Sloan v 216 Bedford Kings Corp.
2024 NY Slip Op 34285(U)
November 25, 2024
Supreme Court, Kings County
Docket Number: Index No. 506287/18
Judge: Richard J. Montelione

At an IAS Term, Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of November, 2024.

P R E S E N T:

HON. RICHARD J. MONTELIONE,
Justice.

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HILARY SHERYL SLOAN and NOAH SHULMAN,

Plaintiffs,

-against-

216 BEDFORD KINGS CORP., JOE'S PIZZA BEDFORD LLC, MANJULA MUKHOPADHYAY, and SHERRI BUILDERS, INC.,

Defendants.

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DECISION AND ORDER

Index No. 506287/18

Mot Seq. Nos. 9-13

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion, Affidavits (Affirmations) Annexed_____ Opposing Affidavits (Affirmations)_____	286-326; 328-354; 357-376; 377-411; 412-442 448; 449-454; 455-459; 460-470; 484-485; 486-487; 488-489; 490-491; 498; 499; 500; 501; 502; 503; 504; 505; 506; 507; 508; 509; 510; 511
Reply Affidavits/Affirmations _____	476; 477; 478; 479; 480; 481; 482; 483; 512; 513; 514; 515-519; 520; 521; 522; 523

In this action to recover damages for personal injuries, the following five motions have been consolidated for disposition and upon consolidation and after oral argument held on April 17, 2024, are decided as follows:[1]

In Motion Seq. No. 12, plaintiff Hilary Sheryl Sloan ("plaintiff" or "injured plaintiff"), and her husband suing derivatively (collectively, "plaintiffs"), move for an

[1] The listing of the motions has been rearranged for ease of analysis.

order, pursuant to CPLR 3211 and 3212: (1) granting the injured plaintiff partial summary judgment on the issue of liability as against defendants Joe's Pizza Bedford LLC ("Pizza") and Sherri Builders, Inc. ("Builders"); and (2) striking all affirmative defenses as to her alleged comparative fault in the answers of defendants Pizza, Builders, 216 Bedford Kings Corp. ("Bedford"), and Manjula Mukhopadhyay ("Manjula");

In Motion Seq. No. 9, defendant Bedford moves for an order, pursuant to CPLR 3211 and 3212, granting it summary judgment on its claims for: (1) contractual indemnification and the additional insured coverage as against Pizza in accordance with the terms of the parties' contract; and (2) contractual indemnification as against Builders;

In Motion Seq. No. 11, defendant Pizza moves for an order, pursuant to CPLR 3212, granting it summary judgment: (1) dismissing as against it all of plaintiffs' claims and all crossclaims by each of Bedford, Manjula, and Builders; and (2) on its claims for contractual and common law indemnification, as well as for contribution, as against Builders;

In Motion Seq. No. 10, defendant Builders moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing as against it all of plaintiffs' claims and all crossclaims by each of Bedford, Pizza, and Manjula; and

In Motion Seq. No. 13, defendant Manjula moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing as against her all of plaintiffs' claims and all of the crossclaims by each co-defendant Bedford, Pizza, and Builders.

Background

In January 2018, plaintiff allegedly was injured when she slipped and fell on a patch of black ice while walking on the sidewalk abutting 216 Bedford Avenue in Brooklyn, New York (the "property").[2] The portion of the sidewalk where plaintiff allegedly slipped abutted a pizzeria operated by Pizza on the ground floor of the property. Bedford was the property owner, whereas Manjula was the owner of the adjacent property at 214 Bedford Avenue (the "adjacent property"). Plaintiff alleged that the icy condition on the sidewalk in front of the property was caused by a disconnected drainpipe (the "drainpipe") which was discharging water, collected from the roof of the property, onto the sidewalk in front of it.

Four years prior in 2014, Bedford leased the property to Pizza. The following year in 2015, Pizza contracted with Builders to renovate the property before it opened its restaurant at the property on August 15, 2015. As part of the renovations, Pizza's contractor, Builders, was to re-route the drainpipe running from the roof of the property to a pipe (or, more precisely, the drainage inlet) in the basement of the property.[3] The drainpipe, as re-routed by Builders, had been disconnected at its bottom from the basement pipe for at least several years before the accident. Builders' president, Anthony

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[2] Immediately after the accident, Pizza's employees "salted all of [the icy portion of the sidewalk] once you got up to it because it was in the shade, so it was hard to see" (EBT of Pino Vitale [Pizza] Tr. at page 95, lines 3-7). Pizza's manager, on inspecting the drainpipe immediately after the accident, noticed that "it was just disconnected with water around it" (*id.* at page 158, lines 16-19).

[3] EBT of Pino Vitale (Pizza) Tr. at page 41, lines 5-6 ("[Builders] rerouted the drain and they were supposed to connect it back going to the basement.").

