

Hope v CBS Corp.

2020 NY Slip Op 33093(U)

September 15, 2020

Supreme Court, New York County

Docket Number: 161497/2015

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

MONICA HOPE,

Plaintiff,

- v -

CBS CORPORATION, JRM CONSTRUCTION
MANAGEMENT, LLC, CONSOLIDATED CARPET
ASSOCIATES, LLC DBA CONSOLIDATED CARPET,

Defendant.

-----X

JRM CONSTRUCTION MANAGEMENT, LLC

Plaintiff,

-against-

CONSOLIDATED CARPET, CONSOLIDATED CARPET
ASSOCIATES, LLC

Defendant.

-----X

CBS CORPORATION

Plaintiff,

-against-

CONSOLIDATED CARPET, CONSOLIDATED CARPET
ASSOCIATES, LLC

Defendant.

-----X

INDEX NO. 161497/2015
MOTION DATE 7/1/2020
MOTION SEQ. NO. 005 006

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595251/2016

Second Third-Party
Index No. 595259/2016

The following e-filed documents, listed by NYSCEF document number (Motion 005) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 153, 157, 158, 161, 166, 167, 168, 170, 173

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 154, 155, 156, 159, 160, 162, 163, 164, 169, 171, 172, 174, 175

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

ORDERED that the branch of defendant CBS Corporation's (CBS) motion (Motion Seq. 005), pursuant to CPLR 3212, for summary judgment dismissing Plaintiff Monica Hope's complaint and all cross-claims against it is granted, and Plaintiff's complaint is severed and shall continue as against the remaining defendants; and it is further

ORDERED that the branch of CBS's motion (Motion Seq. 005), pursuant to CPLR 3212, for summary judgment granting its Third-Party complaint and cross-claims against Consolidated Carpet/Consolidated Carpet Associates LLC (Consolidated Carpet) for contractual indemnification, common-law indemnification, and breach of contract for failure to procure insurance is denied; and it is further

ORDERED that the branch of CBS's motion (Motion Seq. 005), pursuant to CPLR 3212, for summary judgment granting its cross-claims against defendant JRM Construction Management LLC (JRM) for contractual indemnification, common-law indemnification, and breach of contract for failure to procure insurance is denied; and it is further

ORDERED that the branch of Consolidated Carpet's motion (Motion Seq. 006), pursuant to CPLR 3212, for summary judgment dismissing all claims against it is granted to the extent that CBS's Third-Party complaint and cross-claims for common-law indemnification are dismissed as moot; and the branch is otherwise denied; and it is further

ORDERED that defendant JRM's cross-motion (Motion. Seq. 006), pursuant to CPLR 3212, for summary judgment dismissing Plaintiff's complaint is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further;

ORDERED that the remainder of the claims against the parties in this action are severed and shall continue; and it is further

ORDERED that the counsel for defendant CBS shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.

MEMORANDUM DECISION

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Monica Hope (Plaintiff) on November 13, 2014 when she tripped and fell at the 14th floor (Premises) of the building (Building) located at 51 West 52nd Street, New York, New York.

In Motion Seq. 005, defendant/second third-party plaintiff CBS Corporation (CBS) moves, pursuant to CPLR 3212, for summary judgment dismissing all claims against it or, in the alternative, granting its cross-claims against co-defendants/third-party defendants JRM Construction Management LLC (JRM) and Consolidated Carpet/Consolidated Carpet Associates, LLC (collectively, Consolidated Carpet).

In Motion Seq. 006, Consolidated Carpet moves, pursuant to CPLR 3212, for summary judgment dismissing Plaintiff's complaint and all third-party claims and cross-claims against it. JRM cross-moves for summary judgment dismissing Plaintiff's complaint.

BACKGROUND FACTS

Plaintiff is a legal secretary at Orrick, Herrington & Sutcliffe LLP (Orrick) and has worked there since 2006 (NYSCEF doc No. 139, 24:20 to 25:5). Orrick leases multiple floors at the Building owned by defendant CBS, including the 14th floor where Plaintiff allegedly tripped and sustained her injuries.

