SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **46M**

Justice

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RODNEY VARGAS,

Plaintiff,

- v -

ESRT EMPIRE STATE BUILDING, LLC,EMPIRE STATE REALTY TRUST, INC.,LINKEDIN CORPORATION,

Defendant.

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INDEX NO. 155627/2016

MOTION DATE 03/11/2024, 03/11/2024

MOTION SEQ. NO. 010 011

DECISION + ORDER ON MOTION

LINKEDIN CORPORATION

Plaintiff,

-against-

I.S.S. FACILITIY SERVICES INC.

Defendant.

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Third-Party
Index No. 595430/2017

ESRT EMPIRE STATE BUILDING, LLC, EMPIRE STATE REALTY TRUST, INC.

Plaintiff,

-against-

ISS FACILITY SERVICES INC., YAKAMEINSHOP CATERING LLC D/B/A CSAVOR D/B/A GOURMET STREET MAGAZINE

Defendant.

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Second Third-Party
Index No. 595296/2020

The following e-filed documents, listed by NYSCEF document number (Motion 010) 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 315, 321, 322, 323, 324, 325

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

The following e-filed documents, listed by NYSCEF document number (Motion 011) 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 316, 317, 318, 319, 320, 326, 327

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

Upon the foregoing documents, it is ordered that motion sequence number 010 filed by defendant LinkedIn Corporation ("LinkedIn") and pursuant to CPLR 3212 to dismiss the complaint and all cross claims as against and motion sequence number 011 filed by plaintiff Rodney Vargas ("plaintiff") and pursuant to CPLR 3212 for partial summary judgment on the issue of liability against defendants ESRT Empire State Building, LLC and Empire State Realty Trust Inc. (collectively "Empire") are consolidated for disposition and granted.

The cross-motions of defendants Empire are denied.

I. Factual Background

In this action for personal injuries, plaintiff was allegedly injured as a result of a slip-and-fall on August 18, 2015, at approximately 9:15 a.m., at the Empire State Building, located at 338-350 Fifth Ave, New York, New York (NY St Cts Elec Filing [NYSCEF] Doc No. 233, Verified Bill of Particulars). Plaintiff fell in an unlit vestibule near the freight elevator[1] on the 28th floor (NYSCEF Doc No. 223, Verified Complaint). At his deposition, plaintiff testified that he got off the freight elevator and stepped into the vestibule and noticed it was dim (NYSCEF Doc No. 235, Plaintiff EBT, tr at 66). He was not aware of any light switches in the room (*id.*). There was no source of light (*id.* at 53). According to plaintiff, there were no lights in the room for over a month, which he reported to his supervisors, Christopher Ramirez and Lauren Jordan Pro prior to the accident (*id.* at 66-67). He was in the vestibule area when he took a step and fell (*id.* at 64, 53-54). Plaintiff testified that he did not know what he slipped on (*id.* at 54). His lower back, right shoulder and head hit the ground and he lost consciousness (*id.* at 54-55). He woke up and saw darkness

[1] The area of the alleged incident is referred to as the freight area and vestibule area on the 28th floor interchangeably throughout the motions.

(*id.* at 55). He felt around and claimed his pants were greasy with some type of oil (*id.*). He testified that he slipped on "an oily, slippery substance" and it could have been cooking oil (*id.*). He took a photograph of the floor depicting the "yellowish substance" on the vestibule floor that caused him to slip and fall, and the "very dark room" (*id* at 63-65, NYSCEF Doc No. 264).

