SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

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RUTH WILLIAMS,

Plaintiff,

- v -

100 CHURCH FEE OWNER LLC, SL GREEN MANAGEMENT LLC, AND MCGOVERN & COMPANY LLC,

Defendants.

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INDEX NO. 162738/2014

MOTION DATE

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 164-180, 188-211 were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff Ruth Williams commenced this personal injury action after sustaining injuries as a result of a trip and fall in front of a building owned by defendants 100 Church Fee Owner LLC (100 Church) and managed by SL Green Management LLC (SL Green) (collectively, 100 Church). In motion sequence 006, defendant McGovern & Company LLC (McGovern), the construction contractor, moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint and all cross claims alleged against it. 100 Church cross-moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint and all cross claims alleged against it.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff alleges that, in the afternoon of May 6, 2014, she sustained personal injuries after tripping on a recessed in-ground lighting fixture, located on the sidewalk in front of her office building at 100 Church Street, New York, New York. Plaintiff filed an amended complaint, grounded in negligence, against 100 Church and also against McGovern, the construction company who had been hired to perform certain renovation work on the ground floor lobby of the premises. The relevant facts are as follows:

Plaintiff's Testimony

Plaintiff testified that there were three light fixtures on the sidewalk that faced the building. Plaintiff described the fixtures as "[s]quare, protruding, lit" and with dimensions of approximately eight and a half by eight and a half inches. NYSCEF Doc. No. 173, plaintiff's tr at 42. Plaintiff routinely walked by the fixtures and saw them on the date of her accident. She testified that the light fixtures were "uneven," and that they "weren't all level together the same way." *Id.* at 35. Plaintiff had noticed them for at least two to three years, because they were "pretty. It was unusual to have a light fixture in front of city property, which I took it to be city property." *Id.* at 34. She had also always noticed that they were not the same height.

According to plaintiff, when she was walking back to her office from lunch she "tripped on a protruding light fixture on the sidewalk." *Id.* at 30. She stated that she did not watch out for the fixture, she would either pass by it, walk over it or step on it. "Because it's a square and has angles, you step on it in different positions each time you're walking." *Id.* at 77-78. However, on the date of the accident "my foot must have not lined up with the fixture that was raised causing me to trip." *Id.* at 78. Plaintiff sustained injuries to the right side of her body and testified that she still "cannot sleep on the right side of my body during the night." *Id.* at 72.

Plaintiff continued that, within a week after her accident, she saw repairmen working on the light fixture and took pictures. She did not know why the repairmen were there, but testified that, after they left, the light fixture was flat and "level with the sidewalk." *Id.* at 85.

McGovern and the Agreement to Perform Renovations

On August 12, 2010, McGovern and 100 Church entered into an Owner-Contractor Agreement (Agreement) to perform a "Lobby Renovation." NYSCEF Doc. No. 189, Merriman aff, exhibit 2 at 1. The expected completion date was December 31, 2010. In relevant part, the Agreement states that McGovern agrees to perform the "Work" as described in Schedule A and the proposal dated June 11, 2010. Schedule A provides that McGovern will furnish all material

and labor, among other things, in connection with the "[g]eneral construction as per McGovern proposal . . . . and MG engineering/TPG Architecture drawings." *Id.* at 10.

The indemnification provision states as follows:

> To the fullest extent permitted by law, Contractor shall indemnify and hold harmless (i) Owner and the Owner Parties . . . . from and against all losses, liabilities, damages, judgments, costs, fines, penalties, actions or proceedings and attorneys' fees, and shall defend the Owner Indemnified Parties in any action or proceeding, including appeals, for personal injury to or death of any person, for loss or damage to property or for damage to the environment as a result of the (i) acts, omissions or other conduct of Contractor, or any acts, omissions or other conduct of its officers, directors, employees, subcontractors or agents, in connection with Contractor's performance of the Work and its other obligations under this Agreement or (ii) Contractor's performance or failure to perform under this Agreement, or any breach of any warranty or representation of Contractor made under this Agreement.

