Perez v Beach Concerts, Inc.
2018 NY Slip Op 32999(U)
November 5, 2018
Supreme Court, New York County
Docket Number: 158373/2013
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

---X

MARK PEREZ,

Plaintiff,

- v -

BEACH CONCERTS, INC., LIVE NATION WORLDWIDE, INC., LIVE NATION MARKETING, INC., LIVE NATION GLOBAL VENUES AND PROPERTIES, INC., & MICHAEL BROGDEN,

Defendants.

---X

LIVE NATION WORLDWIDE, INC.,
LIVE NATION MARKETING, INC.,

Third-Party Plaintiffs,

- v -

BEST BUY STORES, L.P.,

Third-Party Defendant.

---X

INDEX NO. 158373/2013

MOTION SEQ. NO. 002 & 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 136, 137, 138, 139, 140, 141, 142

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR.

LeClairryan, P.C., New York (Nicole A. Sullivan and Jonathan Mancebo of counsel), for third-party defendants Live Nation Worldwide, Inc., and Live Nation Marketing, Inc.

Fishman, McIntyre, Berkeley, Levine, Semansky, P.C., New York (Mitchell B. Levine of counsel), for Best Buy Stores, L.P.

Motion sequence 002 and 003 are consolidated for disposition.

In motion sequence 002, Best Buy Stores, L.P. (Best Buy) moves for summary judgment under CPLR 3212 and to dismiss Live Nation Worldwide, Inc. and Live Nation Marketing, Inc.'s (Live Nation) third-party complaint against Best Buy. In motion sequence 003, Live Nation moves to vacate the note of issue under CPLR 1405.

For clarification of the facts, *see Perez v Beach Concerts, Inc.*, 2016 WL 3566115, *1 [Sup Ct, NY County 2016], *affd* 154 AD3d 602, 602 [1st Dept 2017].

I. Motion sequence 02

Best Buy's motion is granted in part and denied in part as explained below.

Third-Party Complaint

Live Nation brought a third-party complaint against Best Buy asserting five causes of action: (1) common law indemnification — the first cause of action; (2) breach of contract — the second cause of action; (3) contribution — the third cause of action; (4) breach of contract — the fourth cause of action; and (5) contractual indemnification — the fifth cause of action.

According to the third-party complaint, Section 5 (c) (ii) of Live Nation and Best Buy's agreement — the Sponsorship Agreement — provides that Best Buy will indemnify, defend, and hold Live Nation harmless. Pursuant to the Sponsorship Agreement, section 5 (a) (v) Best Buy agreed to liability insurance naming Live Nation as an additional insured and that such insurance would be primary against all claims for bodily injury. Under the Sponsorship Agreement's Article 4 (a) (iii), staffing, distribution materials, conducting of promotions, premium items, and any additional setup materials would be the sole cost and responsibility of Best Buy. According to the third-party complaint, Best Buy and plaintiff Mark Perez entered into an agreement to build, assemble, construct and complete the Best Buy booth at Jones Beach. Perez, Best Buy's contractor, failed to procure the required insurance under the Sponsorship Agreement. Perez suffered injuries while assembling the Best Buy booth. Live Nation tendered their defense and indemnity to Best Buy. On August 13, 2015, Live Natión received a declination letter for indemnification from Best Buy's carrier, XL Catlin.

Best Buy's Motion

Best Buy moves for summary judgment and for dismissal of the third-party complaint. Best Buy contends that it had no contract with plaintiff. It provided no direction or control to plaintiff or his activities at Jones Beach. Because it had no role in plaintiff's accident, Best Buy argues that it cannot be an indemnitee of Live Nation. Best Buy argues that plaintiff's accident was caused solely from the negligence of Live Nation's employee, defendant Michael J. Brogden.

Best Buy states that it had a "time and materials" agreement with plaintiff to design an enhanced sponsorship booth at Jones Beach; Live Nation was responsible for constructing and

assembling the booth. (Best Buy's memorandum of law, at 26.) Absent a written agreement, plaintiff was not Best Buy's "contractor" under Live Nation and Best Buy's Sponsorship Agreement.