The 28th floor was used for office space by LinkedIn (NYSCEF Doc No. 236, Buterick EBT, tr at 20). There was a kitchen/catering/food vendor space on the 28th floor (*id.*). There was a dual hollow metal door with a card reader to the kitchen area (*id.* at 54). CSavor was the catering service that LinkedIn contracted with to provide food services to employees on the 28th floor (*id.* at 23). At his deposition, Christopher Buterick, the Director of Operations and Chief of Staff for LinkedIn, testified that it was CSavor's responsibility to maintain the kitchen area and clean the area, including mopping and sweeping floors in the area (*id.* at 24). CSavor's employees had to enter the building through the freight entrance loading dock, go through the loading dock security, and use the building access card to use the passenger elevators from the building lobby (*id.* at 31-32). There was one elevator that opened in the vestibule (*id.* 32-33). He further testified that the building's janitorial staff would access the 28th floor through the freight elevator and provided janitorial services throughout the day and in the evenings (*id.*). The buildings' janitorial staff were responsible to clean the floors and remove the trash (*id.* at 40-41). Buterick further testified that his responsibilities included walking through the floors to see if the areas were generally safe for LinkedIn employees (*id.* at 50). He did this once or twice a week and his responsibilities did not include the freight elevator area on the 28th floor (*id.* at 52). He testified that the photographs of the area of the alleged incident were not within the leased premises of LinkedIn (*id.* at 138). LinkedIn did not have the responsibility to clean and maintain that area (*id.* at 80). He did not receive any complaints of any spills or dangerous or slippery conditions on the floor of the

vestibule area (*id.* at 88-89). According to Buterick, the building owner was responsible for the lighting conditions and lighting maintenance of the freight elevator area (*id.* 81-82).

Riccardo Fazzolari, the Assistant Director of Operations for Empire, testified that Empire employed its own custodial staff in August 2015 (NYSCEF Doc No. 238, Fazzolari EBT, tr at 7-8, 25). Empire was responsible for cleaning common hallways before reaching a tenant space, and portions of the building that are not leased to the tenant (*id.* at 27-28, 97). Empire was responsible for maintaining the interior lighting and light bulbs in the common hallways (*id.* at 53-55). Jeremy Rivera ("Rivera"), a janitor employed by I.S.S Management Facilities worked at the Empire State Building on the floors assigned to LinkedIn, including the 28th floor (NYSCEF Doc No. 237, Rivera EBT, tr at 7-9). His cleaning responsibilities did not include the vestibule area as the building staff was responsible for that area (*id.* at 11-12). He inspected the floor of the freight area on the date of the incident at 7:30 am and 20 minutes after the incident and did not observe anything (*id.* at 26-27). He did not see a spill on the floor and testified the floor was clean (*id.* at 15). He did not receive any complaints about the lighting in the freight area prior to the accident (*id.* at 21). He testified that the lighting in the area was slightly dim (*id.*). There were no windows in the freight area (*id.* at 22). Prior to the date of the accident, he observed oil on the floor of the freight area approximately four times (*id.* at 29). A day prior to the accident he notified the building's maintenance facility there was an issue with the ballast (*id.* at 54-55). The facility changed the ballast, and Rivera changed the light bulb on August 18, 2015 (*id.* at 34). Sammy Dervisevic was a supervisor for I.S.S., who performed work for LinkedIn at the Empire State Building (NYSCEF Doc No. 239, Dervisevic EBT, tr at 10-11). I.S.S. was responsible for managing electrical, plumbing, and space planning for space that was inhabited by LinkedIn (*id.* at 12). At his

deposition, he testified that he inspected the floor after the accident and did not see any oil (*id.* at 63).

II. Standard for Summary Judgment

"'[T]he proponent of a summary judgment motion must make 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'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "[F]ailure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Ayotte*, 81 NY2d at 1063 [internal quotation marks and citation omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman*, 49 NY2d at 562).

"Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]; *see also American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]). "On a summary judgment motion, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]).

