Their opposition does not dispute that Parking Corp. itself never fixed sidewalk flags or that it lacked notice of the defect. Instead, their focus is on whether the accident location might be considered part of the area for which Parking Corp. can be held contractually responsible (for indemnification purposes). That is a separate inquiry from the threshold duty analysis. From the standpoint of direct liability to Plaintiff, the uncontroverted facts demonstrate that Parking Corp. owed no duty to repair the public sidewalk defect and was not negligent for Plaintiff's fall. Therefore, to the extent the third-party complaint seeks contribution or indemnification from Parking Corp. based on tort principles (i.e. alleging that Parking Corp.'s negligence contributed to Plaintiff's injuries), Parking Corp. is entitled to summary judgment. Under Administrative Code § 7-210 and the cited case law, the duty to maintain the sidewalk rested on the owner (Apartment Corp.), and Parking Corp. cannot be held liable in tort absent evidence

of its own fault. Accordingly, any common-law contribution claim against Parking Corp. (which would require Parking Corp. to have breached a duty to Plaintiff) must be dismissed as a matter of law.

II. Workers' Compensation Law § 11 Bar to Common-Law Claims

Even if there were any arguable basis for Parking Corp.'s common-law liability (and the court finds there is not), Third-Party Plaintiffs' common-law indemnification and contribution causes of action are independently barred by the Workers' Compensation Law. It is undisputed that Plaintiff was an employee of Parking Corp. injured in the course of his employment. Workers' Compensation Law § 11 provides that in such circumstances, the employer shall not be liable to any third party for contribution or indemnity for the employee's injuries, except where the injuries are "grave" (as defined in the statute) or where the employer had entered into an express written contract of indemnification prior to the accident (*see Workers' Comp. Law* § 11; *Martelle v. City of New York*, 31 AD3d 400, 400 [2d Dept 2006][WCL § 11 "generally bars claims against employers for indemnification or contribution arising out of injuries sustained by an employee in the scope of employment"]). Plaintiff's injuries in this case (described as injuries to both hands from a trip-and-fall) do not qualify as "grave" within the narrow definition of WCL § 11, and Third-Party Plaintiffs do not contend otherwise. Therefore, to the extent the third-party complaint asserts *common-law* indemnification or contribution against Parking Corp., those claims are statutorily barred and must be dismissed on that basis alone.

Third-Party Plaintiffs effectively acknowledge this bar – indeed, their opposition papers confirm that Plaintiff could not sue Parking Corp. directly because of the workers' compensation exclusivity. Their reliance is instead on the contractual indemnification exception in WCL § 11, which permits enforcement of a pre-existing indemnity agreement despite the employer's general immunity. The court will address the contractual indemnification claim in turn. For now, it is sufficient to note that any claims sounding in common-law or implied indemnity/contribution against Parking Corp. cannot stand. Accordingly, Parking Corp.'s motion is granted to the extent of dismissing the third-party causes of action for contribution and common-law indemnification.

III. Contractual Indemnification under the Lease

The central remaining issue is Third-Party Plaintiffs' claim for contractual indemnification pursuant to the lease between Apartment Corp. (landlord) and Parking Corp. (tenant). Section 23.9 of that lease (as referenced in the motion record) contains the tenant's indemnity obligation. In essence, the lease provides that the tenant shall indemnify and hold harmless the landlord (and managing agent, as an "Indemnitee") from and against claims, losses or liability, including attorneys' fees, arising out of the tenant's use or occupancy of the premises or the tenant's acts or omissions, except to the extent caused by the landlord's own negligence or breach of duty. The precise language is quite broad: "Tenant shall not perform or permit any act which may subject any of the Indemnitees to any liability. Tenant shall… indemnify Indemnitees from and against all liabilities, damages, losses, fines, violations, costs and expenses (including attorneys' fees) to the extent not caused by [the Indemnitees' own wrongdoing], arising out of or in connection with the use, occupancy or condition of the Premises or the acts or omissions of Tenant…." (Lease § 23.9, as paraphrased from the record). In a separate section, the lease also stipulates that if either party

brings a legal action "in connection with this Lease," the prevailing party shall be entitled to recover its reasonable attorneys' fees from the other.

