SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART** 58

Justice

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DAVID MERRICK,

Plaintiff,

- v -

MACERICH COMPANY, MACERICH MANGEMENT COMPANY, MACHERICH QUEENS LIMITED PARTNERSHIP, SCHINDLER ELEVATOR CORPORATION, and THYSSENKRUPP ELEVATOR CORPORATION,

Defendants.

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INDEX NO. 158681/2016

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 219, 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, 247, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 268, 269, 270, 271, 272

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action, defendants Macerich Property Management Company, LLC ("MPM") i/s/h/a Macerich Company and Macerich Management Company and Queens Center SPE LLC i/s/h/a Macerich Queens Limited Partnership ("Queens Center") move, pursuant to CPLR 3212, for summary judgment on their cross claims for contractual indemnification, including the reimbursement of attorneys' fees and costs for the defense of this action, as against defendant Thyssenkrupp Elevator Corporation ("TEC") or, in the alternative, for an order granting them conditional contractual indemnification as against TEC, along with such other and further relief as this Court deems just and proper. TEC opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on April 20, 2015 in which plaintiff David Merrick, an employee of nonparty The Namm Group, was injured when part of a freight elevator struck him in the head while he was working at the Queens Center Mall ("the mall" or "the premises"), located at 90-15 Queens Boulevard, Elmhurst, New York. The mall was owned by defendant Queens Center and managed by MPM. Plaintiff was injured during the course of installing terrazzo flooring in an Apple Store ("the store") at the premises. At the time of the incident, he was using the elevator to bring materials to be used in installing the floor from the basement of the mall to the store.

Plaintiff commenced this action by filing a summons and complaint against MPM and Schindler Elevator Corporation on October 14, 2016. Doc. 223.[1] MPM and Queens Center joined issue by their answer dated November 1, 2016. Doc. 224. On or about November 19, 2016, plaintiff served a supplemental summons and amended complaint adding TEC as a defendant. Doc. 225. In the amended complaint, plaintiff alleged that he was injured due to the negligence of the defendants. Doc. 225. Specifically, plaintiff alleged that TEC was negligent in its maintenance of the elevator, including failing to maintain the sensor controlling the door in working order and failing to replace the gate on the elevator. Doc. 225.

MPM, Queens Center and TEC thereafter answered the amended complaint, denying all substantive allegations of wrongdoing and asserting various affirmative defenses. Docs. 227 and 228. MPM and Queens Center also asserted cross claims against TEC seeking, inter alia, contractual indemnification. Doc. 227. TEC denied the allegations in the cross claims but

[1] The claims against Schindler Elevator Corporation were dismissed by order entered August 15, 2022. Doc. 275.

admitted that it had entered into an elevator service contract with Macerich Partnership, L.P. ("MPLP").

In a March 2017 discovery response (Doc. 238), TEC provided MPM and Queens Center with a copy of an Elevator and Escalator Service Agreement ("the agreement") entered into between TEC and MPLP, as a subsidiary of the Macerich Company, in May 2012. Doc. 233. The agreement provided that TEC would "provide escalator and elevator maintenance and repair services", also referred to as "Vertical Transportation Services", at certain shopping centers, including the mall. Doc. 233 at 1; par. 3(A).

Paragraph 6 of the agreement read as follows:

> 6. INDEMNIFICATION. Contractor agrees to indemnify, defend and hold harmless Macerich, each of the owners of the Centers, the Merchants and The Macerich Company together with each of their affiliates, principals, agents, servants, employees, officers, directors and shareholders of, from and against any claim, demand, cause of action, governmental action or proceeding, or other investigation or inquiry (including all attorney's fees, court costs, expenses and disbursements from the date of first notice), whatsoever to the extent arising out of or derived from the breach of this Agreement or the actual and/or alleged negligent performance (or the failure thereof) or willful misconduct by Contractor, its employees, affiliates, and their agents, servants and subcontractors of any portion of this Agreement or the duties prescribed herein. Such indemnity shall include any and all liability resulting from bodily injuries (including death), property damage, or any violation or alleged violation of law arising out of or in any way connected with the negligent performance of this Agreement. The indemnification made by Contractor herein shall survive the termination of this Agreement, Macerich agrees to indemnify, defend and hold harmless Contractor and its affiliates, principals, employees, officers, directors and shareholders of, from and against any claim, demand, or cause of action (including all reasonable attorney's fees, court costs, expenses and disbursements from the date of first notice), whatsoever to the extent arising out of or derived from the breach of this Agreement or the active negligence or willful misconduct by Macerich, its employees and affiliates in the Common Area of the Centers.