Tichner, conceded at his deposition that either one of his employees or, in the alternative, a plumber to whom he had subcontracted a portion of the renovation work had disconnected the re-routed drainpipe from the basement pipe and failed to re-connect it to a drainage outlet before the accident.[4] Because the drainpipe was not re-connected to the basement pipe, it terminated at the ground (or sidewalk) level.[5]

Manjula, as the owner of the adjacent property, testified at her deposition that she had no responsibility for the drainpipe.[6] In that regard, Manjula's expert, licensed land surveyor Frank S. Ferrantello, concluded that the drainpipe was located exclusively within the boundary lines of the property.[7] Plaintiffs' expert, licensed land surveyor Vincent Teutonico, disagreed with Manjula's expert, Ferrantello, as to the exact location of the drainpipe. According to plaintiffs' expert, the drainpipe was not fully enclosed within the property boundaries. Whereas the top and bottom of the drainpipe were located within the property boundaries, a mid-portion of the drainpipe as it was running

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[4] EBT of Anthony Tichner (Builders) Tr. at page 71, lines 14-20; page 176, line 17 to page 177, line 7.

[5] EBT of Pino Vitale (Pizza) Tr. at page 86, lines 16-18 (confirming that the "[drainpipe] terminate[d] at ground level contrary to being inserted into the sewer line"); page 92, line 18 to page 93, line 21 (testifying that the black ice on which the injured plaintiff slipped and fell "came from the [property]" where the drainpipe came down to the sidewalk level).

[6] Manjula's EBT Tr. at page 46, line 23 to page 47, line 5; page 52, line 23 to page 53, line 4; page 96, line 25 to page 97, line 4; page 102, lines 19-21.

[7] In particular, licensed land surveyor Ferrantello concluded (in ¶¶ 7-8 of his affidavit, dated August 2, 2019) that: (1) "[t]he drain pipe located between [Manjula's property at] 214 Bedford Avenue and [the property adjacent to Manjula's at] 212 Bedford Avenue, which services building 214 Bedford Avenue is located on the opposite side of the front of building 216 Bedford Avenue"; and (2) "the roof drainage pipes and down spout pipe located on 216 Bedford Avenue [*i.e.*, the property owned by Bedford] are and were located wholly on 216 Bedford Avenue."

downward from the roof of the property to its sidewalk below encroached (or bowed slightly) by 0.2 feet (or 2.375 inches) onto (and within) the line of the adjacent property.[8]

Before completing discovery, plaintiffs moved for partial summary judgment on the issue of liability as against Bedford and Manjula ("plaintiffs' prior motion"). Therein, plaintiffs contended that Bedford and Manjula, individually and collectively, were responsible for maintaining (and so negligently maintained) the drainpipe, and that they both had notice of its alleged defective condition; namely, that because the bottom of the drainpipe was not connected to the basement pipe, the drainpipe was spilling water (which turned into ice in the winter) onto the abutting sidewalk. By short-form order, dated March 13, 2020, the court (Rivera, J.) denied the entirety of plaintiffs' prior motion as premature, subject to renewal after completion of discovery (the "March 2020 order"). Plaintiffs appealed the March 2020 order to the Second Judicial Department.

By decision and order, dated September 14, 2022, the Second Judicial Department modified the March 2020 order by granting the branch of plaintiffs' prior motion which was for partial summary judgment on the issue of liability as against Bedford, and, as so modified, affirmed the March 2020 order. In addressing the merits of plaintiffs' prior motion, the Second Judicial Department held, as follows:

> "A landowner has a duty to exercise reasonable care in maintaining his or her own property in a reasonably safe condition under the circumstances. In order for a landowner or a party in possession or control of real property to be liable . . . for a defective condition upon property, it must be established that a defective condition existed[,] and that the landowner affirmatively created the condition or had actual or constructive notice of its existence.

[8] Plaintiffs' Expert Affidavit of Land Surveyor Vincent Teutonico, dated December 10, 2019, ¶¶ 4 and 9.

> Here, the plaintiffs demonstrated their *prima facie* entitlement to judgment as a matter of law on the issue of liability against [Bedford]. The plaintiffs made a *prima facie* showing, through video and photographic evidence, as well as expert affidavits, that the drainpipe was unlawfully left unconnected to the [basement pipe] in such a manner that allowed for the discharge of water onto the sidewalk, which water then froze on the day of the accident, causing Sloan to slip and fall. The plaintiffs further demonstrated, *prima facie*, that [Bedford] had constructive notice of the defective condition of the drainpipe through photographs showing that the drainpipe was disconnected from the [basement pipe] for a lengthy period of time, spanning years. In opposition, [Bedford] failed to raise a triable issue of fact, including, as to whether it was an out-of-possession landlord without a duty imposed by statute or regulation. Therefore, *the Supreme Court should have granted that branch of the plaintiffs' motion which was for summary judgment on the issue of liability against [Bedford].*
>
> However, contrary to the plaintiffs' contention, they failed to demonstrate their *prima facie* entitlement to judgment as a matter of law on the issue of liability against [Manjula]. The plaintiffs' evidentiary submissions in support of their motion, which included conflicting opinions of an expert they retained[, *i.e.*, Vincent Teutonico] and an expert retained by [Manjula, *i.e.*, Frank S. Ferrantello], failed to eliminate triable issues of fact regarding [Manjula's] *ownership and control of the drainpipe*. Accordingly, *that branch of the plaintiffs' motion which was for summary judgment on the issue of liability against [Manjula] was properly denied.*" (*Sloan v 216 Bedford Kings Corp.*, 208 AD3d 1192, 1194-1195 [2d Dept 2022] [internal quotations marks, citations, and alterations omitted; typographical errors corrected; emphasis added] [the "appellate order"]).