As a threshold issue, LinkedIn opposes Empire's cross-motions on the ground that they were untimely filed on October 18, 2023, more than 60 days after plaintiff filed the note of issue on August 2, 2023. Pursuant to CPLR 3212 (a), unless the court directs otherwise, a motion for

summary judgment "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" (*see Brill v City of New York*, 2 NY3d 648, 651 [2004]). Absent a "satisfactory explanation for the untimeliness," constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits (*id.* at 652). "[A] court has broad discretion in determining whether the moving party has established good cause for the delay, and its determination will not be overturned unless it is improvident" (*Lewis v Rutkovsky*, 153 AD3d 450, 453 [1st Dept 2017] [citations omitted]). However, an untimely cross-motion for summary judgment may be considered by the court where a timely motion for summary judgment was made on nearly identical grounds (*see Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp.*, 161 AD3d 691, 691-692 [1st Dept 2018]). Empire cross-moves for summary judgment on the issue of liability and contractual indemnification. These issues were raised in both LinkedIn and plaintiff's motions for summary judgment, and therefore are considered by this court.

A. Plaintiff's Motion for Summary Judgment and Empire's Cross-Motion for Summary Judgment (Motion sequence 011)

Parties' Contentions

Plaintiff contends that he is entitled to partial summary judgment on the issue of liability because it is undisputed that Empire was responsible for maintaining the freight/vestibule area where the accident occurred, including cleaning it and maintaining the lighting and light fixtures (NYSCEF Doc No. 261, Memorandum of Law in Support of Thomas S. Pardo, Esq. [memo], at 4). He further argues that Empire had actual and/or constructive notice of the issue with the lighting in the area for over a month prior to the incident date (*id.*).

In opposition to plaintiff's motion and in support of their cross-motion, Empire first argues that it did not create the condition that caused plaintiff to fall, as the oily substance and not the

condition of the light was the proximate cause of plaintiff's fall (NYSCEF Doc Nos. 294 and 312, Memorandum of Law in Opposition of Monique Allen, Esq. [opp memo], at 3-4, 6). Second, it argues that plaintiff assumed the risk of the injury as he was aware of the lighting conditions at the time of the accident and proceeded into a dark room, instead of taking the freight elevator back down to the lobby or using his cell phone for additional lighting (*id.* at 8). Third, it did not have a duty to warn of an open and obvious condition as plaintiff testified that the vestibule area was "dark as a mineshaft" and that he could not even see his hand due to the lighting condition (*id.* at 8-9). Lastly, plaintiff's motion should be denied because he was comparatively negligent as he noticed the vestibule area was dark and could have taken the freight elevator back to the lobby or use his cell phone to provide additional lighting (*id.* at 9).

In reply and in opposition to the cross-motion, plaintiff argues that Empire had notice of the defective lighting conditions as its own work records show it were aware on July 14, 2014, that the lights in the 28th floor freight area were not working (NYSCEF Doc No. 316, Memorandum of Law in Opposition and in Support of Thomas S. Pardo, Esq. [opp memo], 3). Additionally, Dervisevic testified that the janitorial staff cleaned the vestibule area on a nightly basis (*id.*). Furthermore, Buterick's testimony does not demonstrate that the lights were working properly on or prior to the accident date, because he did not state when he visited that area prior to the accident date (*id.* at 4). Second, the defective lighting conditions were a proximate cause of plaintiff's accident (*id.*). The degree of darkness prevented plaintiff from observing and avoiding the slippery spilled substance on the floor (i*d.* at 6). Lastly, plaintiff is not required to show his own freedom from comparative negligence or proximate cause of the accident to be entitled summary judgment (*id.* at 9). Similarly, the assumption of risk is meritless as there is no proof that he voluntarily accepted the risk posed by the inadequate lighting as he had exited the elevator and then realized

the extent of darkness in the vestibule area (*id.* at 10). Additionally, he could not have assumed the risk of slipping on a foreign substance that he had no reason to expect would be present on the floor (*id.*).

LinkedIn, in opposition to the cross-motion, argues that plaintiff's accident was caused by Empire's negligence, and therefore, under the terms of the lease agreement, Empire should defend and indemnify LinkedIn (NYSCEF Doc No. 320, Memorandum of Law in Opposition of Bryan Feldman, Esq. [opp memo], at 5).