Id. at 4.

Pursuant to Schedule G of the Agreement, McGovern was required to procure insurance, "[d]uring the entire term that the Agreement is in effect and until the Work is Finally Completed . . . ." *Id.* at 19. In pertinent part, McGovern was required to obtain Commercial General Liability Insurance coverage as primary insurance that would include coverage for the indemnification provision of the Agreement. McGovern was also required to procure Products and Completed Operations coverage that would extend for three years beyond the completion of Work under the Agreement. Specifically, the relevant insurance requirements are set forth as follows:

> (c) Commercial General Liability Insurance, including Contractual Liability to specifically include coverage for the indemnification clause of this Agreement, Products & Completed Operations Liability (including XCU coverage), Broad Form Property Damage, Personal Injury Liability and Advertising Injury Liability, written on an occurrence form, with combined bodily injury and property damage limits of liability of no less than $5,000,000 per occurrence, $5,000,000 per project general aggregate, $5,000,000 Personal & Advertising Injury and $5,000,000 Products and Completed Operations liability, per project. All such insurance shall be primary insurance, notwithstanding any insurance maintained by Owner or any of the Owner Indemnified Parties. Products and Completed Operations coverage shall contain a provision for an extension of three years beyond the completion of the work under this Agreement, with such extended coverage to have a separate aggregate limit.

Id. at 19.

> Any defects in material or workmanship were guaranteed as follows:
>
> During the [one (1)] year period after the Acceptance Date or during such longer period as is needed to complete the full use of operation of any equipment, as the case may be (the 'Guaranty Period'), Contractor shall promptly repair, replace, restore, or rebuild any Work in which defects in material or workmanship may appear, or to which damage may occur because of such defects, In addition, all material warranties shall be deemed assigned to Owner, although this assignment shall not be deemed to abrogate Contractor's warranty/guaranty, repair or replacement obligations under this Agreement, The Guaranty Period shall be extended by an additional year with respect to any particular item of Work found defective within the initial [one (1)] year Guaranty Period; with such additional one year Guaranty Period to commence on the date Contractor completes its correction of the defective item.

Id. at 5.

Schedule E, contract documents, indicates that TPG Architecture and MG Engineering prepared construction documents, including architectural drawings. Under the section entitled, MEP Drawing List, there are drawings corresponding to the first floor electrical lighting plan and the first floor and basement electrical power plan (E-101.00 and E-201.00). *Id.* at 15. There are also pictures of "in-ground luminaires," as provided by Lighting Management, Inc.

Instant Action

Plaintiff filed an amended complaint against defendants, grounded in negligence, alleging that she sustained injuries due to a "dangerous, hazardous, and defective condition, consisting of an unlevel, worn, uneven, dangerous/defective public sidewalk, and/or improperly maintained and or improperly repaired public sidewalk at the Subject Location." NYSCEF Doc. No. 169, First Amended Complaint (FAC), ¶ 30. She alleges that all defendants owned, operated, maintained, controlled, managed and repaired the sidewalk located at the site of the accident.

In 100 Church's answer, in relevant part, it asserted cross claims against McGovern. In the first cross claim, 100 Church is seeking contractual indemnification. The second cross claim alleges that McGovern breached its contractual obligation by not producing liability insurance in

favor of 100 Church. In the third cross claim, 100 Church is seeking common law indemnification and contribution.

The relevant testimony is as follows:

Derek McGovern (Derek) testified that McGovern was owned by his brother and that it is no longer in business. Although Derek managed projects from 2012 to 2015, he did not manage the project at issue in this case. He stated that, in general, McGovern would hire electricians to perform electrical lighting fixture work as McGovern's employees were not qualified for that. He had an "electrical contractor" who would hire the electricians. NYSCEF Doc. No. 174, Derek's tr at 63. He continued that McGovern, along with the architect and engineer, would "inspect the work that the subcontractor did." *Id.* at 79.