Doc. 233.

Paragraph 7 of the agreement read in part as follows:

> 7. INSURANCE. Contractor shall maintain, at its sole cost and expense, the following insurance:
>
> B. Comprehensive commercial general liability insurance providing coverage for bodily injury, property damage and personal injury, with applicable limits of liability being not less than Two Million Dollars ($2,000,000.00) per occurrence and Five Million Dollars ($5,000,000.00) in the aggregate. Such policy or policies of insurance shall not be canceled or rescinded unless Macerich is provided at least thirty (30) days' prior written notice of the same.
>
> C. Owner's and Contractor's Protective Liability Policy, with limits of liability not less than $5,000,000.00, which lists Macerich, the owners of each Center and The Macerich Company as named insureds, which policy shall remain in effect during the term of this Agreement.
>
> With the exception of the Workers Compensation Insurance, the policy or policies of insurance shall further provide that: Macerich, the owners of each of the Centers, The Macerich Company, and all owned, managed, controlled, non-controlled and subsidiary companies, corporations, entitles, joint ventures, limited liability companies and partnerships and all of their constituent partners and members shall be named as additional insureds to the extent of the insurance limits prescribed in this Paragraph 7 and to the extent of the indemnification obligations of Contractor described herein. Contractor further agrees to provide Macerich with evidence of the existence of all such policies of insurance within ten (10) days prior to the commencement of the term of this Agreement and at such other times during the term hereof as Macerich, in its sole discretion, may require. Such insurance shall be deemed an additional obligation of Contractor and shall not be in discharge of or limitation to the provisions of indemnity contained in this Agreement. of subrogation endorsement attached to the certificate of insurance.

Doc. 233.

Exhibit C to the agreement, entitled "Scope of Services", provided, inter alia, that TEC was to provide "complete routine maintenance and repair of the [v]ertical [t]ransportation [e]quipment"; that TEC was to "make any and all necessary modifications required to bring the existing [v]ertical [t]ransportation [e]quipment into quality operating condition including the replacement of major components, if necessary; that TEC was to "regularly and systematically examine, clean, lubricate and adjust the [v]ertical [t]ransportation [e]quipment and, as conditions

warrant, repair and replace all components of the [said equipment]" including, inter alia, "safety devices". Doc. 233, Ex. C, at par. N. The agreement also provided that "[i]f an infrared door protective device fails, [TEC] shall replace it at no additional cost to Macerich, regardless of model, type, and manufacturer." Doc. 233 at Ex. C par. HH (a)(II).

Exhibit C-1 to the agreement provided, among other things, that TEC was responsible for cleaning and inspecting "detectors and/or photo eyes" on a monthly basis. Doc. 233 at Ex. C-1, par. 1(B)(2).

Section E of Exhibit C of the agreement, entitled "Contractor's Duties", provided, inter alia, that TEC was to furnish:

> "all material, labor, tools, transportation and equipment necessary to provide full preventive maintenance service, lubrication, adjusting, cleaning, repairs, [and] testing…

Doc. 233.

In his April 2017 bills of particular against MPM and TEC, plaintiff alleged that he was injured when the upper door of the elevator struck him in the head and that this occurred because a sensor which was supposed to stop the top door of the elevator from striking an object malfunctioned. Docs. 92 and 93. He claimed that, had the sensor been working properly, the door would have reopened before striking plaintiff's head. Docs. 92 and 93.

In July 2018, MPM and Queens Center moved for summary judgment against TEC based on the foregoing provisions of the agreement. In support of the motion, MPM and Queens Center submitted, inter alia, the affidavit of Jeffrey Owen, a senior property manager for MPM, sworn July 2, 2018, who attested that MPM was the property manager of the mall as of the date of the incident; that the mall was owned by Queens Center; that MPLP was "a subsidiary of The Macerich Company"; and that MPM was an affiliate of MPLP. Doc. 236. By order dated

January 2, 2019, this Court denied the motion with leave to renew upon the completion of discovery. Doc. 239.