In 2009, Orrick renovated its leased office space (the Renovation Project). For the Renovation Project, Orrick retained JRM as general contractor, and JRM, in turn, engaged Consolidated Carpet to do the carpet installation.

On November 6, 2015, Plaintiff commenced this proceeding against CBS and JRM. On April 1, 2016, both CBS and JRM filed their respective third-party complaints against

Consolidated Carpet. Plaintiff later filed an amended complaint to join Consolidated Carpet as an additional defendant.

Plaintiff's Deposition Testimony

Plaintiff testified that on November 13, 2014, as she was walking down the hallway from the ladies' room to her work space on the 14th floor, she tripped over the carpet and fell (NYSCEF doc No. 139, 55:23 to 56:2). Plaintiff testified that her right ankle twisted, causing her to fall forward because the floor was "uneven" under her feet (NYSCEF doc No. 139, 56:21; 68:3-4; 86:22-24). The "unevenness" of the floor was described by Plaintiff as follows:

"There is a mis-leveling of the floor, that's the best way I can describe it. It is not even. The carpet is not bunched up there. It is the floor itself that is uneven but -- and that's the best way I can describe it. A slope would that be a term, a slope."

(NYSCEF doc No. 139; 83:8-19).

Deposition Testimony of James Lockwood (Consolidated Carpet's foreman)

Mr. Lockwood was Consolidated Carpet's foreman at the Renovation Project (NYSCEF doc No. 124, 9:15-23). He testified that before the carpet installation, Consolidated Carpet had to perform flash patching "to smooth the floor" (*Id.*, 14:11-21) and some "ramping" which entails additional flash patching at office fronts to lift elevations up in case of a height differential (*Id.*, 17:6-22). Consolidated Carpet then attached the carpet to the concrete slab using adhesive multipurpose flooring and flattened the adhesive with heavy roller (*Id.*, 19:14 to 20:7). Mr. Lockwood does not recall any issues about leveling off the concrete slab (*Id.*, 16:24 to 17:2) and confirmed that no change order was issued to address such issue (*Id.*, 32:9-20). Mr. Lockwood further testified that after the carpet installation, he and Consolidated Carpet's project manager separately performed overall inspections of the work (*Id.*, 21:11 to 22:23). JRM also inspected the work and signed off (*Id.*, 23:10). Mr. Lockwood also testified that, other than Plaintiff's case, he

has no knowledge of any complaints that were ever made by Orrick about Consolidated Carpet's work (*Id.*, 25:3-8).

Deposition Testimony of John Hallahan (CBS's Vice President of Facilities)

Mr. Hallahan is a Vice President in CBS's Security and Facilities Department (NYSCEF doc No. 122, 8:22 to 9:9). He testified that CBS did not have to approve or inspect the completed Renovation Project but was involved with the portion of the work involving fire, electrical and plumbing to the extent that it required municipal approval (*Id.*, 22:15 to 23:25). Mr. Hallahan does not recall any issues that required his attention to the 14th floor of the Building and is not aware of any complaints ever being made about the condition of floor, slab and carpeting in Orrick's space (*Id.*, 29:4-15).

CBS now moves, by way of summary judgment, to dismiss Plaintiff's complaint and all cross-claims against it. CBS also seeks summary judgment on its third-party complaint and cross-claims against co-defendants JRM and Consolidated Carpet for contractual indemnification, common-law indemnification, and breach of contract for failure to procure insurance (Motion Seq. 005).

Separately, Consolidated Carpet seeks dismissal of Plaintiff's complaint and the third-party complaints against it from CBS and JRM. Consolidated Carpet also seeks summary judgment on its cross-claims against co-defendants CBS and JRM (Motion Seq. 006). JRM cross-moves for summary judgment dismissing Plaintiff's complaint.