On April 12, 2023, plaintiffs filed a note of issue with a certificate of readiness signifying that discovery was completed. The instant motions ensued. The recitation of the well-established standard of review in the summary-judgment context is omitted from this decision and order in the interest of brevity. Additional facts will be stated when relevant to the discussion below.

Discussion

1-A. Plaintiffs' Claims Against Pizza

"[A] lessee of property which abuts a public sidewalk owes no duty to maintain the sidewalk in a safe condition, and liability may not be imposed upon it for injuries sustained as a result of a dangerous condition in the sidewalk, except where the abutting lessee either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the lessee the obligation to maintain the sidewalk which imposes liability upon the lessee for injuries caused by a violation of that duty" (*Brady v 2247 Utica Ave. Realty Corp.*, 210 AD3d 621, 621-622 [2d Dept 2022] [internal quotation marks omitted]).

In connection with Bedford, the appellate order already granted plaintiffs partial summary judgment on the issue of liability as against it, holding that Bedford "had constructive notice of the defective condition of the drainpipe through photographs showing that the drainpipe was disconnected from the [basement pipe] for a lengthy period of time, spanning years" (*Sloan*, 208 AD3d at 1194). It follows, therefore, that Pizza, as Bedford's primary tenant which contracted with Builders for (among other renovations) the re-routing of the drainpipe as well as for its resumed connection to the basement pipe following its re-routing[9]), was in the position of an owner in possession (*see Sonera v 147-16 Hillside Ave. Corp.*, 207 AD3d 588, 590 [2d Dept 2022]). Pino

[9] EBT of Pino Vitale (Pizza) Tr. at page 38, line 24 to page 39, line 11 (testifying that the drainpipe had been connected to the basement pipe when Pizza first leased the ground floor from Bedford).

Vitale ("Vitale"), a partner at Pizza, conceded at his deposition that he was aware of the disconnected drainpipe following Builders' completion of the renovation work[10] (*see Thomassen v J&K Diner, Inc.*, 152 AD2d 421, 424 [2d Dept 1989], *appeal dismissed* 76 NY2d 771 [1990], *reconsideration denied* 76 NY2d 889 [1990]).

Separately from the foregoing, plaintiffs have demonstrated that Pizza had control over the drainpipe. Control over a *dangerous condition* by a tenant or another occupant is another way for third-party liability to be imposed where a party in control of the *underlying fixture, sidewalk, or property* fails to repair or properly maintain it (*see Toner v Trader Joe's E., Inc.*, 209 AD3d 690, 692 [2d Dept 2022]). Here, plaintiffs have established that Pizza had control over the drainpipe by way of Vitale's deposition, who (as noted above) testified that Builders' renovation of the property for Pizza included the re-routing of the drainpipe. Further, Vitale testified that he had the drainpipe closed shortly after the accident.[11] A plaintiff may establish that a defendant was in control of the dangerous condition by way of its post-accident repairs (*see Cleland v 60-02 Woodside Corp.*, 221 AD2d 307, 308 [2d Dept 1995]).

In opposition, Pizza has failed to raise a triable issue of fact. Its principal contention that it lacked actual or constructive notice of the sidewalk ice fails to rebut

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[10] Vilate's EBT Tr. at page 33, lines 19-20 ("[The drainpipe] was never [re-]connected to the basement pipe."); page 36, lines 20-21 ("[A]ccording to [the punch list of unfinished work, the drainpipe] still wasn't connected. It wasn't crossed off [the punch list]."); page 38, lines 12-15 (testifying that Builders "never resolve[d] the drainpipe issue that [Pizza] had a concern back in August of 2015"). *See* Punch List, page 2 (stating "connect [the] drain[]pipe") (NYSCEF Doc No. 320).

[11] Vilate's EBT Tr. at page 159, line 24 to page 160, line 17 (testifying that he had the "[drainpipe] connected after the accident").

plaintiffs' *prima facie* showing that Pizza had actual notice of the disconnected drainpipe (*see Chapman v Silber*, 97 NY2d 9, 20 [2001]). Accordingly, plaintiffs are entitled to partial summary judgment on the issue of liability as against Pizza. It follows that Pizza's motion to dismiss the complaint against it is denied.