At his deposition, plaintiff testified that, at the time of the alleged incident, he was loading palates into a freight elevator located directly outside of the store so that they could be brought to a garbage disposal. Doc. 240 at 39, 53. The elevator opened from the top down. Doc. 240 at 83. He pushed a button on the wall to call the elevator and it opened. Doc. 240 at 55. He then lifted the pallet and moved it into the elevator. Doc. 240 at 56, 58. As he did so, he heard a beeping sound, which meant that the door of the elevator was closing, so he made sure to get inside the elevator. Doc. 240, at 61, 95, 139. However, the door of the elevator came down and hit him on the head. Doc. 240 at 58-59. Plaintiff maintained that the gate was supposed to stop descending if the elevator's sensor detected that someone was present, and that he had seen a gate reopen when someone was in the way of it closing. Doc. 240 at 95-97, 139. Although plaintiff said that the elevator had doors and a gate, he also testified that he did not believe that the elevator had doors. Doc. 240 at 43, 58-59; 116-117. It thus appears, but is uncertain, whether plaintiff used these terms interchangeably at his deposition.

Alex Armizendi, operations manager for MPM, testified on behalf of MPM and Queens Center. Doc. 241. He was responsible for managing contractors responsible for elevators and escalators at the mall and identified the agreement. Doc. 241 at 15, 18. He said that, before the gate came down, the elevator was supposed to beep, and that the beeping was supposed to continue as the gate went down. Doc. 241 at 54. He further stated that, if someone was entering or exiting the elevator as the gate was descending, the gate was supposed to stop moving. Doc. 241 at 55-57.

Robert Preston, a service mechanic for TEC on the date of the incident, testified that TEC had a service contract for the elevators at the mall and had a full time representative present there. Doc. 243 at 9-10, 14. He admitted that TEC was responsible for repairs and preventative maintenance on the elevators at the mall and that he had performed some of such maintenance, including conducting safety tests. Doc. 243 at 15-16, 25, 38. The inspection of the equipment included ensuring that the safety devices involving the elevator gates and doors worked. Doc. 243 at 39. Preston stated that the gate inside the elevator opened like a "clamshell" and that the elevator would not operate unless the gate closed and then the outer doors closed. Doc. 243 at 9-10, 20-23. Additionally, he noted that there was an electric sensor which "prevent[ed] the outer doors from closing if somebody [was] blocking the inner door." Doc. 243 at 24. Repair records reflected that, in December 2014, he repaired an electrical contact responsible for ensuring that the elevator doors were locked and that the sensor would have prevented the inner gate from closing. Doc. 243 at 46-47.

Plaintiff filed a note of issue and certificate of readiness on November 22, 2021. Doc. 245.

MPM and Queens Center now move, pursuant to CPLR 3212, for summary judgment on their cross claim against TEC for contractual indemnification. Docs. 220-245. In support of the motion, they argue that, based on the agreement, they are entitled to full contractual indemnification against TEC, including defense costs and attorneys' fees. Doc. 222 at 3. They insist that the agreement allows them to be indemnified for their own negligence and does not violate General Obligations Law ("GOL") § 5-321. Doc. 222 at 8-10. Further, MPM and Queens Center argue that the agreement imposes upon TEC the sole responsibility for maintaining the elevator. Doc. 222 at 12. Additionally, they urge that, if they are not granted

contractual indemnification at this time, then they are entitled to conditional contractual indemnification. Doc. 222 at 14.

In opposition, TEC argues that the motion must be denied since MPM and Queens Center failed to establish their prima facie entitlement to summary judgment. Doc. 252. Specifically, it maintains that MPM has failed to establish that it was free from negligence and that MPM and Queens Center failed to establish that TEC either created the allegedly dangerous condition or had knowledge of the same. Doc. 252. It further asserts that the motion must be denied based on the law of the case doctrine since this Court denied the prior motion for summary judgment by MPM and Queens Center. Doc. 252. Moreover, TEC maintains that it is not required to contractually indemnify MPM since the latter was not a party to the agreement. Doc. 252. Finally, TEC urges that the GOL bars MPM from seeking indemnity from it. Doc. 252.

In reply, MPM and Queens Center argue that their motion is not barred by the law of the case doctrine. Doc. 268. They further assert that TEC is obligated to indemnify them, and that there is no language in the agreement requiring that TEC is found negligent before it is required to do so. Doc. 220 at 16; 268. Further, MPM and Queens Center assert that the indemnification provision of the agreement does not violate the GOL and that, in any event, there is no evidence of their negligence. Doc. 268. Finally, MPM and Queens center argue that their motion is not premature. Doc. 268.