DISCUSSION

Summary judgment is granted when "the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v*

Eden Cent. School Dist., 15 NY3d 297, [Ct App 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [Ct App 1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [Ct App 1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [Ct App 1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent fails to make a prima facie showing, the court must deny the motion, "regardless of the sufficiency of the opposing papers" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [Ct App 2008] quoting *Alvarez*, 68 NY2d at 324).

Here, each of the defendants moving for summary judgment bears the burden of making a prima facie showing of entitlement to a judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217[A], 951 N.Y.S.2d 84, 2012 NY Slip Op 50729[U] [Sup. Ct., N.Y. County 2012], aff d, 102 AD3d 563 [1st Dept 2013], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Alvarez, supra*, *Zuckerman v City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v Filstein*, 35 AD3d 184 [1st Dept 2006]).

The function of a court in reviewing a motion for summary judgment "is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474 [1st Dept 2012]). Where "credibility determinations are required, summary judgment must be denied" (*Id.*). Thus, on a

motion for summary judgment, the court is not to determine which party presents the more credible argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421, [1st Dept 2013] [holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial]).

Defendants' motions for summary judgment dismissing Plaintiff's claims against them

The Court first writes to address each defendants' motion for summary dismissal of the underlying complaint.

a. CBS (Motion Seq. 005)

CBS moves for summary judgment dismissing Plaintiff's claims against it as it is an out-of-possession commercial landlord that did not have prior notice and did not create, cause or exacerbate any alleged dangerous condition at the Premises (NYSCEF doc No. 118, ¶¶ 47-55). Moreover, CBS highlights Plaintiff's supposed inability to identify any actionable defect that proximately caused her accident (*Id.*, ¶¶56-63).

In opposition, Plaintiff argues that CBS remains liable as an out-of-possession landlord as it retained the right to access the Building and make repairs as necessary and desirable (NYSCEF doc No. 168, ¶¶13-16). Consolidated Carpet also opposes on the ground that there is a question of fact as to whether the alleged mis-leveled floor is a significant structural defect (NYSCEF doc No. 167, ¶ 6-9).

An out-of-possession landlord "is generally not liable for negligence with respect to the condition of property . . . unless [it] is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to

a specific statutory safety provision" (*Sapp v S.J.C. 308 Lenox Ave. Family L.P.*, 150 AD3d 525 [1st Dept 2017]). The out-of-possession landlord must have had either actual or constructive notice of the hazardous condition and have had a reasonable opportunity to repair the condition for liability to be imposed (*Federal Ins. Co. v Evans Constr. of NY. Corp.*, 257 AD2d 508 [1st Dept 1999]). Generally, when the landlord has only a limited right to enter and inspect the premises from time to time, liability is extended only in situations where "the basis of the liability is a significant structural or design defect, that is contrary to a specific safety provision" (*Kittay v Moskowitz*, 95 AD3d 451 [1st Dept 2012]). When the accident does not stem from a structural or design defect, out-of-possession landlords can only be held liable by a contractual obligation beyond a mere right of reentry, or a record of their past course of conduct indicating that they acted to maintain the premises (*see Ritto v Goldberg*, 27 NY2d 887, 889 [1970]; *Dimas v 160 Water St. Assocs.*, 191 A.D.2d 290 [1993]; *Del Giacco v Noteworthy Co.*, 175 AD2d 516, 518 [1991]).

Here, it is undisputed that CBS is an out-of-possession landlord. Its lease agreement with Orrick (the Lease Agreement) requires Orrick to "take good care of the [leased] Premises, and the fixtures and appurtenances therein...and at [Orrick's] sole cost and expense make all repairs thereto, structural and non-structural, as and when needed to preserve them in good working order and condition" (NYSCEF doc No. 128, ¶ 5B). It is also undisputed that CBS retained the right to re-enter the Premises pursuant to Article 15 of the Lease Agreement which provides, in relevant part, as follows:

"Landlord or Landlord's agents shall have the right at all reasonable times (unless such entry is reasonably likely to materially and adversely affect Tenant's use or occupancy of any substantial or material portion of the Premises, in which event such access shall occur at times other than Business Hours, unless in the event of an emergency), upon reasonable prior notice to Tenant...to enter the Premises for the purpose of...making such repairs, alterations, improvements or additions as are necessary or desirable to the Premises or to any other portion of the Building or which Landlord may elect to perform following Tenant's failure in accordance with the terms hereof, to make repairs or perform any work

which Tenant is obligated to perform under this Lease in accordance with the terms hereof..."