In opposition, Live Nation argues that Best Buy's summary judgment motion is premature because Best Buy did not produce 500 pages of email communications until a month after it filed its motion. Live Nation argues that material issues of fact exist for trial, whether Perez was Best Buy's contractor. Live Nation argues that Best Buy has failed to meet its burden on summary judgment because questions of fact exist, namely who and what caused plaintiff's accident, who directed plaintiff's construction of the second level of the trussing system, the parties' intention in providing indemnity for a party's own negligence in limited circumstances, and whether Best Buy complied with the insurance obligations under the Sponsorship Agreement.

Facts

The court explained the facts under motion sequence number 01. See NYSCEF document number 67 or *see Perez v Beach Concerts, Inc.*, 2016 WL 3566115, at *1 [Sup Ct, NY County 2016], *affd* 154 AD3d 602, 602 [1st Dept 2017].

The relevant facts that pertain to the current motions are as follows: On June 26, 2013, plaintiff assisted defendant Brogden[1] in building the second level to the Best Buy booth. The first level to the booth had already been erected. Brogden was operating a forklift to lift the horizontal sections of the aluminum trussing [the second level] to the top of the vertical sections of the structure. Plaintiff was injured while plaintiff and Brogden were attempting to attach the pieces of the second level of the truss to the lower, first level. Plaintiff was standing 10 feet off the ground on the first level while Brogden was operating the forklift. According to plaintiff, Brogden, while operating the forklift, hit the structure, causing plaintiff to plummet to the ground.

Relevant to this motion are the following facts.

Plaintiff established Mark Perez First Up Media. (Exhibit D3 at 206.) He was the sole proprietor of this business. (Exhibit D3 at 206.) Six months before his accident, plaintiff was contacted by a "marketing guy" from Best Buy. (Exhibit D3 at 200-201.) The person knew that plaintiff was "the best at doing signage and banners and set ups over at Jones Beach and designing these things and coming up with concepts." (Exhibit D3 at 201.) Plaintiff had numerous phone calls (about one a day) and emails with Best Buy. Plaintiff never met anyone from Best Buy in person. (Exhibit D3 at 203.) According to plaintiff, he had an agreement with Best Buy. (Exhibit D3 at 203.) Plaintiff agreed to come up with "designs and ideas . . . a vision" for Best Buy's booth at Jones Beach. (Exhibit D3 at 204.) He had to design, draw pictures, and

[1] Brogden testified at his EBT that he is an International Alliance of Theatrical Stage Employees (IATSE) Local 340 union member and that Live Nation sent him his paychecks. (Brogden EBT, at 25.)

work on signs that would hang from the booth. (Exhibit D3 at 204.) He gave Best Buy a proposal with different options at different prices. (Exhibit D3 at 205.) Plaintiff did not sign any agreement with Best Buy. (Exhibit D3 at 207-208.) All their communications were by telephone and email. (Exhibit D3 at 208.) He worked with Best Buy on making Best Buy's logo visible. (Exhibit D3 at 216.) Plaintiff had conference calls with Best Buy and Steve from Live Nation about Best Buy's booth. (Exhibit D3 at 218.)

Plaintiff testified that he bought the metal trussing for Best Buy's booth from a DJ store. (Exhibit D3 at 219.) Plaintiff testified that he used his money to buy the material. (Exhibit 2 at 220.)

For the first level — bottom portion — of the booth, he went to a DJ store to purchase the materials. (Exhibit D3 at 222.) Plaintiff does not remember who set up the first level. The first level measured approximately 20 feet by 10 feet high. Plaintiff remembers that in the three years before the accident when he had set up other booths, Live Nation's personnel would assemble the booths. (Exhibit D3 at 229.) Plaintiff "helped, meaning [he] directed them, told them how to do it, what to do, what went where." (Exhibit D3 at 229.) Plaintiff explained he was not responsible for putting any signage on the booth —that was Best Buy's job. (Exhibit 2 at 250.) Plaintiff explained that when the first level was completed, various individuals from Best Buy came to see it in person. (Exhibit D3 at 246, 249.) Plaintiff billed Best Buy for the work he did on the first level. (Exhibit D3 at 254.) In an email, Best Buy told plaintiff that Live Nation would pay him for the first level. (Exhibit D3 at 248.)