John DePetrillo (DePetrillo), an account executive formerly employed by McGovern, testified that McGovern was hired in 2010 to redo the lobby at 100 Church Street. He signed the Owner-Contractor Agreement on behalf of McGovern. Although he was present at the work site, DePetrillo testified that the installation of ground lights was not a part of this project and that he did not recall anyone from McGovern doing work on the lighting fixtures. "All of our work in this Contract was inside the lobby." NYSCEF Doc. No. 177, DePetrillo tr at 56. McGovern "would hire an electrician, and the electrical contractor would supply the light fixtures." *Id.* at 18. He testified that, in general, McGovern "give[s] a one-year warranty" for lighting work, including providing repairs. McGovern was never called back to do any work within the warranty period.

When he was shown a picture of the allegedly defective lighting fixture, DePetrillo testified that he was not involved in installing that lighting fixture and that he would never leave a lighting fixture in that condition as it "is a tripping hazard." *Id.* at 30. DePetrillo testified that, based on his experience, a lighting fixture left like that would not have been signed off on. He continued that it appeared to be sticking out of the ground about an inch. Looking at the picture, DePetrillo was unable to tell if when the lighting fixture was installed it was level, or if it was already sticking out of the ground. He surmised that someone would use Sikoplast caulk instead of doing the

procedure he described because the back box was not recessed properly and that this would have occurred during the initial installation. "Typically there's a back box and the body of the fixture would be mounted below the surface, and then the plate would get screwed to the back box where the plate would be flush with the surrounding stone or concrete." *Id.* at 33.

DePetrillo stated that the architects would draft the specifications and the electrical drawings. However, the architects were generally hired by the owner and then the architect would hire an engineering firm to do the electrical drawings. "They would inspect the work to see that it was done according to the drawings." *Id.* at 27. The architect would sign off on the work and "usually would give a Letter of Completion to the owner." *Id.* The engineers would also "inspect the lighting, mechanical, [and] electrical." *Id.* at 28-29. DePetrillo testified that there would also have to be a building inspection and an electrical inspection completed by the City of New York prior to issuing a certificate of occupancy for the building. He testified that the city electrical inspector "should have" taken an issue with the lighting fixture and that it should not have passed inspection. *Id.* at 60. DePetrillo did not recognize the men from the picture plaintiff had provided who were allegedly repairing the light fixture after her accident.

Jennifer Ciccotto (Ciccotto) worked as the property manager for the premises between 2012 and 2014. She testified that she believed McGovern installed the light fixtures. However, she stated that she was not present when the work was being done and that any repairs and maintenance "wouldn't necessarily be done by McGovern." NYSCEF Doc. No. 175, Ciccotto tr at 27. She testified that McGovern was not responsible for maintaining the lights and that she was not aware of anyone from McGovern repairing the lights. According to Ciccotto, the light fixtures looked the same from 2012 until 2014. Ciccotto further testified that the light maintenance vendor for the building, Klear Electric, probably changes the light bulbs.

On the date of plaintiff's accident, Ciccotto received a notification that plaintiff had an accident outside of the premises. She testified that, in general, she investigates the accident site and writes down if she noticed anything. "For a slip and fall, I would go to check in the area if

there is any water on the floor, or if whatever the incident entails, we would go to investigate to see is there a reason that this may have occurred." *Id.* at 70. Ciccotto does not recall the investigation but states that she did not take any notes. "I wouldn't make a note unless there was something." *Id.* Ciccotto did not recognize the two people in the picture submitted by plaintiff who appear to be fixing the light fixture.