LEGAL CONCLUSIONS

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "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]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

Initially, this Court notes that the instant motion is not barred by the law of the case doctrine since the denial of movants' initial motion for summary judgment was based on the fact that it was premature and was clearly not a determination on the merits (*See Shatzkin v Village of Croton-on-Hudson,* 51 AD3d 903, 903 [2d Dept 2008]; *Meekins v Town of Riverhead,* 20 AD3d 399, 400 [2d Dept 2005]).

Here, the agreement requires TEC to indemnify Queens Center and MPM, as well as its agents and affiliates, "from and against any claim, demand, [or] cause of action", including "all attorney's fees, court costs, expenses and disbursements . . . to the extent arising out of or derived from the breach of [the] [a]greement *or the actual and/or alleged negligent performance*" of the agreement (emphasis added). Doc. 233 at par. 6. The agreement further provided that "[s]uch indemnity shall include any and all liability resulting from bodily injuries. . . arising out of or in any way connected with [TEC's] negligent performance of this [a]greement." Doc. 233 at par. 6. Thus, TEC's indemnification obligation, including costs and attorneys' fees, was triggered by plaintiff's allegation that said defendant's negligent performance of the agreement contributed to the accident (*See Vitucci v Durst Pyramid LLC*, 205 AD3d 441, 445 [1st Dept 2022]). Additionally, the indemnification provision contains a savings clause and, thus, does not violate GOL § 5-322.1 *(See Payne v NSH Community Servs., Inc.*, 203 AD3d 546, 548 [1st Dept 2022] [citations omitted]). MPM and Queens Center are

therefore entitled to conditional summary judgment on their contractual indemnification claim against TEC to the extent that plaintiff's accident was not caused by their negligence (*see Vitucci v Durst Pyramid LLC,* 205 AD3d at 445, *citing Gonzalez v G. Fazio Constr. Co., Inc.*, 176 AD3d 610, 611 [1st Dept 2019]).

Even where issues of fact exist regarding an indemnitee's active negligence, an award of conditional indemnification is proper where the indemnification provision in question does not violate the GOL (*See Cuomo v 53rd & 2nd Assoc., LLC*, 111 AD3d 548, 548 [1st Dept 2013] [defendant entitled to conditional summary judgment on its claim for contractual indemnification where the extent of its indemnification depended on the extent to which it was found negligent for plaintiff's injuries]). Since the agreement herein does not require TEC to indemnify MPM and Queens Center for their own negligence (contrary to the contention of MPM and Queens Center), MPM and Queens Center are thus entitled to conditional summary judgment on their contractual indemnification claim against TEC (*See Burton v CW Equities, LLC*, 97 AD3d 462, 463 [1st Dept 2012]).

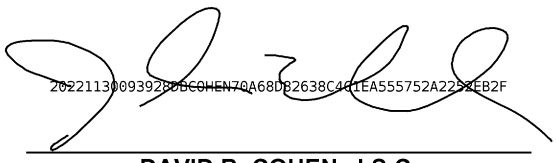
Finally, this Court deems without merit TEC's argument that the agreement does not require it to indemnify MPM. As noted previously, TEC entered into the agreement with "The Macerich Partnership, L.P., a subsidiary of The Macerich Company." Doc. 233 at 1. The agreement required TEC to indemnify The Macerich Partnership, L.P. and The Macerich Company, "together with each of their affiliates, principals, agents, servants, employees, officers, directors and shareholders." Doc. 233 at par. 6. In his affidavit in support of the motion, Owen represents that MPM "was, and is, an affiliate of the Macerich Partnership, L.P., a subsidiary of

the Macerich Company." Doc. 236 at par. 10. Thus, TEC is clearly required to indemnify MPM.[2]

The parties' remaining contentions are either without merit or need not be addressed given the findings above.

Accordingly, it is hereby:

ORDERED that the motion for summary judgment by defendants Macerich Property Management Company, LLC i/s/h/a Macerich Company and Macerich Management Company and Queens Center SPE LLC i/s/h/a Macerich Queens Limited Partnership on their cross claims against defendant Thyssenkrupp Elevator Corporation for contractual indemnification, including reimbursement of attorneys' fees and the costs of defending this action, is granted insofar as movants are granted conditional indemnification against Thyssenkrupp Elevator Corporation to the extent that they are found to be free of any negligence causing or contributing to plaintiff's alleged accident.



11/30/2022
DATE

DAVID B. COHEN, J.S.C.

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

[2] TEC does not dispute that it is obligated to indemnify Queens Center, the owner of the mall, pursuant to the agreement. Doc. 233 at par. 6.