A month before his accident, plaintiff received a phonecall from Best Buy, a "marketing guy," asking plaintiff to improve the booth. (Exhibit D3 at 250.) Plaintiff had to make the booth look bold and show off Best Buy's brand. (Exhibit D3 at 251.) Best Buy and plaintiff agreed that a second level would be added to the booth. (Exhibit D3 at 252.) They had numerous phonecalls and emails back and forth. (Exhibit D3 at 252.) Plaintiff gave Best Buy options about orienting their banners; plaintiff was not responsible for printing the banners. (Exhibit D3 at 255.) Plaintiff designed the banners. (Exhibit D3 at 260.) Best Buy agreed to the second level; plaintiff picked up the truss system from the same DJ store. (Exhibit D3 at 256.) Plaintiff explained that he billed Best Buy for the second level. (Exhibit D3 at 254.) According to plaintiff, the truss system, first and second level, belonged to Best Buy. He purchased the materials but it would become Best Buy's property until the end of the season at Jones Beach. (Exhibit D3 at 257.)

On the day of the accident, Live Nation told him to show up with the materials at 11:00 a.m. (Exhibit D3 at 261.) Rob, a Live Nation employee, told plaintiff that he would have "union" there; plaintiff understood that to mean a crew of stagehands to assemble the system. (Exhibit D3 at 266.) Plaintiff expected Live Nation to build the structure. (Exhibit E at 51.) Plaintiff explained that he does not remember anyone from Best Buy "there with [him], ever." (Exhibit E at 55.)

Josh Arnold, Best Buy's event marketing associate, testified that he was the one in contact with Live Nation in 2013. (Exhibit J at 23.) He testified that he never went to Jones Beach in 2013. (Exhibit J at 23.) Best Buy's team agreed to the plans that plaintiff had with respect to Best Buy's booth. Best Buy's creative team agreed to pay plaintiff $9,500. (Exhibit J

at 39.) Arnold approved of the new dimensions for the booth. Arnold testified that he did not receive any invoices from plaintiff. (Exhibit J at 51.) Arnold acknowledge that Best Buy paid plaintiff $5,000. (Exhibit J at 69.)

According to Robert Scolaro — Live Nation's then vice president of sponsorship sales — Live Nation owned the first level. Best Buy paid for the second level. (Exhibit K at 84.) Scolaro explained that Best Buy wanted the booth to go higher, to a second level. (Exhibit K at 54.) He explained that Live Nation had to obtain approval from the New York State Parks (NYS Parks), the landlord for the venue. (Exhibit K at 54.) And that Live Nation obtained approval. (Exhibit K at 55.) Scolaro testified that neither Best Buy nor plaintiff was involved in obtaining approval from NYS Parks. (Exhibit K at 55-56.) Scolaro testified that Live Nation "would have approved the aesthetics, the actual design of the banners, but there wasn't anything to approve structurally, because it was essentially an extension of what was below." (Exhibit K at 55.)

Scolaro testified that he did not see anyone from Best Buy present when plaintiff was rendering services on the booth. No one from Best Buy supervised plaintiff's work. (Exhibit K at 60.)

Best Buy provides its certificate of liability insurance in support of its motion. (Exhibit M.) Scolaro does not have any information about Best Buy's insurance or what, if anything, Live Nation did to verify that Best Buy or any other vendors obtained insurance.

A. Common-Law Indemnification — First Cause of Action

Best Buy's motion to dismiss the common-law indemnification cause of action in the third-party complaint is granted.

