SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy Bannon **PART 42**
Justice

CROWN WISTERIA, INC.

- v -

UBERTO LTD., EVEREST SCAFFOLDING, INC., ALFRED K.T. CHAN and FIONA MADELINE CIBANI

INDEX NO. 159372/14

MOTION DATE 4/3/18

MOTION SEQ. NO. 006

The following papers were read on this motion for summary judgment:

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law	**No(s). 1**
Answering Affirmation(s) — Affidavit(s) — Exhibits	**No(s). 2**
Replying Affirmation — Affidavit(s) — Exhibits	**No(s). 3**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In this action to recover for injury to property allegedly due to the defendants' trespass, negligence, and creation of a private nuisance arising out of the defendants' construction project, defendant Fiona Madeline Cibano moves pursuant to CPLR 3212 for conditional summary judgment on her cross-claim against defendant Uberto Ltd. (Uberto) for contractual indemnification, and dismissing Uberto's cross-claims against her for breach of contract and for contractual indemnification. The motion is denied.

As a preliminary matter, Uberto's arguments in its "Rejection Notice" that Cibani's motion was untimely and contained incurable errors is without merit. The court may properly consider Cibani's motion, which was filed within the deadline set by this court for summary judgment motions.

The main action in this case arises out of the renovation of Cibani's Manhattan townhouse. Cibani hired Uberto as construction manager for the project pursuant to an agreement dated December 7, 2011 (the CM Agreement). Section 3.18 of AIA Document A201-2007, General Conditions of the CM Agreement, obligated the contractor to indemnify and hold harmless the owner of the property "[t]o the fullest extent permitted by law" from and against "claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of the 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 . . . but only to the extent caused by the negligent act or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable."

During construction, Cibani and Uberto were engaged in negotiations with the plaintiff, which was Cibani's neighbor and owner of property adjacent to Cibani's townhouse, to obtain access to the plaintiff's property in order to perform the renovation work on Cibani's property. Ultimately, Cibani applied for a license to access the plaintiff's property pursuant to RPAPL § 881. While Cibani's application was pending, Cibani and Uberto entered into Contract Amendment 003 to the CM Agreement, dated September 22, 2014 (the Amendment). The Amendment provides that the parties can perform the remaining work on Cibani's property, provided that "the protection work is performed only using the air space of [the plaintiff's property] and without actually touching [the plaintiff's property]." In exchange for Uberto's compliance with the terms of the Amendment, Cibani agreed to defend, indemnify, and hold Uberto harmless from any claims alleging trespass upon the plaintiff's property or violation of the New York City Building Code for work on the property without a license or the plaintiff's permission.

On or about September 24, 2014, the plaintiff commenced the instant action, alleging that Uberto and one of its subcontractors had trespassed upon its property. On or about November 17, 2014, the plaintiff amended the complaint to add claims sounding in private nuisance, strict liability in tort for property damage, and negligence. On or about May 2, 2017, the plaintiff amended the complaint again and named Cibani as a defendant. The second amended complaint alleges damages to the plaintiff's property including damage to the party wall shared by the plaintiff's and Cibani's properties, damage to the chimneys and flues on the plaintiff's property, damage to the drainage system on the plaintiff's property, and damage due to entry by Uberto's workers onto the plaintiff's property. Uberto and Cibani each separately settled with the plaintiff, and the plaintiff has filed stipulations of discontinuance against the defendants. Cibani and Everest Scaffolding, Inc. have also settled the cross-claims between them. The only remaining claims in this action are Uberto's and Cibani's cross-claims against one another.

The proponent of a motion for summary judgment pursuant to CPLR 3212 must establish its entitlement to such relief as a matter of law (see Zuckerman v City of New York, 49 NY2d 557 [1980]) by submitting proof in admissible form demonstrating the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). If the movants fail to meet this burden and establish their claim or defense sufficiently to warrant a court's directing judgment in their favor as a matter of law (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York Univ. Med. Ctr., supra; O'Halloran v City of New York, supra. This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970). Should the movants meet their burden, it then becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hosp., supra. "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." Garcia v J.C. Duggan, Inc., 180 AD2d 579, 580 (1st Dept.

1992).

Contractual indemnification clauses must be "construed as to achieve the apparent purpose of the parties" (Hooper Associates, Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989]), and are enforced only where "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances." Campos v 68 E. 86th St. Owners Corp., 117 AD3d 593, 595 (1st Dept. 2014), quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153 (1973). The indemnification provision in the CM Agreement does not purport to completely indemnify Cibani for its own negligent acts and, hence, is enforceable. See General Obligations Law § 5-322.1(1); Miranda v Norstar Bldg. Corp., 79 AD3d 42 (3rd Dept. 2010). Nonetheless, contractual indemnification is available to a party only where that party is itself free from fault in the happening of the underlying accident. See General Obligations Law § 5-322.1(1); Rodriguez v Heritage Hills Socy., Ltd., 141 AD3d 482 (1st Dept. 2016); Cuomo v 53rd & 2nd Assoc., LLC, 111 AD3d 548 (1st Dept. 2013). Moreover, the terms of the CM Agreement's indemnification provision require a showing of negligence on the part of Uberto, its subcontractors, or their employees. No determination has been made as to the relative fault of the parties, and Cibani's assertion that the second amended complaint "makes it clear" that the plaintiff suffered property damage "as a result of Uberto's performance of the work," without any supporting evidence, does not definitively establish that Uberto was negligent in its performance of that work. In addition, the fact that Cibani delegated all work to Uberto does not free her from liability for Uberto's acts, as an owner may be liable for trespass if the owner directs the trespass or a trespass is necessary to complete the contract. See Tschetter v Sam Longs' Landscaping, Inc., 156 AD3d 1346 (4th Dept. 2017); see also Axtell v Kurey, 222 AD2d 804 (3rd Dept. 1995). Thus, Cibani's motion for conditional summary judgment on her cross-claim for indemnification is premature.

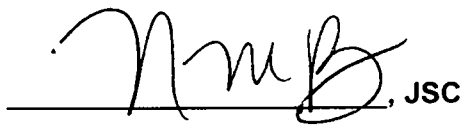
The second indemnification provision in the Amendment purports to indemnify Uberto against allegations of trespass upon the plaintiff's property or for alleged violations of the Building Code of the City of New York for performing work without a license or permission from the plaintiff. Since this provision only applies to the intentional act of trespass, and does not apply to damages deriving from Uberto's negligence, it is enforceable under General Obligations Law § 5-322.1(1), subject to Uberto's showing that it is free from fault, and that it complied with the Amendment's provision that Uberto and its agents protect the plaintiff's property "without physically accessing [the plaintiff's] property" and instead "use the air space over [the plaintiff's] property to install needle scaffolding/netting from [Cibani's] building." To the extent that the plaintiff sought to recover damages that are the result of physical access to its property beyond that provided for in the Amendment, Uberto may not prevail on its claims for breach of contract and indemnification against Cibani. However, some claims in the second amended complaint allege damages caused by non-physical trespass, including damage to the drainage system on the plaintiff's property caused when digging was done on Cibani's property and the erection of scaffolding in the airspace of the plaintiff's property. Thus, Uberto's cross-claims survive.

Accordingly, it is

ORDERED that the motion of the defendant Fiona Madeline Cibani pursuant to CPLR 3212 is denied in its entirety.

This constitutes the Decision and Order of the court.

Dated: July 9, 2018



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HON. NANCY M. BANNON

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION

2. Check as appropriate: MOTION IS: ☐ GRANTED ■ DENIED ☐ GRANTED IN PART ☐ OTHER