1-B. Plaintiffs' Claims Against Builders

Plaintiffs have met their initial burden by demonstrating, *prima facie*, that Builders created the dangerous condition in the form of the disconnected drainpipe, and that Builders owed a duty to the injured plaintiff. It is true, as Builders asserts, that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 138 [2002]). However, the aforementioned no-duty rule does not apply when a party "launches a force or instrument of harm" (*id.* at 140 [internal quotation marks omitted]). "In this context, a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury" (*id.* at 141-142; *see also Cohen v Schachter*, 51 AD3d 847, 848 [2d Dept 2008] ["A contractor may be liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk."]). Water dripping from a negligently constructed structure (for example, a sidewalk shed) onto a sidewalk and subsequently freezing to form ice on the sidewalk qualifies under the "launching of a dangerous condition" exception (*see Anastasio v Berry Complex, LLC*, 82 AD3d 808, 808-809 [2d Dept 2011]).

Here, plaintiffs rely on Builders' testimony that conceded that either one of its workers or, alternatively, its plumbing subcontractor had failed to reconnect the drainpipe, thus causing the water to accumulate and subsequently to freeze on the abutting sidewalk.

In opposition, Builders has failed to raise a triable issue of fact. Builders' self-serving contention (in ¶ 28 Builders' reply affirmation) that "it is uncontroverted that the [drain]pipe was reconnected as part of the final punch list," is devoid of any documentary support. Rather, all that Builders points to in support of this contention are various documents reflecting that: (1) its architect received a certificate of completion from the City of New York; and (2) Pizza made the required payment. The former did not address whether the drainpipe was re-connected at the conclusion of the renovation project, and the latter is immaterial because, in the summary-judgment context, satisfactory work is not a prerequisite to payment (*see e.g. Board of Educ. v A. Barbaresi & Son, Inc.*, 25 AD2d 855, 856 [2d Dept 1966]).

Accordingly, plaintiffs are entitled to partial summary judgment on the issue of liability as against Builders. As was the case with plaintiffs' motion against Pizza, it follows that Builders' motion to dismiss the complaint is denied.

2-A. <u>Bedford's Cross-Claims Against Pizza</u>

Contractual Indemnification[12]

[12] Although Bedford alleged both contractual indemnification and common law indemnification against Pizza (Bedford's Answer at ¶ 41), Bedford's notice of motion (at ¶ 1) and accompanying attorney affirmation (at ¶¶ 51-79) sought relief only for its contractual indemnification claim. Accordingly, the Court does not consider the merits of Bedford's common law indemnification claim.

Bedford's lease with Pizza provides the following indemnification and insurance procurement provisions:

> [§ 51] "[Pizza] shall defend[,] indemnify and hold [Bedford] harmless from and against any all claims, losses, liability or expense, including reasonable attorney's fees, and lost rent arising out of [Pizza's] use of the Demised Premises and/or arising in or about the Demised Premises or any part thereof or from any other causes due to the negligence, carelessness or otherwise improper conduct (including illegal activities) of [Pizza], his servants, agents, employees, visitors, licensees, during the term of this Lease."
>
> [§ 46] "[Pizza] is responsible for the cost and expense of all repairs and replacements, including structural repairs for the demised premises and the basement. [Pizza] agrees throughout the term of this lease, at its own cost and expenses, and in a manner satisfactory to [Bedford], to put, keep, and maintain, the [demised] premises in good repair, both inside and outside, and the areas and vaults thereon, or adjoining or in front of same, and all connections with the street, water, electric, gas mains, sewer lines, steam pipes and each and every fixture used in connection with the demised premises, including basement; and [Pizza] releases [Bedford] from all obligations to maintain or repair or replacement for the demised premises, including basement and agrees to maintain the demised premises, in all portions and parts thereof in a manner equal to the maintenance of the building in the City of New York."
>
> [§ 63] "[Pizza] shall specifically indemnify and hold [Bedford] harmless against any and all claims or damages [Bedford] may sustain through [Pizza's] failure to keep the demised premise in a safe and clean condition, which include, but not limited, to . . . any accident claims made by . . . pedestrians."
>
> [§ 55] "Notwithstanding any negligence on the part of Landlord, Landlord shall not be held liable for any injury to or death of any person or persons, or injury or damage to merchandise, goods, furniture, fixtures or other property, from theft or accident, or from steam, gas, electricity, water, rain which may seep into, issue or flow from the building."
>
> [§ 49] "[Pizza] shall maintain, at tenant's sole expense, at all times during the terms of the lease, comprehensive general liability insurance with respect to the premises of not less than Two Million ($2,000,000) Dollars per each occurrence for personal injuries and not less than One Million ($1,000,000)

> Dollars for property damages. . . . All of the above insurance policies . . . shall name the Landlord as an additional insured."

According to Bedford, the indemnification provisions require Pizza to indemnify Bedford for plaintiffs' claims. Pizza counters, arguing that it was not negligent, and therefore under no obligation to indemnify Bedford, and that even if Pizza were negligent, the indemnification provisions are void under General Obligations Law (GOL) § 5-321. The former argument lacks merit as the Court already concluded that Pizza had control over the drainpipe (*see supra* at 6-8). As for the latter, the court agrees that the indemnity provision is unenforceable pursuant to GOL § 5-321, as explained below.

