SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2**

Justice

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INDEX NO. 161486/2015
MOTION SEQ. NO. 001

PETER MCKEE,

Plaintiff,

- v -

SCIAME CONSTRUCTION, LLC, F.J. SCIAME CONSTRUCTION CO., INC., and 404 PARK PARTNERS, LP,

DECISION AND ORDER

Defendants.

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SCIAME CONSTRUCTION, LLC and 404 PARK PARTNERS, LP,

Third-Party Plaintiffs,

- v -

FIVE STAR ELECTRIC CORP.,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this personal injury action, third-party defendant Five Star Electric, Corp. ("Five Star") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint of third-party plaintiffs Sciame Construction, LLC ("Sciame") and 404 Park Partners, L.P. ("404 Park") (collectively "third-party plaintiffs"). Five Star also moves to dismiss the third-party complaint pursuant to CPLR 3211(a)(1) and (10) based on defenses in the documentary evidence and for failure to name indispensable parties. In the alternative, should this Court deny those branches of the motion, Five Star seeks to sever the third-party action pursuant to CPLR 603 and 1010 because Sciame and 404 Park did not timely implead Five Star into this action and because Five

Star would be prejudiced since discovery in the underlying action is complete. After oral argument, as well as a review of the relevant statutes and case law, the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

On August 12, 2014, plaintiff Peter McKee ("McKee") was allegedly injured when he tripped and fell on debris while working at a construction site located at 404 Park Avenue South in Manhattan ("the premises"). (Doc. 19 at 4.) At the time of the accident, the site was being converted from an office building into condominiums. (*Id.* at 7.) Defendant Sciame acted as the general contractor supervising the construction (*id.*), and defendant 404 Park was the owner of the project (*id.*; Doc. 27 at 29). There were no witnesses to the accident. (Doc. 38 at 6.)

McKee commenced this action on November 6, 2015 by filing a summons and complaint against Sciame, 404 Park, and F.J. Sciame Construction Co., Inc. (Docs. 19 at 3; 20.) At his deposition, which was held on October 4, 2016, McKee testified that he was employed by United Air Conditioning ("United"), whose task it was to install the air conditioning system in the building (Doc. 19 at 5), and that he would arrive at work around 7 a.m. (Doc. 26 at 29). Other tradesmen were working at the premises, including electricians, roofers, carpenters, and steamfitters. (Doc. 19 at 5.) McKee stated that his accident occurred around 9 a.m. on the roof of the building as he was headed toward an elevator *en route* to the fourth floor. (*Id.* at 6; Doc. 26 at 25–29.) Although McKee maintained that he tripped on debris, he was unable to specify what kind of material he fell on. Specifically, he testified:

> Q: And as you were walking, please tell us what happened next?
> A: I was walking back to the elevator and I tripped on some—it was electrical debris or roofing debris. I'm not sure whatever I tripped on, but I fell. That is when I split my hand.

* * *

Q: Can you—as we sit here and take your time, can you recall whether it was electrical or roofing debris?

A: It had to be both because the electricians was [sic] working right there and the roofers, they got stuff all over the place all the time. Just one of those type of situations.

(Doc. 26 at 27–28.) McKee could not recall if any of his coworkers had witnessed him fall. (*Id.* at 32.)

On October 11, 2016, plaintiff examined defendant Sciame by deposing Peter Politi ("Politi"), who was Sciame's superintendent on the project. (Doc. 19 at 7.) Politi was responsible for overseeing project developments and, in conjunction with City Safety, for jobsite safety. (*Id.* at 7–8.) In furtherance of keeping the premises safe, Sciame employed laborers who would clean the construction debris at the end of each workday. (*Id.* at 9.) Politi would also perform extensive walkthroughs in the morning around 7 a.m. (Doc. 27 at 43), noon (*id.*), and in the afternoon around 3 p.m. (*id.*), at which time he would inspect each floor for potential safety hazards (*id.* at 10). Consistent with McKee's testimony, Politi stated that there was ongoing work on the roof of the premises in August of 2014. (Docs. 19 at 11; 27 at 34.) When asked about plaintiff's alleged accident, however, Politi said that he did not witness it and that he first learned of the accident when counsel requested that he appear for a deposition. (Doc. 27 at 62.)