Analysis of Empires' Cross-Motion

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the dangerous condition . . . nor had actual or constructive notice of its existence" (*Ceron v Yeshiva Univ.*, 126 AD3d 630, 632 [1st Dept 2015] [citations omitted]). "To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employee to discovery and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986] [citations omitted]). "To demonstrate lack of constructive notice, a defendant must produce evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned" (*Barrett v Aero Snow Removal Corp.*, 167 AD3d 519, 520 [1st Dept 2018] [internal quotation marks and citations omitted]). "[A] landowner must act as a reasonable person in maintaining his or her property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003] [internal quotation marks and citations omitted]). Where inadequate lighting is alleged, it is the defendant's burden to establish, as a matter

of law, that it received no notice of the alleged inadequate lighting conditions or that the lighting conditions were not a proximate cause of the plaintiff's injury (*see Rivas v Waldbaums Supermarket*, 247 AD2d 600, 600-601 [2d Dept 1998]).

Empire failed to meet its burden on the issue of proximate cause. "Proximate cause is almost invariably a factual issue" (*Haibi v 790 Riverside Dr. Owners, Inc.*, 156 AD3d 144, 147 [1st Dept 2017] [citations omitted]. "[T]he issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts" (*id.* [internal quotation marks and citations omitted]). Here, plaintiff testified that when he stepped out of the freight elevator, it was "dark as a mineshaft" in the area of the accident, and there were no natural or artificial lights in the area (*see* Plaintiff EBT, tr at 51, 53). Empire further failed to make a prima facie showing that it lacked actual or constructive notice of the alleged hazardous condition caused by the inadequate lighting where plaintiff fell, as it did not produce a witness who can testify that no complaints about the location were received before the accident and that there were no prior incidents in that area before plaintiff fell (*see Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept 2020]) and did not submit any evidence when it last inspected the vestibule on the day of the accident (*see Rodriguez v Kwik Realty, LLC*, 216 AD3d 477, 478 [1st Dept 2023] [summary judgment was denied as defendant building owner did not submit any evidence when the vestibule on the day of the accident was last inspected]). The only evidence concerning the condition of the accident area at the time of the alleged incident is from plaintiff, who testified to the inadequate lighting, which is corroborated by a photograph that shows the alleged hazardous condition (*see Gomez v Samaritan Daytop Vil., Inc.*, 216 AD3d 456, 458 [1st Dept 2023]). Since Empire failed to meet its initial burden to show that it did not cause, create, or have actual or constructive notice

of the alleged condition, the burden does not shift to plaintiff to raise a triable issue of fact (*see Velocci*, 188 AD3d at 439).

Furthermore, this court rejects Empire's argument that it is not liable because the dark vestibule area was an open and obvious condition and plaintiff failed to exercise reasonable care under the circumstances to avoid it (*see Navarro v University Ave., L.P.*, 221 AD3d 412, 413 [1st Dept 2023] [citations omitted] ["An open and obvious condition only relieves a property owner of its duty to warn not the duty to maintain the premises in a reasonably safe condition"]). Similarly, Empire's argument that plaintiff was comparatively negligent is hereby rejected as "whether plaintiff exercised reasonable care in walking down a dark [vestibule] merely goes to the issue of comparative negligence" (*id.*). Since Empire did not meet its prima facie burden of proof, its cross-motion for summary judgment dismissing the complaint is denied without the need to consider the adequacy of plaintiff's opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]).

Analysis of Plaintiff's Motion

"[A] property owner is subject to liability for a defective condition on its premises if a plaintiff demonstrates that the owner either created the alleged defect or had actual or constructive notice of it" (*Doherty v 730 Fifth Upper, LLC*, 227 AD3d 606, 607 [1st Dept 2024] [citations omitted]. To be entitled to summary judgment on the issue of liability, a plaintiff need only demonstrate that the defendant was negligent, and that negligence was a proximate cause of the accident (*see Benny v Concord Partners 46th St. LLC*, 192 AD3d 531, 531-32 [1st Dept 2021]).