GOL § 5-321 provides, in pertinent part, that:

> "[e]very covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable" (§ 5-321).

The legislature enacted the statute in response to *Kirshenbaum v General Outdoor Adv. Co.* (258 NY 489 [1932]), which held that a landlord was not liable to the tenant even though the landlord's negligence caused the tenant damages because of a contractual provision (*see Mendieta v 333 Fifth Ave. Assn.*, 65 AD3d 1097, 1100 [2d Dept 2009]). "Pursuant to this legislation, a landlord could no longer claim that it was not liable to the tenant for the landlord's own negligence based upon a provision in the lease" (*see id.*). Thus, the statute "prohibit[s] agreements which free landlords (or others in comparable relationships) from all responsibility

to a tenant (or others) for negligence; the former are thus compelled at their own peril to retain the incentive to act prudently" (*Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 161 [1977]).

However, GOL § 5-321 is not meant to unilaterally dispose of all indemnification provisions between a landlord and tenant. For example, the Court of Appeals held that indemnification was enforceable when there was "a commercial lease negotiated between two sophisticated parties who included a broad indemnification provision, coupled with an insurance procurement requirement " (*Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 [2006]). Thus, "[w]here . . . a lessor and lessee freely enter into an indemnification agreement whereby they use insurance to allocate the risk of liability to third parties between themselves, General Obligations Law § 5-321 does not prohibit indemnity" (*id.* at 419). "In such circumstances, the landlord is not exempting itself from liability to the victim for its own negligence" (*Castano v Zee-Jay Realty Co.*, 55 AD3d 770, 772 [2d Dept 2008], *lv denied* 12 NY3d 701 [2009). Instead, the landlord and tenant are using insurance companies to shift liability risk between themselves (*see id.*)

Here, as Bedford points out, pursuant to the terms of the lease, Pizza was responsible for maintaining the premises, obligated to indemnify Bedford and required to procure insurance naming Bedford as an additional insured. Bedford further notes that it and Pizza are both sophisticated parties. Although these are, plainly, relevant factors that tend to favor an indemnity provision being exempt

from GOL § 5-321 (*Great Northern*, 7 NY3d at 419), such factors are not a mere checklist that a landlord can simply check off to escape from the dictates of GOL § 5-321 (*see Ben Lee Distribs., Inc. v Halstead Harrison Partnership*, 72 AD3d 715, 716 [2d Dept 2010]). The language describing the scope of a landlord's indemnity is also relevant to determining whether § 5-321 applies. Indeed, "an agreement [that] exempt[s] a lessor from its own negligence is void and unenforceable" (*Castano*, 55 AD3d at 772).

Here, the language in the contract between Bedford and Pizza specifically states: "Notwithstanding any negligence on the part of Landlord [Bedford], Landlord shall not be held liable for any injury . . . ."[13] Such a sweeping indemnification provision is unenforceable under § 5-321 (*see e.g. Rego v 55 Leone Lane, LLC*, 56 AD3d 748, 749-750 [2d Dept 2008]; *see also Ben Lee Distribs., Inc.*, 72 AD3d at 716). "[T]he indemnification provision improperly contemplate[d] a complete rather than partial shifting of liability from [Bedford] to [Pizza] inasmuch as it made no exception for [Bedford's] own negligence" (*Wagner v Ploch*, 85 AD3d 1547, 1548 [4th Dept 2011] [internal citation and quotation marks omitted]; *see also Castano*, 55 AD3d at 772). Further, fatal to Bedford's argument is that the appellate order already held that it was negligent (*Sloan*, 208 AD3d at 1194). "[I]f the purpose of the indemnity clause is to exempt the landlord from liability to the victim . . . for its own negligence, it

[13] Contract between Bedford and Pizza at ¶ 55.

violates General Obligations Law § 5-321" (*Mendieta v 333 Fifth Ave. Assn.*, 65 AD3d 1097, 1101 [2d Dept 2009]; *see e.g. Gibson v Bally Total Fitness Corp.*, 1 AD3d 477, 479 [2d Dept 2003]). Accordingly, that branch of Bedford's motion seeking contractual indemnity as against Pizza is denied. Correspondingly, that branch of Pizza's motion to dismiss Bedford's contractual indemnity claim as against Pizza is granted (*see e.g. Danielson v Jameco Operating Corp.*, 20 AD3d 446, 448 [2d Dept 2005]).

Breach of Contract for Failure to Procure Insurance

Although Bedford asserts in its attorney affirmation that Pizza failed to procure insurance listing Bedford as an additional insured, this is not based on personal knowledge and is therefore a nullity. (*See, US Natl. Bank Assn. v Melton*, 90 AD3d 742 at 743, [2nd Dept 2011], "...the affirmation of an attorney which is not based upon personal knowledge of the facts is of no probative or evidentiary significance [*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-385, 828 NE2d 604, 795 NYS2d 502 [2005]; *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456, 826 NYS2d 152 [2006]"). Bedford does not otherwise make any cognizable legal argument supporting its claim. In short, a brief refence to a claim with no supporting affidavit or legal argument is insufficient to show one's entitlement to summary judgment, and therefore the burden never shifted to Pizza (*see generally Zuckerman v City of New York,* 49 NY2d 557 [1980]). Accordingly, that branch of Bedford's motion seeking summary judgment on its breach of contract for failure to procure insurance claim against Pizza is denied.