On April 25, 2017, Sciame and 404 Park impleaded Five Star into the underlying action. (Doc. 23.) Five Star was retained as the electrical subcontractor for the project and oversaw the installation of the building's electrical system, which entailed work on the roof. (Doc. 27 at 36–37.) In their third-party complaint, Sciame and 404 Park asserted causes of action against Five Star for common law and contractual indemnification (Doc. 23 at 10, 14), contribution (*id.* at 11,

13), and for reimbursement from Five Star for failure of Five Star's insurance carrier to defend, indemnify, and hold them harmless (*id.* at 11–12).

Five Star now moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint of Sciame and 404 Park. (Doc. 18.) Five Star further seeks to have the third-party complaint dismissed under CPLR 3211(a)(1) and (10) because there are legal defenses founded upon the documentary evidence and because, in commencing this third-party action, third-party plaintiffs have failed to name indispensable parties, such as McKee's employer—United—and the other contractors who were present at the site. (*Id.* at 1–2.) In the alternative, should this Court deny those branches of the motion, Five Star requests that the third-party action be severed from the underlying action, since Sciame and 404 Park failed to timely implead Five Star and since discovery in the underlying action is complete. (*Id.* at 2.)

POSITIONS OF THE PARTIES:

In support of its motion for summary judgment dismissing the complaint, Five Star argues that Sciame and 404 Park are not entitled to contractual indemnification or contribution. In the contract between Sciame and Five Star, the indemnification provision requires that Five Star indemnify and hold Sciame harmless from any injuries arising from the project, "but only to the extent caused by the negligent acts or omissions of the Subcontractor [i.e., Five Star] . . . ." (Doc. 29 at 9.) Based on McKee's admission during his deposition that he was unsure of the type of debris on which he tripped, Five Star asserts that there is no documentary evidence showing that it was negligent during the construction project (Doc. 19 at 15–19) and that any finding of negligence would instead have to be based on improper speculation (*id.* at 19). Five Star also

argues that it did not supervise or control McKee's work and that it thus did not cause or contribute to his injury. (*Id.* at 20.)

With respect to the cause of action based on Five Star's insurer's alleged failure to defend, indemnify, and hold Sciame and 404 Park harmless, Five Star maintains that the claim properly lies against the insurance carrier that it procured; in other words, Five Star argues that it fulfilled its obligation to procure insurance and that third-party plaintiffs should instead be suing the insurer for this cause of action. (*Id.* at 21.) Thus, Five Star argues that, because the insurer, not Five Star, has the duty to defend and indemnify third-party plaintiffs, this cause of action should be dismissed. (*Id.*) Five Star further asserts that, since it cannot be found negligent based on the documentary evidence herein, Sciame is not entitled to common law indemnification or contribution. (*Id.* at 21–26.)

In opposition, Sciame and 404 Park argue that Five Star's CPLR 3212 summary judgment motion is premature because discovery is incomplete. (Doc. 35 at 2.) In particular, they allege that Five Star has failed to meaningfully respond to their discovery demands. (*Id.* at 3.) Moreover, they submit an affidavit by Afzal Basrudin ("Basrudin"), United's general superintendent on the day that McKee was injured. (*Id.* at 3–4.) In the affidavit, Basrudin represents that he was called by McKee's foreman shortly after the alleged accident, and that the foreman said that McKee had tripped over a spool of BX cable on the roof that belonged to Five Star. (*Id.*) Third-party plaintiffs also allege that there is an issue of fact because, although McKee's injury occurred around 9 AM, the workday started around 7 AM. (*Id.* at 4.) Sciame and 404 Park maintain that this window of time creates issues of fact as to Five Star's negligence because a Five Star worker could have left the cable on which McKee purportedly tripped in the interim.