On the issue of notice, plaintiff testified that he reported to his supervisor that the light in the freight area was not working for over a month prior to the accident (*see* Plaintiff EBT, tr at 66), and the building's work order record demonstrates that Empire had notice that there were no lights

in the freight area since July 14, 2015, a month prior to plaintiff's accident (*see* NYSCEF Doc No. 256). Empire's opposition fails to raise any triable issue of fact to its liability. Its contention that the oily substance and not the light condition was the proximate cause of plaintiff's accident is meritless. "Even if the oily substance on the floor was a proximate cause of plaintiff's accident, there may be more than one proximate cause of a workplace accident" (*Wiscovitch v Lend Lease (U.S.) Constr. LMB Inc.*, 157 AD3d 576, 578 [1st Dept 2018] [internal quotation marks and citations omitted]). "Moreover, plaintiff is not required to show that defendants' negligence was the sole proximate cause of the accident to be entitled to summary judgment" (*Benny*, 192 AD3d at 532 [citation omitted]). Plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). The precise manner in which the accident does not need to be demonstrated (*id.*). To the extent Empire contends that plaintiff was at fault because he did not take the freight elevator back to the lobby or use his phone light, these arguments are unavailing since a party need not demonstrate the absence of his own comparative fault to be entitled summary judgment as to defendants' liability (*see Ayala v Pascarelli*, 168 AD3d 613 [1st Dept 2019]). Similarly, the issue of whether a condition is open and obvious is relevant to comparative fault and does not preclude summary judgment on the issue of defendant's liability (*Derix v Port Auth. of N.Y. & N.J.*, 162 AD3d 522, 522 [1st Dept 2018]). Accordingly, plaintiff is therefore entitled to summary judgment on the issue of liability.

B. LinkedIn's Motion for Summary Judgment and Empire's Cross-Motion for Summary Judgment (Motion sequence 010)

Parties' Contentions

In support of its motion for summary judgment, LinkedIn contends that it did not owe plaintiff a duty of care because the vestibule area, where the plaintiff fell is not located within the

LinkedIn tenant space (NYSCEF Doc No. 245, Memorandum of Law in Support of Bryan Feldman, Esq. [memo], at 6). LinkedIn was not responsible for cleaning the vestibule and maintaining the lighting conditions in the vestibule (*id* at 6-7.). It also argues that all cross claims against it should be dismissed, including contribution and common law indemnification as there is no evidence that plaintiff's injuries were caused by LinkedIn (*id.* at 14). Dismissal is warranted for the claims of the failure to procure insurance and contractual indemnification because LinkedIn has agreed to defend and indemnify Empire (*id.*). It further argues that the claim for contractual indemnification should be dismissed because plaintiff's accident was not caused by its negligence or occur in LinkedIn's leased space (*id.* at 15). In opposition, counsel for plaintiff does not dispute that the accident occurred in an area that was not part of LinkedIn's leased space, and that the maintenance and repair of the lighting in the area where plaintiff fell was Empire's responsibility (NYSCEF Doc No. 267, Memorandum of Law in Opposition of Thomas S. Pardo, Esq. [opp memo], 1).

In opposition and in support of its cross-motion, counsel for Empire addresses only the contractual indemnification crossclaim. It argues that LinkedIn is required to contractually indemnify Empire because plaintiff's accident arises out of, or was in connection with the use or occupancy of the demised premises by LinkedIn because it retained plaintiff's employer, CSavor, to provide food services to its employees (NYSCEF Doc No. 272, Memorandum of Law in Opposition of Monique Allen, Esq., [memo], at 5-6). LinkedIn had a contract with CSavor, who used cooking oil in their work to provide food services to LinkedIn employees, and used the kitchen area that was right next to the freight area where the accident occurred (*id.* at 7). In opposition, LinkedIn argues that their claim for contractual indemnification is premature as Empire has not rendered payment to plaintiff (NYSCEF Doc No. 322, Memorandum in Opposition and