(*Id.* at Article 15 [i]).

However, although CBS did retain a limited right of reentry under the Lease Agreement, as discussed above, liability would only extend if Plaintiff's injuries stemmed from a design or structural defect that violated a specific statute. Here, Plaintiff's complaint alleges that CBS is liable only under common-law negligence; no statutory violation is implicated. In her opposition to CBS's motion for summary judgment, Plaintiff failed to raise a triable issue of fact as she failed to adduce evidence that the alleged defect on the concrete slab was a significant structural defect in violation of an applicable statutory provision. Given that Plaintiff only alleges negligence, without reference to specific statutory safety provision, CBS's right of reentry under the lease is inconsequential (*see Stockman v Barcelona Bar*, 2019 NY Slip Op 30334(U) [Sup Ct 2019]; *see also Kopetic v Port Auth. of NY & NJ*, 176 AD3d 530 [1st Dept 2019]); *Dirschneider v Rolex Realty Co. LLC*, 157 Ad3d 538 [1st Dept 2018]; Thus, Plaintiff's claims against CBS should be granted.

In light of this Court's determination, all claims for common-law indemnification and contribution against CBS should likewise be dismissed. "[C]ommon-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*Martins v Little 40 Worth Assocs., Inc.*, 72 A.D.3d 483 [1st Dept. 2010] citing *Correia v Professional Data Mgt.*, 259 A.D.2d 60 [1st Dept. 1999]). Contribution under the common-law similarly requires a showing of fault by a tortfeasor (*Aiello v. Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234 [1st Dept. 2013]). As

CBS has successfully demonstrated that it is free from negligence, it cannot be held liable for common-law indemnification and contribution to its co-defendants JRM and Consolidated Carpet.

Therefore, the Court holds that the branch of CBS's motion seeking dismissal of all claims against it should be granted.¹

b. Consolidated Carpet (Motion Seq. 006)

Consolidated Carpet also seeks dismissal of Plaintiff's complaint against it. In support, Consolidated Carpet argues that it owes no duty of care to Plaintiff (NYSCEF doc No. 133, ¶¶ 28-44). Moreover, Plaintiff allegedly failed to demonstrate that Consolidated Carpet performed its work in a negligent manner (*Id.*, ¶¶45-51).

The default rule is that contractors, such as Consolidated Carpet, do not have duties to third-parties, as "[a] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third-party" (*Espinal v Melville Snow Contractors*, 98 NY2d 136 [2002]). However, as the Court in *Espinal* noted, there are three exceptions to this rule, to wit:

"[There are] three situations in which a party who enters a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to the third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting parties duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely"

(98 NY2d at 140).

The Court finds that the latter two exceptions, detrimental reliance and displacement of duty, are not applicable to Consolidated Carpet. Plaintiff makes no argument of detrimental reliance here given that the contract between JRM and Consolidated Carpet was executed and fully

¹ The branch of CBS's motion seeking summary judgment on its claims for common-law indemnification against its co-defendants is thus moot in light of the Court's determination that Plaintiff's complaint insofar as asserted against CBS is dismissed in its entirety (see *Marquez v L&M Dev. Partners, Inc.*, 141 AD3d 694 [2d Dept 2016]; *Cardozo v Mayflower Ctr., Inc.*, 16 AD3d 536 [2d Dept 2005]).

performed four years before her accident. The exception of displacement of duty also does not apply as Consolidated Carpet's contract did not displace Orrick's obligation to maintain the Premises.