The court notes at the outset that contractual indemnification provisions are generally enforceable in New York to the extent that they do not purport to indemnify a party for its own sole negligence (which would violate General Obligations Law § 5-322.1). Here, the indemnity clause appears tailored to exclude indemnification for the landlord's own negligence or failure to uphold its obligations, and there is no argument that the clause is void or against public policy. Moreover, Workers' Compensation Law § 11 expressly allows an employer to assume liability by contract even where common-law liability is barred. Thus, Parking Corp.'s status as Plaintiff's employer does not immunize it from a breach of contract claim for indemnification, provided the contract indeed covers the circumstances of this accident. The critical question is whether the incident that befell Plaintiff falls within the scope of Parking Corp.'s indemnification undertaking in the lease.

Parking Corp. argues that it does not, because the accident occurred outside the demised "Premises" (the garage) and was unrelated to any act or omission by Parking Corp. in its use of the Premises. Third-Party Plaintiffs argue that it does, because the accident happened "in front of the garage" as Plaintiff was engaged in his employment, and thus arose out of Parking Corp.'s occupancy and use of the building's garage. In contract interpretation terms, the dispute is whether Plaintiff's injury "arose out of" the use, occupancy or condition of the leased Premises (or out of Parking Corp.'s acts), or whether it was merely a sidewalk accident unrelated to the garage's operations.

Generally, the phrase "arising out of" in an indemnification clause is understood to mean "originating from, incident to, or having connection with" – and it is given a broad interpretation, focusing on the general nature of the event and whether there is some nexus to the indemnitor's activities (*see Marin v. AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 825 [2d Dept 2009][clause covering injuries "arising out of" tenant's use of premises was triggered by an accident connected to tenant's operations, even if not caused by tenant's negligence]). Thus, it is not necessary that the indemnitor (tenant) be at fault; it is sufficient if the accident was connected to the tenant's business or the condition of the area the tenant is obliged to maintain (as between the parties). However, where an accident is wholly unrelated to the tenant's premises or activities, it falls outside the scope of a tenant's indemnity obligation. For example, in *O'Brien v. Prestige Bay*, cited earlier, the tenant PC Richards had no duty to indemnify the landlord for a sidewalk defect where the lease imposed no sidewalk maintenance duty and the accident was essentially a public sidewalk condition unconnected to the tenant's usage.

In the instant case, the lease defines the "Premises" as the garage space only, and requires the tenant to use it for an automobile parking garage business. The only explicit sidewalk-related duty assumed by the tenant is snow/ice removal at the garage's entrances. The alleged defect here was a broken slab of sidewalk concrete. By all accounts, remedying such a structural defect was the landlord's responsibility, not the tenant's. If Plaintiff's accident occurred at a location on the sidewalk not immediately adjacent to the garage entrance, then it is difficult to see how it "arose out of" the condition of the leased Premises or any act of the tenant. It would be an ordinary sidewalk accident outside the demised area, arising from the landlord's failure to maintain the

sidewalk (a duty that the landlord could not delegate to avoid liability to the public, per § 7-210). In that scenario, Parking Corp.'s indemnity should not apply – indeed, it is reasonable to infer the parties did not intend for the tenant to insure the landlord against the landlord's own sidewalk maintenance failures in front of other parts of the building. On the other hand, if the accident in fact occurred directly in front of the garage (for example, at the interface of the garage driveway and sidewalk), one could argue that the injury had a substantial connection to the tenant's use of the Premises. It was Parking Corp.'s employee, exiting or entering the garage in the course of his work, who fell. The location being "in front of the garage" might be viewed as part of the area that the tenant's invitees and employees traverse to access the business. In such a case, the indemnification clause might be triggered – particularly since the lease required the tenant to clear snow at the entrances, suggesting the parties contemplated the tenant caring for the immediate sidewalk at those points. The indemnity clause obligates the tenant to avoid acts that "subject Indemnitees to liability" and to indemnify the landlord for liabilities arising in connection with the use or condition of the Premises, to the extent not caused by the landlord's own breach. If a trier of fact found that the accident happened at the garage entrance area, one could find that it was connected to the condition or use of the Premises (e.g., if a defective ramp or curb cut used by the garage was involved).