McGovern's Motion for Summary Judgment

McGovern argues that it should be granted summary judgment because it did not have a duty to plaintiff and none of the exceptions are present rendering plaintiff an intended third-part beneficiary of the contractual relationship between McGovern and 100 Church. McGovern continues that it performed its obligations under the contract and did not "launch[] the force of harm through" this performance. It maintains that "McGovern did not improperly install the light in the ground. Moreover, there is simply no evidence that McGovern actually installed the light fixture at all, let alone in a defective manner." NYSCEF Doc. No. 165, Sperry affirmation, ¶ 27. In addition, pursuant to the Agreement, the work was finally completed more than three years prior to plaintiff's accident.

McGovern further alleges there is no evidence that it displaced 100 Church's obligation to maintain the premises free from defective and hazardous conditions. Pursuant to the Agreement, McGovern was released from obligations as of December 31, 2010, except for the requirement to maintain certain insurance for three more years. Even so, according to McGovern, this would not entirely displace 100 Church's obligation to maintain the premises. In addition, Ciccotto's testimony indicates that Klear Electric, not McGovern, would be responsible for repairing the light fixtures.

McGovern claims that plaintiff's complaint must be dismissed as the alleged defective condition was open and obvious and not inherently dangerous. Plaintiff testified that she noticed the light fixtures on a daily basis for at least three years and had never made any complaints. Further, plaintiff could easily walk around the allegedly hazardous light fixture.

In the event that the complaint is not dismissed in its entirety, McGovern argues that the cross claims must be dismissed against it. Starting with the cross claim for contractual indemnification, McGovern states that, pursuant to the terms of the Agreement, there is no longer a duty to indemnify 100 Church. McGovern agreed to indemnify 100 Church for any injuries sustained as a result of McGovern's actions in connection with its work under the Agreement or for any breach of any warranty. McGovern was required to correct any defects for a one-year period. As plaintiff's accident did not occur in connection with the work being performed and the breach of warranty claim has expired, 100 Church is not entitled to contractual indemnification. According to McGovern, there is nothing in the Agreement obligating it to defend and indemnify 100 Church beyond the completion date. In addition, McGovern was not responsible for any repairs or maintenance on the light fixtures. McGovern adds that 100 Church, and not McGovern, has the obligation to keep the sidewalk or entranceway free from defective conditions.

McGovern states that it procured and maintained the relevant insurance policies in accordance with the Agreement, with the Products and Completed Operations portion of the policy expiring on December 31, 2013, which was three years after the Work was Finally Completed. As a result, there is no basis for the breach of contract cross claim as McGovern produced an insurance policy pursuant to the terms of the Agreement. McGovern also argues that any cross claims for common law indemnification or contribution must be dismissed as McGovern did not owe a duty to plaintiff and was not responsible for plaintiff's accident.

Plaintiff's Opposition

In opposition to McGovern's motion, plaintiff argues that summary judgment must be denied as several questions of fact remain with respect to the light fixture. To begin, according to plaintiff, McGovern failed to set forth any evidence that the light fixture was open and obvious. Plaintiff further claims that this issue would not preclude her negligence claim but would only be relevant for her comparative fault.

Even, assuming arguendo, the light fixture was open and obvious, plaintiff argues that summary judgment should be denied. First, plaintiff argues that, pursuant to Administrative Code § 19-152 (a) (6), the raised and allegedly improperly installed light fixture is an inherently dangerous condition. While noting that the owner has a nondelegable duty to maintain and repair the sidewalk, plaintiff argues that McGovern too can be liable, if it launched an instrument of harm when improperly installing the light fixture. Second, plaintiff claims that questions of fact remain as to whether the light fixture is a trap or snare. While the light fixture was technically visible, the similar color of the caulking and the sidewalk, in addition to plaintiff's viewing angle along her walking path, among things, raise questions of fact as to whether the light fixture was a trap or snare.