Common-law, or implied, indemnity applies even absent contractual indemnification when a vicarious-liability relationship exists between a third party and a tortfeasor or by an obligation imposed by law. (*Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 24-25 [1985].) Common-law indemnification is predicated on "vicarious liability without actual fault," which necessitates that "a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003] [internal quotation marks omitted]; *see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 567 [1987]; *Consolidated Rail Corp. v Hunts Point Term. Produce Coop. Assn., Inc.*, 11 AD3d 341, 342 [2004].)

Common-law, or implied, indemnity is a restitution concept meant to provide relief in fairness to a party that should not bear a loss and allow that party to recover from a party at fault. (*Mas v Two Bridges Assocs. by Nat. Kinney Corp*, 75 NY2d 680, 690–691 [1990].) A claim for common-law indemnity is viable when one party is held vicariously liable solely on account of another's negligence to shift the entire burden of the loss to the real wrongdoer (*Id.* at 690; *accord 17 Vista Fee Assocs. v Teachers Ins. & Annuity Ass'n of Am.*, 259 AD2d 75, 80 [1st Dept 1999].)

Claims for common-law indemnity are barred where "the party seeking indemnification was itself at fault, and both tortfeasors violated the same duty to plaintiff." (*Monaghan v SZS 33 Assocs., L.P.*, 73 F3d 1276, 1284 [2d Cir 1996]; *accord 110 Cent. Park S. Corp. v 112 Cent. Park S., LLC*, 970 NYS2d 681, 688 [Sup Ct, NY County 2013], citing *Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [finding that common-law indemnification is predicated on "vicarious liability without fault" and dismissing common-law indemnity claim against third-party defendant where "plaintiff alleged direct, not vicarious liability for negligence"].)

For a party to establish a claim for common-law indemnification, the party "'must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident.'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault." (*Chapel v Mitchell*, 84 NY2d 345, 347 [1994].)

Best Buy provides the examination before trial (EBT) testimony of various witnesses, including plaintiff's numerous EBT transcripts, among other exhibits. Despite the voluminous record in support and in opposition to the motion, no evidence exists that any negligence on Best Buy's part caused plaintiff's injury. Live Nation's common law indemnification cause of action against Best Buy is dismissed.

B. Breach of Contract — Second Cause of Action

The second cause of action in the third-party complaint provides that Best Buy is obligated to indemnify and hold harmless Live Nation and reimburse Live Nation for the costs, disbursements, and attorney fees that Live Nation has incurred in defending the main action.

Live Nation's second and fifth causes of action are based on contractual indemnification, discussed below, Section E.

C. Contribution — Third Cause of Action

Best Buy's motion to dismiss the contribution cause of action in the third-party complaint is granted. A claim for contribution is distinct from indemnification in that it enables a joint tortfeasor that has paid more than its equitable share of damages to recover the excess from other tortfeasors. (*Sommer v Fed. Signal Corp.*, 79 NY2d 540, 555–557 [1992].) The factfinder will apportion the loss against the tortfeasor in terms of relative culpability. (*Id.*; *accord Rosado*, 66 NY2d at 24–25.) The goal of contribution is fairness to tortfeasors who are jointly liable. (*Sommer*, 79 NY2d at 555–557.) Whether a party has a viable claim for contribution from another party turns on a finding of culpability and the measure of damages sought. (*See Trump Vil. Section 3*, 307 AD2d at 897; *accord Rockefeller Univ. v Tishman Constr. Corp. of N.Y.*, 240 AD2d 341, 343 [1st Dept 1997]; *Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003] ["Contribution is available where two or more tortfeasors combine to cause an injury and is

determined in accordance with the relative culpability of each such person."] [internal quotation marks and citations omitted].)

No evidence exists that any negligence on Best Buy's part caused plaintiff's injury. The contribution cause of action in Live Nation's third-party complaint is dismissed.