Further Support of [opp memo], at 3). Second, Empire has not proved it is free from negligence as Empire's janitorial services was responsible for cleaning up any spills in the vestibule and maintenance of the lighting in that area (*id.* at 5). Third, there is no evidence that the condition that caused plaintiff's accident was created by CSavor (*id.* at 6). Fourth, plaintiff's accident did not arise out of or in connection with LinkedIn's use or occupancy of its space (*id.* at 6-7).

Analysis of LinkedIn's Motion

Dismissal of Plaintiff's Complaint

The court finds that LinkedIn did not owe a duty of care to plaintiff. "Liability for a dangerous condition on property may only be predicated upon occupancy, ownership control or special use of such premises" (*Branch v County of Sullivan*, 25 NY3d 1079, 1082 [2015], quoting *Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57, 60 [1st Dept 2006]). "Where none of these factors are present, a party cannot be held liable for injuries caused by the allegedly defective condition" (*Deutsch v Green Hills (USA), LLC*, 202 AD3d 909, 911 [2d Dept 2022] [citations omitted]). LinkedIn established, prima facie, that it did not owe a duty of care to plaintiff because it did not own, occupy, control, or make special use of the property where the accident occurred. In support, LinkedIn submitted the testimonies of plaintiff, a representative of LinkedIn and a representative of Empire, who confirmed that Empire was responsible for the cleaning and maintenance of the floor and lights in the area where plaintiff slipped and fell (*see* Fazzolari EBT, tr at 27-28, 53-55, 97; *see also* Buterick EBT, tr at 80-82, 138). In opposition, plaintiff failed to raise a triable issue of fact as he conceded that Empire was responsible for maintaining the vestibule area of the 28th floor, and the lighting conditions as well (*see* NYSCEF Doc No. 267 at 1). Based on the foregoing, summary judgment is granted in favor of LinkedIn, dismissing plaintiff's claims against it.

Dismissal of Empire's Cross Claims

"Indemnification provisions are strictly construed, and the right to contractual indemnification depends upon the specific language of the contract" (*McCoy v Medford Landing, L.P.*, 164 AD3d 1436, 1440 [2d Dept 2018] [citations omitted]). The indemnification clause in the lease provides, in relevant part, that

> "Except as to the extent resulting from the negligence or willful misconduct of Landlord, its agents, employees or contractors, or any breach of this lease by Landlord, Tenant shall defend, indemnify and hold harmless Landlord . . . from and against any and all claims, demands, liability . . . arising from or in connection with . . . (a) the use or occupancy or specific manner of use or occupancy of the demised premises by tenant . . . (c) any act, omission or negligence of Tenant or any of its subtenants, assignees or licensees or its or their partners, members, managers, principals, directors, officers, agents, invitees, employees, guests, customers or contractors . . . (d) any accident, injury or damage occurring in or about the demised premises . . . (*see* NYSCEF Doc No. 242 ¶ 21).

LinkedIn has established its entitlement to summary judgment against Empire on its contractual indemnification claim through the plain language of the subject lease, and by demonstrating LinkedIn's freedom from active negligence. LinkedIn's witness, testified that LinkedIn had no obligation to maintain the freight area on the 28th floor in question, further confirmed by Empire's witness who attested that it was Empire's responsibility to maintain that area. Moreover, the court finds that LinkedIn has no obligation to indemnify Empire, as "[t]he unambiguous language of the parties' agreement expressly limits [LinkedIn's] to situations where [LinkedIn's] negligence [upon the demised premises] was responsible for plaintiff's injuries" (*Peranzo v WFP Tower D Co. L.P.*, 201 AD3d 486, 487 [1st Dept 2022]). In opposition, Empire failed to raise a triable issue of fact. Pursuant to the lease, LinkedIn was under the obligation to indemnify Empire if it was established that plaintiff's injury arose out LinkedIn's or its invitees'

negligence. Empire's contentions are meritless, as there is no evidence that the oily substance that plaintiff slipped on was caused by LinkedIn or CSavor, or that LinkedIn was responsible for the lighting condition that caused plaintiff's accident. Based on the foregoing, this court dismisses Empire's cross claim for contractual indemnification against LinkedIn.