100 Church's Opposition

100 Church does not oppose McGovern's motion with respect to dismissing the complaint on the basis that the alleged condition was open and obvious and not inherently dangerous.[1] 100 Church otherwise opposes McGovern's motion dismissing the complaint and cross claims, arguing that questions of fact remain as to whether McGovern negligently performed its work under the contract. McGovern does not equivocally state whether or not it installed the lighting fixtures. However, according to 100 Church, it has provided evidence that McGovern was contractually obligated to install the lighting fixture and that it completed the work. In support of this contention, 100 Church submits the affidavit of Roger Merriman (Merriman), SL Green's Vice President of Construction, who "oversaw the entire construction project on behalf of SL Green in the regular course of my employment." Merriman aff, ¶ 3. Merriman states that "[a]ll required work specified in the contract, including the installation of the subject in ground recessed lighting, was completed by McGovern." *Id.*, ¶ 4. He notes that the project documents prepared by the architects and

[1] 100 Church also does not oppose McGovern's arguments with respect to dismissing the cross claim alleging a breach of contract for failure to procure insurance.

engineers contain drawings for the recessed in-ground luminaires and that the product description and specification sheets are also attached.

According to 100 Church, McGovern's request to dismiss the complaint on the basis that McGovern did not owe a duty to plaintiff should be rejected. As plaintiff claimed that her alleged accident was the result of the negligent installation of the lighting fixture, "the finder of fact could determine that McGovern was actively negligent and launched an instrument of harm, relative to the installation . . . .," NYSCEF Doc. No. 188, Goldstein affirmation, ¶ 13.

100 Church alleges that, pursuant to the contractual indemnification provision, McGovern is required to indemnify 100 Church from any damages resulting from any acts or omissions in connection with McGovern's, or McGovern's subcontractor's, performance of the work under the Agreement. It continues that, if the trier of fact determines that the light fixture was negligently installed, McGovern would be contractually required to indemnify 100 Church. Although the warranty provision guarantees McGovern's work for a specific period, the contractual indemnification has no expiration date. 100 Church believes that these provisions are mutually exclusive and that McGovern would be liable for contractual indemnification.

Further, Merriman's affidavit allegedly "provides specific and compelling evidence that McGovern actually completed the lighting installation . . . ." *Id.*, ¶ 12. As a result, if the trier of fact determines that McGovern negligently installed the light fixture, 100 Church may be entitled to common law indemnification and contribution.

100 Church's Cross Motion

100 Church concedes that the cross motion is untimely, as it was not filed within 60 days of the filing of the note of issue. Nevertheless, it argues that the court should consider the cross motion, on the grounds that it was made in response to McGovern's pending summary judgment motion and, similar to McGovern's motion, addresses the open and obvious doctrine.

According to 100 Church, it is entitled to summary judgment dismissing the complaint because the in-ground recessed lighting fixture was open and obvious and not inherently

dangerous. Plaintiff testified that she routinely and intentionally stepped on the light for many years without incident. Further, as plaintiff testified that she appreciated the light, no duty to warn exists. 100 Church summarizes that it did not breach any duty of care to plaintiff, "including any duty to warn [plaintiff] of the condition of the subject light, in light of her in-depth and longstanding awareness about the presence of the light. Thus, cross-movants cannot bear any liability to [plaintiff] in the case at bar." NYSCEF Doc. No. 201, Goldstein affirmation, ¶ 27.

DISCUSSION

I. Summary Judgment

"On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The "movant bears the heavy burden of establishing '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'" (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1106 [2015], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Once this showing has been made . . . , the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *see Zuckerman v City of New York*, 49 NY2d at 562).

"[T]he court's function is issue finding rather than issue determination" (*Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 481 [1st Dept 2018]).

"[S]ummary judgment is a drastic remedy that should be employed only when there is no doubt as to the absence of triable issues" (*Aguilar v City of New York*, 162 AD3d 601, 601 [1st Dept 2018]).

II. 100 Church's Cross Motion

100 Church cross-moved for summary judgment dismissing the complaint and any cross claims.[2] While conceding that the cross motion is untimely, 100 Church requests that the court consider the cross motion.