D. Breach of Contract — Fourth Causes of Action

The fourth cause of action provides that Best Buy and its contractors, Perez, had to obtain liability insurance and to add Live Nation as an additional insured to the policy; the insurance was to be primary. Live Nation contends that it has had to defend itself in the main action.

In support of its motion, Best Buy submits the certificate of insurance for the relevant policy, but this is not sufficient. A "certificate of insurance is evidence of an insurer's intent to provide coverage, but it is not a contract to insure . . ., nor is it conclusive proof, standing alone, that such a contract exists." (*Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 469 [1st Dept 1998]; *accord Horn Maintenance Corp. v Aetna Cas. & Sur. Co.*, 225 AD2d 443, 444 [1st Dept 1996]; *Morrison-Knudsen Co. v Continental Cas. Co.*, 181 AD2d 500, 500 [1st Dept 1992].)

Because a question of fact exists about whether Best Buy procured the proper insurance, Best Buy's motion is denied. (*See JT Queens Carwash, Inc. v 88-16 N. Blvd., LLC*, 101 AD3d 1089, 1090 [2d Dept 2012] [upholding denial of summary judgment to contractor / insurance company for declaratory judgment finding that "certificates of insurance which were informational only" were insufficient to demonstrate that movant maintained the requisite insurance]; *McGill v Polytechnic Univ.*, 235 AD2d 400, 402 [2d Dept 1997] [upholding grant of summary judgment to owner and others finding that "submission of a certificate of insurance which expressly stated that it was '[a] matter of information only and confer[red] no rights on the [movant]' is insufficient, by itself, to show that contractor purchased the required insurance"].)

E. Contractual Indemnification — Fifth Cause of Action

Best Buy's motion to dismiss the fifth cause of action is granted.

Whether a party has a valid claim for contractual indemnification depends on the specific language in a contract. (*Suazo v Maple Ridge Assoc., LLC*, 85 AD3d 459, 460 [1st Dept 2011].) "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *accord Tonking v Port Auth. of N.Y. & N.J*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]; *accord George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009] [holding that a promise to indemnify should not be found unless it can be "clearly implied from the language and purpose of the entire agreement and the surrounding circumstance."].)

No liability for contractual indemnification exists unless it is explicitly assumed. (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989] [finding that where an obligation to indemnify is assumed under a contractual agreement, "that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed"]; *accord Rosado*, 66 NY2d at 27.)

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and that "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003] [internal quotations and citation omitted]; *accord Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002].)

Best Buy and Live Nation's Sponsorship Agreement provides mutual indemnification clauses. Each party agreed to indemnify the other with some exceptions.

Section 5 (c) (ii) of Live Nation and Best Buy's agreement — the Sponsorship Agreement — provides that Best Buy (the Sponsor) will

> "indemnify, defend and hold manager [Live Nation], the facilities, their respective partners, parent companies, subsidiaries, affiliated companies, their officers, directors, employees and members (manager 'additional indemnitees') harmless from any and all third-party claims, demands, suits, liabilities or expenses (including reasonable attorneys' fees) arising out of or in connection with:
>
> "(I) Any acts or omissions of sponsor [Best Buy], or its officers, directors, employees, agents or contractors in connection with the performance of sponsor's [Best Buy] obligations under this agreement except to the extent such claims are caused by manager [Live Nation], facility or their officers, directors, employees, agents or contractors . . . ."

Best Buy argues that plaintiff was not its contractor for purpose of section 5 (c) (ii). Best Buy's argument is that because it had no contract with plaintiff, plaintiff was not Best Buy's contractor. But that argument is unpersuasive. According to plaintiff's EBT testimony, Best Buy had an oral contract with plaintiff. Best Buy hired Mark Perez of First Up Media. The details of that contract were discussed by telephone and email. Despite Best Buy's characterization of its dealing with plaintiff, the evidence shows that Best Buy hired a contractor, plaintiff, to design its booth at Jones Beach.

Plaintiff's injury "ar[ose] out of or [is] in connection with" Best Buy's booth at Jones Beach.