2-B. Bedford's Cross-Claims Against Builders[14]

Contractual Indemnification

Bedford has failed to establish *prima facie* that it is entitled to contractual indemnification from Builders. The contract between Pizza and Builders defines Pizza (but no one else) as the "owner" to be indemnified pursuant to § 8.12 thereof. "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

3-A. Pizza's Cross-Claims Against Builders

Contractual Indemnification

Pizza's contract with Builders provides (in § 8.12 at page 7 thereof) that:

> "To the fullest extent permitted by law, [Builders] shall indemnify and hold harmless [Pizza] . . . from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), *but only to the extent caused by the negligent acts or omissions of [Builders],* a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder." (emphasis added)

Pizza has established *prima facie* that it is entitled to summary judgment on its contractual indemnification claim against Builders, subject to apportionment of liability at trial, in light of Pizza's delay of more than a year after the completion of the

[14] As with footnote 12, the Court only considers Bedford's contractual indemnification cross-claim as against Builders which was the only claim that Builders addressed in its motion papers.

contracted-for work (and until the happening of the accident) before it took action to correct the defect and invoked the aforementioned indemnification provision against Builders (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]). The phrase "to the fullest extent permitted by law" "contemplates partial indemnification and is intended to limit [Builders'] contractual indemnity obligation solely to [Builders'] own negligence" (*id.*). The rest of the provision's plain language makes clear Builders' indemnity obligation to Pizza.

In opposition, Builders fails to raise an issue of fact[15] and merely argues that Pizza is not entitled to contractual indemnity because Pizza was itself negligent.[16] Although Pizza may not be entitled to be indemnified for its own negligence, it is nonetheless entitled to conditional contractual indemnification from Builders pending an apportionment of fault since it has been determined herein that Builders was also negligent. Thus, inasmuch as the indemnity provision at issue clearly obligates Builders to indemnify Pizza for its (Builders) own negligence, that branch of Pizza's motion seeking contractual indemnity against Builders is granted conditionally pending apportionment of liability. Lastly, it follows that Builders' motion to dismiss this claim is denied.

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[15] To the extent that Builders discuss indemnification, its argument concerns common law indemnification (in ¶¶ 21-22, 24 of Builders' attorney affirmation in opposition, dated October 17, 2023)

[16] Builders' attorney affirmation in opposition, dated October 17, 2023, ¶¶ 15-20)

Common Law Indemnification

However, and notwithstanding the labels used in paragraph 94 of its attorney affirmation, Pizza never addresses the merits of why the Court should grant it summary judgment on its common law indemnification and contribution claims. The only references to common law indemnification and contribution are where Pizza argues why these claims from its codefendants should be dismissed against Pizza.[17] Accordingly, Pizza has not met its burden, and, by result, is not entitled to summary judgment on these claims.

Common Law Indemnification and Contribution Claims as Against Pizza

Concerning common law indemnification, it is impossible for a defendant to recover under this theory if the defendant seeking relief was negligent (*see Fedrich v Granite Bldg. 2, LLC*, 165 AD3d 754, 756 [2d Dept 2018]; *see also Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 16 [2d Dept 2019]). The analysis ends here if the defendant seeking relief was negligent (*see e.g. Crutch v 421 Kent Dev., LLC*, 192 AD3d 977, 981 [2d Dept 2021]), i.e., a defendant cannot point to his or her codefendant's negligence as a way to circumvent the requirement that the party seeking indemnification be free of negligence. As discussed above, Builders was found negligently liable for plaintiff's injuries (*see supra* at 9-10), thereby precluding Builder's common-law indemnity claim. Accordingly, Pizza is entitled to summary judgment dismissing Builder's common-law indemnity claim as against it.

[17] Pizza's attorney affirmation in opposition, dated June 11, 2023, ¶¶ 82-85.

Contribution

"As opposed to indemnification, which shifts the entire liability to the negligent party, where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy" (*Fedrich,* 165 AD3d at 757 [internal quotation marks omitted]). Here, both Builders and Pizza were found negligent. Thus, if Builders wished to seek contribution from Pizza, its fellow tortfeasor, contribution is the only available remedy. Consequently, that branch of Pizza's motion seeking to dismiss Builders' contribution claim as against it is denied.