100 Church's cross motion for summary judgment must be denied because it is untimely. The cross motion against plaintiff, a nonmoving party, "was not a true cross motion." *Rubino v 330 Madison Co., LLC*, 150 AD3d 603, 604 (1st Dept 2017). Furthermore, 100 Church did not provide good cause for the delay. *See e.g. Muqattash v Choice One Pharm. Corp.*, 162 AD3d 499, 500 (1st Dept 2018) (internal quotation marks and citation omitted) ("The court properly declined to consider Choice One's cross motions for summary judgment since. . . . Choice One did not provide good cause for its delay. In any event, these motions were not true cross motions as they each sought, at least in part, relief against nonmoving parties").

III. McGovern's Motion for Summary Judgment

> To sustain a cause of action alleging negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries. If there is no duty of care owed by the defendant to the plaintiff, there can be no breach and, consequently, no liability can be imposed upon the defendant.

Mojica v Gannett Co., Inc., 71 AD3d 963, 965 (2d Dept 2010) (internal quotation marks and citations omitted).

McGovern argues that the complaint and any cross claims must be dismissed as against it as there is no evidence that McGovern was negligent or violated some duty of care. McGovern also makes the argument that the complaint must be dismissed as a matter of law against all defendants, because the lighting fixture constituted an "open and obvious" condition and there was no duty to warn. As the cross claims would be rendered moot if the complaint is dismissed in its

[2] There are no cross claims asserted against 100 Church.

entirety, this argument will be addressed first. *See Turchioe v AT&T Communications*, 256 AD2d 245, 246 (1st Dept 1998) ("The third-party actions and all cross claims are dismissed as a necessary consequence of dismissing the complaint in its entirety").

The underlying premise of the open and obvious doctrine is the following:

> Where a danger is readily apparent as a matter of common sense, there should be no liability for failing to warn someone of a risk or hazard which he [or she] appreciated to the same extent as a warning would have provided. Put differently, when a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists as no benefit would be gained by requiring a warning.

Westbrook v WR Activities-Cabrera Mkts., 5 AD3d 69, 71 (1st Dept 2004) (internal quotation marks and citations omitted).

Defendants argue that the lighting fixture was open and obvious because plaintiff had noticed the fixture for at least three years on a daily basis, including on the date of her accident. Furthermore, at times, plaintiff would intentionally walk on the fixture. Plaintiff argues that the lighting fixture was not open and obvious as, among other things, the height differential between the fixture and the sidewalk was difficult to observe, because the caulking around the fixture blended in with the sidewalk. As she entered the building, her foot came into contact with the fixture, causing her to fall.

The question of whether a condition is open and obvious is "generally a jury question," and "even visible hazards do not necessarily qualify as open and obvious." *Id.* at 72; *see also Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200, 200 (1st Dept 2004) ("Whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances"). Furthermore, "[p]laintiff's awareness of a dangerous condition does not negate a duty to warn of the hazard, but only goes to the issue of comparative negligence." *Farrugia v 1440 Broadway Assoc.*, 163 AD3d 452, 454-455 (1st Dept 2018). Therefore, under the circumstances, McGovern has not demonstrated that this alleged defect is open and not inherently dangerous.

Moreover, even if the condition was open and obvious, the complaint could not be dismissed in its entirety at this time, as plaintiff is not only claiming a failure to warn but also a failure of 100 Church to maintain the premises in a safe manner. 100 Church, as the building owner, still "has a nondelegable duty to maintain its premises in a reasonably safe condition, taking into account the foreseeability of injury to others." *Id.* at 454. This duty to maintain the premises in a safe manner is a distinct duty from a duty to warn. *See Lawson v Riverbay Corp.*, 64 AD3d 445, 446 (1st Dept 2009) ("the open and obvious nature of an obstacle simply negates the property owner's duty to warn of a hazard; it does not eliminate the property owner's duty to ensure that its property is reasonably safe").

Accordingly, since issues of fact remain whether the lighting fixture was an open and obvious condition and whether 100 Church breached its duty to maintain the premises in a reasonably safe condition resulting in foreseeable injury to plaintiff, summary judgment is denied dismissing the complaint on this basis.