But the record demonstrates that Best Buy need not indemnify Live Nation. The Sponsorship Agreement provides that Best Buy indemnify Live Nation "except to the extent such claims are caused by manager [Live Nation], facility or their officers, directors, employees, agents or contractors." The record shows that Live Nation had its own employees who would set up and construct the trussing. (Exhibit 3, Plaintiff's Dec. 31, 2014, EBT, at 274-276; Exhibit E at 50-51.) Live Nation sent one union laborer, Brogden, to build the trussing system. Brogden hit the metal trussing with the forklift that he was operating and plaintiff fell and injured himself. Brogden, IATSE Local 340 worker, worked for Live Nation; he received checks from Live Nation. (Brogden EBT, at 25.) Live Nation's contractor "caused," or contributed, to plaintiff's fall.

Live Nation gave IATSE "jurisdiction over all carpentry, electrical, rigging and properties . . . in conjunction with a performance or presentation of a concert or show." (Exhibit O, at ¶ A.) IATSE was responsible to "take in, handl[e], assembl[e], strike and take out [] all equipment used in connection with any show, concert, attraction, production, or presentation" at the Theatre. (Exhibit O, at ¶ A [1].) IATSE was responsible for, among other things, carpentry, set building, rigging, portable steel erection, scaffolding erection, electric and lighting, lift equipment, camera operations projection, wardrobe, electrical and audio, board operation, forklift operation, and moving material to and from trucks. (Exhibit O, at ¶ A [3].)

Live Nation gave IATSE the "jurisdiction over the sponsorship booths . . . such as but not limited to trusses." (Exhibit O, at ¶ A [4]; Brogden EBT, at 31.) Under the IATSE agreement, "only management employees, specifically Local 340 Stagehands, shall perform any of the work coming within the jurisdiction of the Union [IATSE]." (Exhibit O, at ¶ D.)

No evidence exists that Best Buy's "acts or omissions" caused plaintiff's injury

Live Nation argues in opposition that Best Buy's unilateral decision to construct the second level of the trussing system was "extra-contractual." (Live Nation's Memo of Law at 16.) According to Live Nation, it never agreed to the second level. As such, Live Nation argues that the indemnification provision applies, section 5 (c) (ii) (IV) and that Best Buy must indemnify Live Nation. Section 5 (c) (ii) (IV) provides that Best Buy will indemnify Live Nation for "[the use, operation, display or transportation of any of sponsor's [Best Buy's] equipment at sponsor's direction." But according to Scolaro's testimony, Live Nation obtained approval from the NYS Parks for Best Buy's booth. It seems disingenuous that Live Nation now argues that Best Buy's plans to build the second level to the booth was "extra-contractual." Live Nation obtained authorization for the booth. Section 5 (c) (ii) (IV) is inapplicable.

Best Buy argues in the alternative that section 5 (c) (ii) violates public policy in that it violates General Obligations Law (GOL) § 5-322.1. The court need not consider this alternative argument. In any event, the provision does not violate GOL § 5-322.1. GOL § 5-322.1 (1) voids indemnification clauses in construction contracts that "purport[] to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part . . . ." An agreement to indemnify in connection with a construction contract is void and unenforceable to the extent that

such agreement contemplates full indemnification of a party for its own negligence. (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], *rearg denied* 90 NY2d 1008 [1997].) Section 5 (c) (ii) provides for an exception, namely, "to the extent such claims are caused by manager [Live Nation], facility or their officers, directors, employees, agents or contractors." This exception saves the provision from violating GOL § 5-322.1.

Best Buy's motion to dismiss the fifth cause of action is granted. The second cause of action based on a breach of contract claim is likewise granted.

The court has considered the parties' remaining arguments and finds them unavailing.

II. Motion sequence 03

Live Nation moves (1) to vacate the note of issue under 22 NYCRR 202.21 because it argues that disclosure is incomplete; (2) to compel Best Buy to provide disclosure under CPLR 3124 (a) and 3126 (3); to extend its time to file its summary-judgment motion until 60 days after disclosure is complete; (4) and to stay Best Buy's current summary judgment motion (sequence 02) pending the outcome of this motion (sequence 03).