The resolution of this issue, therefore, turns on a fact question: Where exactly did Plaintiff fall, and was that location within the ambit of the garage's entrance area or solely part of the general sidewalk in front of the residential portion of the building? On this motion, Parking Corp. relies on deposition testimony and photographs to assert that the fall occurred closer to the residential side, between a tree and the wall, and not near the garage entrance. Third-Party Plaintiffs counter with the Workers' Compensation form stating "in front of the garage."

Having carefully reviewed the evidentiary submissions, the court finds that Third-Party Plaintiffs have raised a material issue of fact regarding the accident's location. While the Workers' Compensation Board "First Report of Injury" is not a sworn statement by a witness, it is a business record created near the time of the accident that directly conflicts with Plaintiff's deposition description. It cannot be entirely ignored. The form explicitly places the site of the trip-and-fall "in front of the garage," which, if true, could implicate Parking Corp.'s obligations. This contradiction goes to a key factual question underlying the contractual indemnification claim. On a summary judgment motion, the court's role is not to resolve credibility or weigh evidence as would a jury, but simply to determine if a triable issue is presented. Here, there is evidence on each side of the location dispute: Plaintiff's testimony (buttressed by the building superintendent's testimony) on one side, and the WCB report on the other. A reasonable fact-finder could potentially credit one over the other. The WCB report, although hearsay, was submitted by Third-Party Plaintiffs without objection and may be admissible under a business records exception if a proper foundation is laid (for example, through testimony of the employer or its insurer who prepared or filed it). Even if it were deemed inadmissible, the existence of such a record known to the employer raises a factual line of inquiry. The discrepancy here is not a minor one – it is at the heart of whether Parking Corp.'s indemnity is triggered. Under these circumstances, the court concludes that summary judgment on the contractual indemnification claim would be premature. Where there is conflicting evidence or a gap in proof on a material issue, the safer course is to deny summary judgment so that the issue can be resolved at trial (*see, e.g.*, *Cristescu v. Gasparis*, 148 AD3d 669,

670 [2d Dept 2017]][summary judgment inappropriate when movant's proof failed to eliminate questions of fact as to a critical issue, and conflicting evidence remained]).

Parking Corp.'s arguments to neutralize the WCB report – such as Plaintiff's denial of filing a claim and the assertion that the report is mere hearsay – are noted, but they do not entirely dispel the factual controversy. Plaintiff's testimony that he did not personally fill out a workers' compensation claim does not establish that the First Report is false; it simply means someone else (likely his employer or supervisor) completed the accident report. The form's statement could have been based on that person's understanding of where the accident happened. Determining the accuracy of that statement, and the weight it deserves relative to Plaintiff's testimony, will involve credibility determinations that are beyond the scope of summary judgment. The court cannot simply accept Parking Corp.'s characterization that there is "no conflicting evidence" – clearly, Third-Party Plaintiffs have pointed to a conflict. It will be for the trier of fact to decide whether Plaintiff's version is correct, or whether perhaps the accident did occur at a spot that is, in fact, "in front of the garage." In the latter event, a further determination will be needed as to whether the lease's indemnification clause covers that scenario. These are issues unsuitable for resolution as a matter of law on the current record.