In general, an independent contractor, such as McGovern, is not liable in tort or for breach of contract for injuries sustained by a third party. *Espinal v Melville Snow Contractors*, 98 NY2d 136 (2002) (*Espinal*). However, three exceptions occur, which include the following:

> (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm"; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely.

Id. at 140. (internal citations omitted). Both plaintiff and 100 Church argue that the first exception, as presented in *Espinal (supra)*, applies to McGovern.

"As part of its prima facie showing, a contracting defendant is only required to negate the applicability of those Espinal exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars." *Barone v Nickerson*, 140 AD3d 1100, 1101 (2d Dept 2016) (internal quotation marks and citations omitted). Here, plaintiff only provides conclusory

allegations in the bill of particulars and the amended complaint that McGovern "created or exacerbated the alleged dangerous conditions and, thus, launched a force or instrument of harm." *Id.* at 1102. As a result, by submitting the Agreement between 100 Church and McGovern, McGovern has met its burden on summary judgment to establish that it did not owe plaintiff a duty of care because plaintiff was not a party to the contract. *See e.g. Hagan v City of New York*, 166 AD3d 590, 592 (2d Dept 2018) ("Here, Temco established its prima facie entitlement to judgment as a matter of law by demonstrating, prima facie, that the plaintiff was not a party to its cleaning services contract, and that it, thus, owed him no duty of care"). Plaintiff fails to raise a triable fact in opposition.

100 Church argues that McGovern's request to dismiss the complaint on the basis that it owed no duty to plaintiff should be denied, as questions of fact remain as to whether McGovern launched an instrument of harm due to its negligent installation of the lighting fixture. McGovern essentially argues that there is insufficient evidence to demonstrate that it installed the lighting fixtures. In addition, even if it did install the fixtures, it did not install them improperly. 100 Church claims that McGovern did install the lighting fixtures, pursuant to the documents and drawings prepared by the architect and the engineering consultants in connection with the lighting plan.

Contrary to McGovern's argument, there is sufficient evidence to raise an issue of fact as to whether McGovern installed the lighting fixture. According to the project documents annexed to the Merriman affidavit, McGovern was required under its contract to install the recessed in-ground lighting fixtures. While DePetrillo testified that any installed light fixtures would have been inspected and approved by the project architect among other people, McGovern did not present any evidence to support this assertion. Therefore, a question of fact remains as to whether McGovern installed the recessed in-ground light fixtures and, if so, whether it did so in accordance with the plans or whether it failed to exercise reasonable care in fulfilling its contractual obligations, thereby launching the instrument of harm to plaintiff.

Accordingly, McGovern's summary judgment motion dismissing plaintiff's complaint as against it must be denied.

IV. Cross Claims Against McGovern

Contractual Indemnification

As set forth above, there is a section in the Agreement referencing indemnification and there is Schedule G, which sets forth the insurance requirements. There is also another provision, defects, which indicates that any defects in material or workmanship have a one-year guaranty, with another one-year guaranty available from the date the defects are repaired. The indemnification provision requires McGovern to indemnify 100 Church for damages sustained as a result of the acts of omissions of McGovern or its subcontractors in connection with McGovern's performance of the Work or other obligations under this Agreement, or, to indemnify 100 Church for any breach of warranty under this Agreement. The Work under the Agreement is set forth as lobby renovation work, with a finite start and end date of August 12, 2010 and December 31, 2010, respectively.

Schedule G, insurance requirements, has the same finite start and end dates, stating that the policies of insurance are to remain in effect during the time the Agreement is in effect until the Work is finally completed. It references the indemnification provision, requiring commercial general liability insurance to "specifically include coverage for the indemnification clause of this Agreement . . . ." Parallel to the breach of warranty in the indemnification provision, there was a carve-out for the Products and Completed Operations insurance coverage to extend for three years beyond the completion of the Work.