3-B. Bedford's Failure to Procure Insurance Claim Against Pizza

That branch of Pizza's motion to dismiss Bedford's claim that Pizza failed to procure insurance and name Bedford as an additional insured is granted. Pursuant to the terms of the lease, Pizza was required to carry "comprehensive general liability insurance with respect to the premises of not less than Two Million ($2,000,000) Dollars per each occurrence for personal injuries and not less than One Million ($1,000,000) Dollars for property damages," and to name Bedford as an additional insured. In support of its motion to dismiss this claim, Pizza contends that it has made payments to Bedford for the premiums for the requisite insurance, and that said payments were incorporated into the lease (NYSCEF Doc No. 136, ¶¶ 49, 52). In addition, Pizza submits, *inter alia,* letters from its insurer which indicate that Pizza had the requisite insurance at the time of the injured plaintiff's accident and that Bedford was named as an additional insured under

the policy[18] (*see generally Matter of Rivera v Superior Laundry Services, LLC*, 142 AD3d 1257, 1258-59 [3d Dept 2016]). In opposition, Bedford's one-paragraph attorney affirmation, which failed to address this claim, is insufficient to rebut Pizza's *prima facie* showing that it complied with the lease's insurance provisions. Moreover, the insurer's subsequent refusal to defend and indemnify Bedford under the coverage obtained does not alter this conclusion (*see Perez v Morse Diesel Int'l, Inc.,* 10 AD3d 497, 498 [1 Dept 2004]).

3-C. Manjula's Cross-Claims Against Pizza

That branch of Pizza's motion seeking to dismiss Manjula's common law indemnity claim against it is denied in light of the issues of fact as to Manjula's liability (*see Fedrich*, 165 AD3d at 756).

4-A. Plaintiffs' Claims Against Manjula

Manjula is not entitled to summary judgment dismissing plaintiffs' claims and crossclaims as against her under the theory that she owed no duty to the injured plaintiff. Previously, the appellate order held that plaintiffs were not entitled to summary judgment against Manjula, explaining that "[their] evidentiary submissions in support of their motion, which included conflicting opinions of an expert they retained[,] and an expert retained by [Manjula], failed to eliminate triable issues of fact regarding [Manjula's]'s ownership and control of the drainpipe" (*Sloan*, 208 AD3d at 1195). The appellate order explained that plaintiffs' submissions, which included Teutonico's and Ferrantello's

[18] NYSCEF Doc No. 411.

respective affidavits did not eliminate the aforementioned issues of fact regarding Manjula's ownership and control of the drainpipe. Now, Manjula has accompanied her summary judgment motion with the same affidavit from Ferrantello that she previously submitted in opposition to plaintiffs' prior motion. Meanwhile, plaintiffs likewise have submitted the same affidavit from Teutonico. Simply put, Manjula and plaintiffs have recycled the same expert affidavits which they utilized in opposition or in support (as applicable) of plaintiffs' prior motion. It follows that there are still issues of material fact here because these experts' affidavits did not resolve the relevant issues of fact in connection with plaintiffs' prior motion.

4-B. Manjula's Cross-Claims Against Bedford, Builders, and Pizza

The Court now turns to Manjula's arguments to dismiss the common law indemnification and contribution cross-claims from all of her codefendants.[19]

The analysis here is similar to the analysis surrounding Pizza's motion for summary judgment to dismiss the common law indemnity and contribution claims against it (*see supra* at 17-18). In short, a claim for common law indemnification from Bedford, Builders or Pizza must fail because all three were liable, and as liable parties,

[19] Bedford's Answer at ¶¶ 40-41; Builders' Answer at ¶¶ 42-43; Pizza's Answer at ¶ 38. Of note, Bedford also sought contractual indemnification against Manjula even though there was no contract between Bedford and Manjula. Nevertheless, the Court lacks the authority to grant summary judgment dismissing this claim because Manjula never moved for this relief (*see Wells Fargo Bank, N.A. v St. Louis*, 229 AD3d 116, 124 [2d Dept 2024]).

they are not entitled to common law indemnity from Manjula (*see e.g. Crutch*, 192 AD3d at 981).[20]

As for contribution, Bedford, Builders, and Pizza would be entitled to contribution if the factfinder concludes that Manjula was negligent (*see Fedrich*, 165 AD3d at 757). Thus, at this stage of litigation, the Court must deny Manjula's motion for summary judgment to dismiss the contribution claims against her.

5-A. Co-Defendants' Cross-Claims Against Builders

Common Law Indemnification Claims

As with Manjula, all three of Builders' codefendants sought common law indemnification against it. That branch of Builders' motion seeking to dismiss Bedford and Pizza's common law indemnification claims is granted as said co-defendants were found negligent. However, that branch of Builders' motion to dismiss Manjula's common-law indemnity claim is denied in light of the issues of fact as to Manjula's liability (*see e.g. Crutch*, 192 AD3d at 981) .

Contribution Claims

All three of Builders' codefendants also sought contribution from Builders. Builders' argument that it was not negligent,[21] and therefore the contribution claims must

[20] Manjula took a circuitous route to meeting her burden. The portion of her memorandum of law explicitly addressing the common law indemnity cross-claims argues that Manjula was not negligent, and therefore, cannot be held liable for common law indemnification (at ¶¶ 21-24). Although issues of fact exist as to Manjula's negligence, she has nonetheless met her burden by noting the negligence on the part of Bedford, Builders, and Pizza. And as noted above, a negligent party simply cannot recover for common law indemnification (*see Fedrich*, 165 AD3d at 756).