Best Buy and plaintiff oppose Live Nation's motion.

22 NYCRR 202.21 (e) provides the following:

> "*Vacating note of issue*. Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect."

22 NYCRR 202.21 (d) provides that "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings." To conduct disclosure after the filing of the note of issue, Live Nation must demonstrate "unusual or unanticipated circumstances" that "develop[ed] subsequent to the filing of a note of issue," which require additional disclosure to prevent "substantial prejudice." (*See Madison v Sama*, 92 AD3d 607, 607 [1st Dept 2012]; *Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481, 483 [1st Dept 2010]; *Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st Dept 2005].)

Live Nation's motion to vacate the note of issue under 22 NYCRR 202.21 is untimely. And Live Nation acknowledges its untimeliness. Live Nation explains that at Arnold's EBT on June 29, 2016, Live Nation requested various emails and documents. On June 30, 2016, plaintiff

filed its note of issue. On August 29, 2016, Best Buy filed its summary-judgment motion (sequence 02). On September 29, 2016, Best Buy produced approximately 500 pages of emails. On February 6, 2017, Live Nation noticed Best Buy's in-house counsel, Mark Odegard, for an examination before trial. On February 21, 2017, Best Buy rejected the notice because plaintiff had already filed his note of issue.

Live Nation has demonstrated that it received hundreds of records (emails) from Best Buy after plaintiff filed its note of issue. It is fair to assume that Live Nation anticipated receiving those records from Best Buy given its request. Live Nation has not demonstrated that this was an "unusual or unanticipated circumstances" that "develop[ed] subsequent to the filing of a note of issue."

In any event, Live Nation has not demonstrated that "additional disclosure" is required from Best Buy to prevent "substantial prejudice." Live Nation argues that it needs to depose Mark Odegard, Best Buy's in-house counsel, to determine the parties' intent about the indemnification provision. Live Nation provides the drafts that the parties reviewed and edited. But the parties' agreement is clear and unambiguous on its face. (*W.W.W. Assocs., Inc v Giancontieri*, 77 NY2d 157, 163 [1990].) Live Nation does not explain how without Best Buy's in-house counsel's testimony substantial prejudice will occur. It is unclear what Odegard would testify to. Extrinsic evidence about the parties' intent is unnecessary.

Live Nation's motion to vacate the note of issue is denied. Live Nation's motion to compel Best Buy to provide disclosure under CPLR 3124 (a) and 3126 (2) is also denied. Odegard need not be deposed. And Best Buy has responded to Live Nation's demands. (Best Buy's Reply, Exhibit 2.)

Disclosure is complete. No need exists to extend Live Nation's time to file its summary-judgment motion "until 60 days after disclosure is complete." Live Nation had ample opportunity to file its summary-judgment motion.

Given the court's rulings above, a stay of Best Buy's current summary-judgment motion (sequence 02) pending the outcome of this motion (sequence 03) is denied.

Live Nation's motion is denied.

That aspect of Best Buy's opposition seeking sanctions against Live Nation for its motion is denied.

The court has considered the parties' remaining arguments and finds them unpersuasive.

Accordingly, it is hereby

ORDERED that defendant Best Buy Stores, L.P. (Best Buy) motion for summary judgment under CPLR 3212 and to dismiss Live Nation Worldwide, Inc. and Live Nation Marketing, Inc.'s (Live Nation) third-party complaint against Best Buy (motion sequence 002) is

granted in part and denied in part: the first, second, third, and fifth causes of action are dismissed; the fourth cause of action survives; and it is further

ORDERED that Live Nation's motion (sequence 003) is denied; and it is further

ORDERED that third-party defendants must serve a copy of this decision and order on all parties and on the County Clerk's Office, which is directed to enter judgment accordingly.

11/5/2018
DATE

GERALD LEBOVITS, J.S.C.

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