Furthermore, dismissal of Empire's cross claim for contribution is warranted as LinkedIn did not owe plaintiff a duty (*see Burgos v 14 E. 44 St., LLC*, 203 AD3d 688, 690 [2d Dept 2022] [citations omitted] [A claim for contribution should be dismissed when the party from which contribution is sought owed no legal duty to the injured plaintiff or the party seeking contribution other than its contractual obligation]. Similarly, LinkedIn is entitled to dismissal of all claims for common-law indemnification against it because there is no evidence of negligence on its part in the record (*see Dejesus v Downtown Re Holdings LLC*, 217 AD3d 524, 526 [1st Dept 2023]). Finally, Empire's cross claim against LinkedIn for breach of contract for failure to procure insurance naming Empire as an additional insured is dismissed, as LinkedIn submitted proof which includes Empire as an additional insured (*see* NYSCEF Doc No. 243, Tender Acceptance Letter). Empire has not opposed said proof.

Analysis of Empire's Cross Motion

The branch of Empire's cross-motion which was for summary judgment on its cross claims for contractual indemnification from LinkedIn is denied. Empire failed to show prima facie that an act or omission of LinkedIn caused the hazardous condition and their own freedom from fault (*see Heredia v C.S. Realty Assoc. LLC*, 217 AD3d 496, 498 [1st Dept 2023]). "A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal

quotation marks and citations omitted]). The right to contractual indemnification depends upon the specific language of the contract (*Ging v F.J. Sciame Constr. Co., Inc.*, 193 AD3d 415, 418 [1st Dept 2021]). A party seeking contractual indemnification must prove itself free from negligence . . . (*see Spielmann v 170 Broadway NYC LP*, 187 AD3d 492, 494 [1st Dept 2020], *see also Bleich v Metropolitan Mgt., LLC*, 132 AD3d 933 [2d Dept 2015]), because to the extent its negligence contributed to the accident it cannot be indemnified therefore (*see Velasquez v Mosdos Meharam Brisk of Tashnad*, 189 AD3d 1655, 1657-1658 [2d Dept 2020]). As discussed above, since Empire failed to establish its freedom from negligence, it failed to establish its prima facie entitlement to judgment for contractual indemnification (*see Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447, 448 [1st Dept 2008] [affirming denial of owner's summary judgment on contractual indemnification claim against tenants where issues of fact existed concerning owner's negligence]).

Accordingly, it is hereby

ORDERED that defendant LinkedIn Corporation's motion for summary judgment (mot seq # 010) pursuant to CPLR 3212 is granted, and plaintiff's complaint and defendants Empire State Building, LLC and Empire State Realty Trust, Inc.'s cross claims are dismissed together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendants Empire State Building, LLC and Empire State Realty Trust, Inc.'s cross-motion (mot seq # 010) for summary judgment on the issue of contractual indemnification pursuant to CPLR 3212 is denied; and it is further

ORDERED that plaintiff Rodney Vargas' motion for partial summary judgment (mot seq # 011) pursuant to CPLR 3212 is granted on the issue of liability against defendants Empire State Building, LLC and Empire State Realty Trust, Inc.; and it is further

ORDERED that defendants Empire State Building, LLC and Empire State Realty Trust, Inc.'s cross-motion (mot seq # 011) for summary judgment to dismiss plaintiff's complaint and all cross claims against them is denied.

This constitutes the decision and order of the Court.

11/1/2024
DATE

RICHARD G. LATIN, 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