[21] Builders' attorney affirmation in support, dated June 9, 2023, ¶¶ 67-68.

fail, is not persuasive. As such, the court denies Builders' motion for summary judgment to dismiss all contribution claims against it (*see Fedrich*, 165 AD3d at 757).

5-B. Bedford's Cross-Claim Against Builders

Contractual Indemnification Claim

Inasmuch as there was no contract between Bedford and Builders (*see supra* at 15), that branch of Builders' motion to dismiss Bedford's contractual indemnity claim as against it is granted (*see e.g. Pantaleo v Bellerose Senior Hous. Dev. Fund Co., Inc.*, 147 AD3d 777, 778 [2d Dept 2017]).

6. Defendants' Affirmative Defense of Injured Plaintiff's Culpable Conduct

Lastly, plaintiffs have moved, pursuant to CPLR 3211 (b), to strike the affirmative defenses of the injured plaintiff's allegedly culpable conduct. "To be entitled to partial summary judgment a plaintiff does not bear the . . . burden of establishing . . . the absence of his or her own comparative fault" (*Rodriguez v City of New York*, 31 NY3d 312, 324 325 [2018]). However, where, as here, plaintiffs' motion for summary judgment also seeks to strike defendants' affirmative defense of comparative fault, "the issue of [the injured] plaintiff's comparative negligence may be decided in the context of [such] a summary judgment motion" (*Sapienza v Harrison*, 191 AD3d 1028, 1029 [2d Dept 2021).

Here, plaintiffs have established their *prima facie* entitlement to judgment dismissing defendants' affirmative defenses alleging comparative negligence by way of the properly authenticated surveillance video footage of the injured plaintiff's accident (*see Zhu v Shrestha*, 229 AD3d 844, 846 [2d Dept 2024]; *Vasquez v Strickland*, 211 AD3d 414, 414 [1st Dept 2022]). In opposition, defendants have failed to raise a

triable issue of fact. Accordingly, the remaining branch of plaintiffs' motion which is for an order, pursuant to CPLR 3211 (b), striking defendants' affirmative defense of culpable conduct on the injured plaintiff's part is granted, and such affirmative defense is stricken from all of defendants' respective answers.

All other issues not specifically addressed herein have been considered by the court and found to be either without merit or moot in light of its determination.

Conclusion

Accordingly, it is hereby

ORDERED that in Motion Seq. No. 12, plaintiffs' motion for an order, pursuant to CPLR 3211 and 3212: (1) granting the injured plaintiff's partial summary judgment on the issue of liability as against Pizza and Builders; and (2) striking any affirmative defenses as to her alleged comparative fault in any/all of defendants' answers, is granted; and the remainder of plaintiff's motion is denied; and it is further

ORDERED that in Motion Seq. No. 9, Bedford's motion for an order, pursuant to CPLR 3211 and 3212, granting it summary judgment on its claims for: (1) contractual indemnification and the additional insured coverage as against Pizza in accordance with the terms of the parties' contract; and (2) contractual indemnification as against Builders, is denied; and it is further

ORDERED that in Motion Seq. No. 11, Pizza's motion for an order, pursuant to CPLR 3212, granting it summary judgment: (1) on its claim for contractual indemnification against Builders is granted conditionally subject to an apportionment of fault between Pizza and Builders; and that branch of Pizza's motion (2) to dismiss Builders' common

law indemnification claim; (3) to dismiss Bedford's contractual indemnification claim; and (4) to dismiss Bedford's failure to procure insurance claim is granted; and the remainder of Pizza's motion is denied; and it is further

ORDERED that in Motion Seq. No. 13, Manjula's motion for an order, pursuant to CPLR 3212, granting it summary judgment to dismiss the common law indemnification claims from Bedford, Pizza, and Builders is granted; and the remainder of Manjula's motion is denied; and it is further

ORDERED that in Motion Seq. No. 10, Builders' motion for an order, pursuant to CPLR 3212, granting it summary judgment: (1) to dismiss the common law indemnification claims from Bedford and Pizza against it; and (2) to dismiss Bedford's contractual indemnification claim against it is granted; and the remainder of Builders' motion is denied; and it is further

ORDERED that the parties and their counsel, and insurance adjuster(s) with authority to settle and have direct telephone access with any other insurance company employee authorized to settle for an amount over the authorized limitations of the adjuster, and up to the limits of the policy, are directed to appear in person in the chambers of the below named Justice, room 1135 at 360 Adams Street, Brooklyn, NY 11201, on March 12, 2025 at 2:30pm, for a settlement conference; and it is further

ORDERED, that any medical records or reports in the possession of either party that are pertinent to the issue of damages shall be provided to the court one week prior to the scheduled settlement conference and such records shall be returned to the respective parties at the end of the settlement conference; and it is further

ORDERED that plaintiffs' counsel is directed to serve a copy of this decision and order with notice of entry within 10 days of the entry of this order.

The foregoing constitutes the decision and order of the court.

ENTER,

Hon. Richard J. Montelione
Justice of the Supreme Court