It is well settled that "[a] reading of the contract should not render any portion meaningless. Further, a contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose." *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-325 (2007) (internal quotation marks and citations omitted). 100 Church's interpretation that the indemnification provision should be read separately

from the remainder of the agreement and therefore, that it had no expiration date countermands the principle that "[a]ll parts of [a] contract must be read in harmony to determine its meaning." *Matter of Bombay Realty Corp. v Magna Carta*, 100 NY2d 124, 127 (2003). "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." *Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87-88 (1st Dept 2018) (internal quotation marks and citations omitted). Courts have "refused to place a burden upon a contractor 'which he did not expressly assume and which it is inconceivable he would have accepted.'" *Luby v Rotterdam Sq., L.P.*, 47 AD3d 1053, 1056 (3d Dept 2008), quoting *Inman v Binghamton Hous. Auth.*, 3 NY2d 137, 148 (1957).

The parties entered into a contract for a limited period of time, after which McGovern was no longer responsible for repair and no longer agreed to indemnify. Here, any viable contractual indemnification claim would have to stem from a personal injury occurring prior to December 31, 2010, or from a claim arising from defective work or breach of warranty occurring prior to December 31, 2013. As plaintiff's accident took place after both of those dates, McGovern is not contractually required to indemnify 100 Church and is granted summary judgment dismissing this cross claim.

Accordingly, McGovern is entitled to summary judgment on 100 Church's cross claim for contractual indemnification.

Breach of Contract

McGovern has met its burden on summary judgment dismissing the breach of contract cross claim for failure to procure insurance by establishing that it did comply with its obligation to procure insurance pursuant to the terms of the Agreement and there is no contrary evidence presented.

Accordingly, McGovern is entitled to summary judgment on 100 Church's cross claim for breach of contract.

Common Law Indemnification

"The right to indemnification may be created by express contract or may be implied by law to prevent an unjust enrichment or an unfair result." *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 451-452 (1st Dept 1985). As discussed, the contractual indemnification provision in the Agreement was not in force by the time plaintiff's accident occurred. However, the right to indemnification may be implied by common law to "prevent an unfair result or the unjust enrichment of one party at the expense of the other." *Richter v Hunter's Run Homeowners Assn. Inc.*, 14 AD3d 601, 602 (2d Dept 2005).

To be granted summary judgment dismissing a cross claim for common law indemnification, a contractor must establish "that the injured plaintiff's accident was not due solely to its negligent performance or nonperformance of an act solely within its province." *Roach v AVR Realty Co., LLC*, 41 AD3d 821, 824 (2d Dept 2007). As set forth above, a question of fact exists as to whether McGovern launched the instrument of harm by negligently installing the light fixture.

Accordingly, McGovern's motion for summary judgment on 100 Church's cross claim for common law indemnification must be denied.

Contribution

"Contribution is generally available as a remedy when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe[] to the injured person." *Trump Vill. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 896 (1st Dept 2003) (internal quotation marks and citations omitted). Again, as shown above, since a question of fact remains as to whether McGovern negligently installed the light fixture, 100 Church has a viable contribution cross claim against it.

Accordingly, McGovern is not entitled to summary judgment dismissing 100 Church's cross claim for contribution.

CONCLUSION

Accordingly, it is

ORDERED that the motion for summary judgment brought by defendant McGovern & Company LLC dismissing plaintiff's complaint is denied; and it is further

ORDERED that the motion for summary judgment brought by defendant McGovern & Company LLC dismissing the cross claims against it is granted to the extent that 100 Church's cross claims for contractual indemnification and breach of contract are dismissed, and that the motion to dismiss the cross claims is otherwise denied; and it is further

ORDERED that the cross motion for summary judgment brought by defendants 100 Church Fee Owner LLC and SL Green Management LLC, is denied; and it is further

ORDERED that all remaining claims are severed and shall continue.

7/27/20
DATE

PAUL A. GOETZ, J.S.C.

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