In reply, Five Star argues that Sciame and 404 Park have failed to raise triable issues of fact that would preclude summary judgment. In particular, Five Star claims that Sciame and 404 Park merely raised feigned issues of fact by submitting the affidavit of Basrudin because Basrudin himself did not witness McKee's accident, and consequently the affidavit constitutes inadmissible hearsay. (Doc. 38 at 6–7.) To the extent that third-party plaintiffs claim that there is an issue of fact because the workday started at 7 a.m. and McKee was injured around 9 a.m., Five Star maintains that there is no factual issue because Sciame, and not Five Star, would have been responsible for cleaning up any debris that may have accumulated during that time and because McKee does not know what he tripped on. (*Id.* at 4–6.) Thus, they assert that any conclusion regarding the nature of the debris would be pure speculation. (*Id.* at 9–10.)

With respect to third-party plaintiffs' cause of action that Five Star has failed to indemnify, defend, and hold them harmless, Five Star simply argues that this Court should grant its motion to dismiss that cause of action because Sciame and 404 Park did not oppose that branch of the motion in their papers. (*Id.* at 10.)

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) In so moving, a party must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the movant makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the

facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

a. Whether Sciame and 404 Park are Entitled to Contractual Contribution and Indemnification.

In their third-party complaint, Sciame and 404 Park's first and second asserted causes of action against Five Star are for contractual indemnification (Doc. 23 at 10) and contractual contribution (*id.* at 11). The indemnification provision in Five Star's contract with defendant Sciame requires Five Star to indemnify Sciame for any claim, damage, loss, or expense to the extent that the same was caused by negligent acts or omissions by Five Star. (Doc. 29 at 9.) Therefore, if Sciame and 404 Park are entitled to contractual indemnification, it must be found by this Court that Five Star was somehow negligent with respect to plaintiff McKee's accident.

"In order to prevail on a negligence claim, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." (*Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016] (internal citations omitted).) In analyzing the element of proximate cause, courts have elucidated that a plaintiff, in establishing causation, "must present a theory of liability and facts in support thereof on which the jury can base a verdict. Absent an explication of facts explaining the accident, the verdict would rest on only speculation and guessing, warranting summary judgment." (*Kane v Estia Greek Rest.*, 4 AD3d 189, 190 [1st Dept 2004]; *see also Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434, 435 [2d Dept 2006] ("Although proximate cause can be established in the absence of direct evidence of causation and . . . may be inferred from the facts and circumstances

underlying the injury, mere speculation as to the cause of a fall, where there can be many causes, is fatal to a cause of action.") (quotes and brackets omitted).)

Here, this Court finds that Five Star established its prima facie showing of entitlement to judgment as a matter of law. In support of its motion, Five Star proffered McKee's and Politi's deposition testimonies. When asked about whether he remembered the type of debris he fell on—electrical or roofing debris—McKee could not state for certain, instead saying, "[i]t had to be both because the electricians [were] working right there and the roofers, they got stuff all over the place all the time. Just one of those type [sic] of situations." (Doc. 26 at 28.) Indeed, McKee stated: "I'm not sure whatever I tripped on, but I fell." (*Id.* at 27–28.) This is the prototypical "speculation and guessing" as to issues of a defendant's negligence which our caselaw prohibits. (*See Kane*, 4 AD3d at 190; *Manning*, 28 AD3d at 435 (granting summary judgment dismissing complaint where plaintiff stated that she slipped on "[e]ither a plastic string or a piece of cardboard" but could not state for certain); *see also Mazurek*, 27 AD3d at 228 (granting summary judgment dismissing complaint where plaintiff testified that she did not know why she fell).)

Sciame and 404 Park failed to raise any triable issues of fact precluding summary judgment in favor of Five Star. In opposing Five Star's summary judgment motion, they submitted the affidavit of Basrudin, United's superintendent, who stated that United's foreman of the project at the premises, Mike Ryan ("Ryan"), told him via a telephone call that McKee had tripped over a spool of BX cable belonging to Five Star. (Doc. 35 at 15.) Basrudin, however, has no personal knowledge of the accident or the conditions on the premises that day. (*Id.*) In fact, Basrudin's affidavit states that Ryan did not witness the accident, either. (*Id.*) Thus, the sole evidence that Sciame and 404 Park submit in opposing Five Star's summary judgment motion

not only constitutes hearsay but also does not raise an issue of fact. Where, as here, hearsay is the only evidence submitted in opposition to a motion for summary judgment, it may not be considered. (*See Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 564 [1st Dept 2011] (stating that hearsay evidence may be considered in opposition to summary judgment where it is not the only proof submitted); *Thomas v Caldor's*, 224 AD2d 171, 171 [1st Dept 1996] (hearsay evidence and conclusory statements offered by plaintiff were insufficient to defeat the proof offered by defendant in support of summary judgment motion).)

