SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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ANTHONY TAYLOR,

Plaintiff,

Index No. 155116/12

-against-

DECISION/ORDER

CROSSTOWN PARKING, INC.,

Defendant.

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CROSSTOWN PARKING, INC.,

Third-Party Plaintiff,

-against-

SOLO PARKING, INC.,

Third-Party Defendant.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Anthony Taylor commenced the instant action seeking to recover damages for injuries he allegedly sustained when he tripped and fell on the sidewalk adjacent to property owned by defendant/third-party plaintiff Crosstown Parking, Inc. ("Crosstown"). Crosstown now moves for an Order pursuant to CPLR § 3212 granting it summary judgment against Solo Parking, Inc. ("Solo") requiring Solo to defend and indemnify Crosstown. For the reasons set forth below, Crosstown's motion is denied.

The relevant facts are as follows. In or around July 2012, plaintiff Taylor allegedly tripped and fell on the sidewalk in front of 316-320 West 118th Street, New York, New York, a property owned by Crosstown (the "subject premises"). Specifically, plaintiff testified that he walked about a half a block on the south side of West 118th Street when he found the sidewalk blocked by a car in front of a garage at the subject premises. He further testified that when he attempted to walk around the car on the side closest to the subject premises, he caught his foot in a hole in a metal grate/sidewalk doors and tripped and fell, sustaining injuries (the "accident").

Crosstown acquired the subject premises in 2004. Solo already occupied the subject premises at that time pursuant to a lease with the subject premises' former owner. That lease expired in 2006. Thereafter, effective June 1, 2006, Crosstown, as landlord, and Solo, as tenant, entered into a six-year lease of the subject premises for Solo to operate the subject premises as a parking garage (the "Lease"). Although the exact date is disputed by the parties, in or around the summer of 2012, Solo vacated the subject premises.

On or about August 1, 2012, plaintiff commenced the instant action against Crosstown seeking to recover damages stemming from his accident. Thereafter, in or around April 2013, Crosstown commenced a third-party action against Solo seeking defense and indemnification from Solo based on Article 36.8 of the Lease which provides as follows:

> Tenant shall indemnify and hold Landlord harmless from and against any and all liability, claim, damage and expense reasonably incurred, including, without limitation, attorneys' fees and disbursements, arising out of, under or in connection with this Lease and the Premises, including, without limitation, defending against any action, suit or claim arising from injury to persons or property of any and every nature and for any matter or thing arising out of, under or in connection with the use and occupancy of the Premises, or any part thereof, from and after Commencement Date or arising out of the use, occupation, management or possession of the

> Premises, or any part thereof, or of the vaults, alleys, sidewalks adjacent thereto, occasioned by Tenant...*provided that Tenant shall not be liable for any loss, damage or expense resulting from the negligent or wrongful act or omission of Landlord, its agents or employees.*

(emphasis added). Crosstown now moves for summary judgment requiring Solo to assume the defense of this action on behalf of Crosstown and to indemnify and hold Crosstown harmless for the entire amount of any recovery had by plaintiff Taylor in the action.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See id.*

In the instant action, this court finds that Crosstown's motion for summary judgment requiring Solo to defend, indemnify and hold Crosstown harmless must be denied on the ground that it is premature. A party is entitled to contractual indemnification when the intention to indemnify is "clearly implied from the language and purposes of the entire agreement and the surrounding circumstances." *Torres v. LPE Land Dev. & Constr., Inc.*, 54 A.D.3d 668 (2d Dept 2008). A party seeking contractual indemnification "must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor." *Cava Constr. Co., Inc. v. Gealtex Remodeling Corp.*, 58 A.D.3d 660, 662 (2d Dept

2009). In the present case, the Lease requires Solo to indemnify Crosstown for a personal injury claim "arising out of, under or in connection with the use and occupancy of the Premises...or any part thereof, or of the...sidewalks adjacent thereto, occasioned by Tenant...*provided that Tenant shall not be liable for any loss, damage or expense resulting from the negligent or wrongful act or omission of Landlord, its agents or employees*" (emphasis added). As there has been no determination of Crosstown's negligence, the court cannot determine whether Crosstown is entitled to contractual indemnification at this time. Indeed, in order for Crosstown to be entitled to contractual indemnification, plaintiff's accident must not have occurred due to any negligent or wrongful act or omission of Crosstown.

Accordingly, Crosstown's motion for summary judgment is denied. This constitutes the decision and order of the court.

Dated: 2/1/16

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C