Accordingly, Parking Corp.'s motion for summary judgment is denied with respect to the contractual indemnification cause of action. The claim for contractual indemnity will remain pending for adjudication at trial (or other disposition). The court emphasizes that this determination rests on the existence of a factual dispute; it does not represent a finding that the indemnification clause definitely applies. It means only that the issue cannot be resolved one way or the other without weighing evidence.

IV. Breach of Contract to Procure Insurance

The third-party complaint also contains a cause of action alleging that Parking Corp. breached the lease by failing to procure required liability insurance naming the owner/managing agent as insureds. Parking Corp. has demonstrated, through submission of a certificate or policy copies, that it did obtain the required commercial general liability and umbrella insurance coverage as mandated by the lease. Third-Party Plaintiffs in their opposition did not refute this evidence or claim any lack of insurance coverage. In fact, it appears undisputed that Parking Corp. was insured at the relevant time and that Apartment Corp. was an additional insured under that policy (given that Apartment Corp. tendered this claim to Parking Corp.'s insurer). Because Parking Corp. fulfilled its contractual obligation to procure insurance, there is no basis for a breach of contract claim on that point. Therefore, Parking Corp. is entitled to dismissal of the third-party cause of action for failure to procure insurance. That branch of the motion is granted. (To the extent Third-Party Plaintiffs' indemnity claim is ultimately successful, Apartment Corp.'s protection would presumably come via Parking Corp.'s insurer; if the indemnity fails, then no further relief is needed. In either scenario, the insurance procurement claim adds nothing and is rendered academic by the facts).

V. Outstanding Discovery and Procedural Issues

Third-Party Plaintiffs argue that the motion should be denied or held in abeyance due to the absence of a deposition of Parking Corp. Under CPLR § 3212(f), if it appears that facts essential to oppose the motion may exist but cannot then be stated, the court may deny the motion or order a continuance for discovery. However, relief under CPLR § 3212(f) is not warranted where the opposing party has had ample opportunity to pursue discovery and failed to do so, or where the alleged missing facts are not essential or not likely to exist. Here, the court is not persuaded that Third-Party Plaintiffs are entitled to any CPLR § 3212(f) deference. The record reveals that Third-Party Plaintiffs chose to waive a deposition of Parking Corp. during the discovery period. They allowed the note of issue to be filed, representing that discovery was complete, without ever deposing Parking Corp. or moving to compel such deposition. Under these circumstances, Third-Party Plaintiffs have effectively waived their right to complain about the lack of that testimony (*see Manzo v. City of New York*, 62 AD3d 964, 965 [2d Dept 2009][by failing to move to vacate or strike the note of issue within 20 days of its filing, defendants "waived the right to seek further discovery," and summary judgment would not be precluded on grounds of incomplete discovery]). While the court prefers, whenever possible, that parties complete all relevant depositions, one party cannot strategically avoid deposing the other and then use that absence as a shield against summary judgment. Third-Party Plaintiffs have not shown that Parking Corp. in any way frustrated or refused discovery; indeed, there is an affidavit in the record indicating Parking Corp. was ready to produce a witness had one been noticed. Third-Party Plaintiffs simply did not pursue it. Moreover, Third-Party Plaintiffs have not identified specific essential facts that the Parking Corp.'s deposition would reveal which are not already ascertainable from the existing evidence. The main point they raise is the authorship of and basis for the Workers' Compensation report. Yet, Third-Party Plaintiffs themselves possess that document and have submitted it. Knowing its contents, they could have, for instance, deposed the building superintendent (which they did) or other employees to ask who reported the accident to the WCB. They did not seek such information or press Parking Corp. on it before discovery closed. At this stage, invoking CPLR § 3212(f) appears to be an afterthought.

The court finds that the factual issues in this case (primarily the accident location) are clearly joined even without Parking Corp.'s deposition. Each side has evidence on the issue. A deposition of a Parking Corp. representative might have provided further clarification or context, but Third-Party Plaintiffs' lack of diligence in obtaining it precludes them from claiming prejudice now. Accordingly, the court rejects the argument that the motion should be denied or adjourned for further discovery. The motion has been decided on the merits of the evidence submitted.