Moreover, even if there is a concern that Five Star's workers may have left the debris in the period between 7 a.m., when the workday began, and 9 a.m., when McKee allegedly fell, Politi's deposition testimony does not warrant a finding of negligence against Five Star. According to Politi's deposition, Sciame, in conjunction with Site Safety,[1] was responsible for the cleanup of any onsite debris. (Doc. 27 at 13–14.) Politi testified that he would perform a round "[f]irst thing" in the morning at 7 a.m. to see if there were any locations that needed cleaning. (*Id.* at 42–43.) This suggests that Sciame and Site Safety—not Five Star—owed the duty of care toward McKee.

Because third-party plaintiffs have failed to raise any triable issue of fact in opposition to Five Star's prima facie showing of entitlement to judgment as a matter of law, Five Star is granted summary judgment as to the first cause of action for contractual indemnification. (*See Robinson v Brooks Shopping Ctrs., LLC*, 148 AD3d 522, 523 [1st Dept 2017] (dismissing a third-party claim for contractual indemnification where the third-party defendant was not negligent).) Five Star should be granted summary judgment dismissing the second cause of action for contractual contribution, since contractual contribution is not a cause of action. (*See*

[1] Five Star's affirmation in support of its motion refers to Site Safety as "City Safety." (Doc. 19 at 8.)

Eisman v Vil. of E. Hills, 149 AD3d 806, 808 [2d Dept 2017] (contribution does not require any kind of agreement between the wrongdoers).) Similarly, Five Star is also granted summary judgment dismissing third-party plaintiffs' fourth and fifth causes of action, for common law contribution and common law indemnification respectively. (Doc. 23 at 13–14.) (*See Consol. Rail Corp. v Hunts Point Term. Produce Co-op. Assn, Inc.*, 11 AD3d 341, 342 [1st Dept 2004] (to establish common law indemnification, one party must be vicariously liable for the negligent acts of another).)

b. Whether Sciame and 404 Park are Entitled to Damages for Five Star's Alleged Failure to Defend, Indemnify, and Hold Them Harmless.

Sciame and 404 Park allege in their third cause of action against Five Star that "Five Star Electric's insurance carrier has not agreed to defend, indemnify and hold harmless Third-Party Plaintiffs in this lawsuit . . . ." (*Id.* at 12.) Five Star alleges that, as required under its contract with Sciame, it obtained insurance for the project. (Doc. 19 at 21.) Sciame and 404 Park, in response, did not contest that allegation. (Docs. 35; 38 at 10–11.) The cause of action, as stated in the third-party complaint, is premised on the refusal of the insurance carrier that Five Star procured to defend, indemnify, and hold Sciame and 404 Park harmless (Doc. 23 at 12), and thus the cause of action properly lies against the insurance carrier, not Five Star. Therefore, Five Star is granted summary judgment dismissing the third cause of action in third-party plaintiffs' complaint.

Since this Court has granted summary judgment in favor of Five Star dismissing the complaint of third-party plaintiffs Sciame and 404 Park, it is unnecessary to consider Five Star's arguments for dismissal and severance under CPLR 3211(a)(1) and (10), and CPLR 603 and 1010.

In accordance with the foregoing, it is hereby:

ORDERED that third-party defendant Five Star Electric, Corp.'s motion for summary judgment is granted and the complaint of third-party plaintiffs Sciame Construction, LLC and 404 Park Partners, L.P. is dismissed as against Five Star Electric, Corp.; and it is further

ORDERED that the caption be amended to reflect the dismissal of third-party defendant Five Star Electric, Corp. and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon all parties, upon the Clerk of the Court (60 Centre Street, Room 141B), and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.

11/26/2018
DATE

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

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