However, the Court finds that a question of fact remains in terms of the applicability of the first exception, the launching of an instrument of harm. As Plaintiff argues, there is a factual issue of whether Consolidated Carpet's "ramping" may have caused the "unevenness" of the floor described by Plaintiff. The Court notes that Mr. Lockwood testified that "ramping" is done "when you have a height elevation, say [when] the office fronts are in and [there is] a difference of a half-inch... flash patch[ing is done] to bring the height up" (NYSCEF doc No. 124, 17:9-12). He further stated that the ramping is done from the office front out and, based on how the rest of the slab is, the floor may gradually get lower as the ramping proceeds to the middle of the hallway (*Id.*, 43:18 to 44:2). Mr. Lockwood, however, cannot say whether this "ramping" down can be considered a "mis-leveling," as a survey of the whole floor is necessary to answer that question (*Id.*, ¶¶ 11-21). The Court finds that this is a material issue of fact rendering dismissal of Plaintiff's complaint against Consolidated Carpet unwarranted at this juncture.

The Court rejects Consolidated Carpet's argument that Plaintiff failed to demonstrate that the cause of her accident was Consolidated Carpet's negligent work and not any number of intervening causes. *First*, negligence cases by their very nature do not typically lend themselves to summary dismissal "since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*McCummings v New York City Transit Auth.*, 81 NY2d 923 [Ct App 1993]). *Second*, Consolidated Carpet cannot rely on the cases of *Foley v Liogys* (124 AD2d 641 [2d Dept 1986]), *Piccola v Incorporated Village of*

Valley Stream (213 AD2d 465 [2d Dept 1995]) and *Leeds v City of New York* (2011 NY Slip Op 30830 (U) [Sup Ct 2011]) as they are inapposite.

In *Foley*, the Court found that plaintiff did not establish that the defective condition in the sidewalk where she fell was created by defendant's negligent work as opposed to the normal elements and passage of time. Here, it is not clear how "normal elements and passage of time" can have contributed to any alleged "unevenness" of the floor at the Premises. In *Piccola*, the Court was unable to find how appellant's repaving of his driveway could have caused or exacerbated any defect on the adjoining area where plaintiff tripped. Here, viewing the record in the light most favorable to Plaintiff, the circled area where Plaintiff supposedly tripped and fell (*see* photo in NYSEF doc. No. 118, p. 7) does not eliminate the possibility that she tripped while walking in close proximity to an office front where the "ramping" work was done. Finally, in *Leeds*, there was no evidence that defendants caused the defect on the road where plaintiff tripped and fell; thus, the Court found that the mere fact that the defendant contractor performed some excavation work was insufficient to support liability. Here, Plaintiff specifically attributes her accident to the "unevenness" of the floor at the Premises and Consolidated Carpet has admitted that it is the entity responsible for the evenness of the floor before installing carpet (NYSCEF doc No. 124, 13:20).

Therefore, Consolidated Carpet's motion for summary dismissal of Plaintiff's complaint is denied at this juncture.

c. JRM's cross-motion for dismissal (Motion Seq. 006)

JRM cross-moves to dismiss Plaintiff's complaint as against it. As a preliminary matter, JRM acknowledges that its motion was filed "past the Court[']s deadline" but argues that it has a "good faith excuse", *i.e.*, that "due to corporate restructuring (layoffs) of the CNA staff counsel and the closing of its New York City office in 2019...[its] motion [was] made somewhat past the

Court's deadline" (NYSCEF doc No. 151, ¶ 4). No parties opposed JRM's cross-motion on the basis that it was filed late. This Court will address JRM's untimely cross motion as it seeks relief on the same issues addressed in Consolidated Carpet's motion (*Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416 [1st Dept 2014] ["Although a court may decide an untimely cross motion, it is limited in its search of the record to those issues or causes of action "nearly identical" to those raised by the opposing party's timely motion."]).