VI. Controlling Precedent and Application

In reaching its decision, the court has been guided by controlling precedent. The legal principles outlined above are consistent with those authorities: e.g., *Alvarez v. Prospect Hospital* on summary judgment burdens; *Crimlis*, *O'Brien*, and *Hernandez* on sidewalk liability; Workers' Compensation Law § 11 as interpreted by *Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 71 NY2d 599 (1988) (no third-party contribution claim against employer absent grave injury or contract); and numerous cases enforcing or declining to enforce contractual indemnification in premises liability contexts. Notably, the Appellate Division, First Department, has reiterated that a tenant is generally not liable for sidewalk defects unless it affirmatively caused or agreed to assume that duty (*Shamilova v. Berkowitz*, 192 AD3d 491, 492 [1st Dept. 2021]). And

in *Wesco Ins. Co. v. Jewelers Mut. Ins. Co*., 235 AD3d 438 (1st Dept 2025), the Appellate Division, First Department addressed insurance coverage issues between a landlord and tenant's insurers in a sidewalk injury context, underscoring the importance of the lease's risk allocation provisions. This court's analysis and outcome align with those decisions: Parking Corp., as tenant, has no direct liability for the sidewalk defect, but the lease's risk-shifting mechanism (indemnification/insurance) remains to be sorted out based on factual determinations.

For the reasons discussed above, Third-Party Defendant 333 East 46th Parking Corp. has demonstrated its entitlement to summary judgment in part, but genuine issues of material fact prevent summary disposition of the entire third-party action. It is therefore:

ORDERED that Parking Corp.'s motion for summary judgment is granted to the extent that: 1.) The third-party causes of action for common-law indemnification and contribution are dismissed with prejudice, as barred by the Workers' Compensation Law and for lack of any negligence or duty by Parking Corp. in the circumstances of this case; and 2.) The third-party cause of action for breach of contract to procure insurance is dismissed as moot or without merit, it being uncontroverted that Parking Corp. maintained the requisite insurance coverage during the relevant period; and it is further

ORDERED that the motion is otherwise denied. In particular, the branch of the motion seeking dismissal of the contractual indemnification claim is denied, in view of the outstanding issues of fact as to the location of Plaintiff's accident and the applicability of the lease's indemnification provision. This denial is without prejudice to renewal at trial or other appropriate juncture, should the facts develop such that Parking Corp.'s non-liability under the indemnification clause can be established; and it is further

ORDERED that Parking Corp.'s request for an award of attorneys' fees, costs, and disbursements at this time is denied. Under the lease, entitlement to attorneys' fees is predicated on being the "prevailing party" in a legal action connected to the lease. Since the third-party action has not been entirely resolved in Parking Corp.'s favor, Parking Corp. is not yet a prevailing party. The claim for attorneys' fees is therefore premature. Parking Corp. may renew its application for attorneys' fees and expenses if and when it ultimately prevails on the remaining claims, whether by later motion or at trial. Conversely, should Third-Party Plaintiffs prevail on the indemnification claim, they may seek attorneys' fees pursuant to the lease if appropriate. All issues of contractual fee-shifting are reserved until the liability of Parking Corp. under the indemnity clause is determined; and it is further

ORDERED that Third-Party Defendant 333 East 46th Parking Corp. shall serve a copy of this decision and order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that the Clerk of the Court is directed to enter summary judgment dismissing the specified third-party claims against 333 East 46th Parking Corp. in accordance with this decision and order. The contractual indemnification claim (and any associated request for attorneys' fees by Third-Party Plaintiffs under that claim) shall continue to pend for adjudication; and it is further

ORDERED that the parties shall proceed to trial or other resolution on the remaining issues consistent with this decision and order.

This constitutes the decision and order of the court.

1/12/2026
DATE

HASA A. KINGO, J.S.C.

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