In its moving papers, JRM maintains that as a third-party contractor, it had no duty to Plaintiff (NYSCEF doc No. 151, ¶ 7). JRM argues that it does not own, nor did it occupy or control the Premises where the accident happened. The Court finds this argument unpersuasive. As the general contractor, JRM supervised the work of Consolidated Carpet. Mr. Lockwood testified that JRM performed an inspection of Consolidated Carpet's work upon completion and signed off (NYSCEF doc No. 124, 22:24 to 23:2). Thus, the first *Espinal* exception is equally applicable to JRM as it is to Consolidated Carpet. As there remains a factual issue as to whether Consolidated Carpet's work may have caused or contributed to the "unevenness" of the floor where Plaintiff was injured, the Court finds that JRM failed to establish its *prima facie* entitlement to summary judgment dismissing Plaintiff's claim against it.

CBS's motion for summary judgment granting its claims against Consolidated Carpet and JRM (Motion Seq. 005)

a. Claim for Contractual Indemnification against Consolidated Carpet

CBS moves for summary judgment in its favor on its claim for contractual indemnification as against Consolidated Carpet. Consolidated Carpet moves for summary judgment dismissing said claim against it.

“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]; see also *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

“In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability” (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; see also *Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, “[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*Correia*, 259 AD2d at 65).

The Subcontract Agreement between JRM and Consolidated Carpet dated June 12, 2008 (NYSCEF doc No. 130) provides in pertinent part, the following:

“To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless Owner, Contractor and Contractor’s other laborers, subcontractors, or supplies and all of their agents and employees from and against all claims, damages, losses, liabilities, fines, payments and expenses, including but not limited to attorney’s fees, arising out of and in connection with injuries (including death), or damage to property (including materials, machinery, tools, equipment or the Work), whether furnished by the Owner, Contractor or Subcontractor resulting from performance of the Work caused in whole or in any part by a violation of any law, ordinance, or regulation or by any negligent or willful act or omission, or any claim of strict liability, arising out of Work by Subcontractor or anyone directly or indirectly employed by Subcontractor or anyone for whose acts Subcontractor may be liable.”

(*Id.* at ¶ 5.10.6).

Given that the Subcontract Agreement requires that indemnification is triggered by claims “arising out of” Consolidated Carpet’s work, the Court finds that summary judgment is premature as it cannot be said at this stage that the accident was caused by the acts or omissions

of Consolidated Carpet. In *Lopez v Consol. Edison Co. of New York*, 40 N.Y.2d 605, 607 [1976], the Court of Appeals explained that a similar indemnity clause “has no application unless there has been an ‘act or omission’ by Peckham resulting in injury to persons or property” (id. at 609). As here it is not yet evident that Plaintiff’s accident arose out of an act or omission by Consolidated Carpet, CBS is not entitled to summary judgment on its contractual indemnification claim. However, since as discussed above, Consolidated Carpet has not demonstrated it is completely free of negligence, it is also not entitled to dismissal.

b. Claim for Failure to Procure Insurance against Consolidated Carpet and JRM

CBS also moves for summary judgment in its favor against Consolidated Carpet and JRM for breach of contract for their failure to procure insurance².

CBS alleges that Consolidated Carpet’s subcontract clearly obligated it to purchase and maintain insurance covering CBS as additional insured. Apart from this bare allegation, CBS failed to reference any contractual provisions to support its assertion. Article 12.2 of the Subcontract Agreement between Consolidated Carpet and JRM provides that “[a]ll insurance policies shall name Contractor, and if so directed by Contractor, shall name Owner, and any of Owner’s designees, as “additional insureds”” (NYSCEF doc No. 30, p. 18). However, CBS failed to adduce any evidence that JRM has ever directed Consolidated Carpet to name parties, other than JRM, as “additional insured” pursuant to Article 12.2. The Court therefore finds that CBS is not entitled to summary judgement granting its claim against Consolidated Carpet for failure to procure insurance.

As to JRM, JRM’s Contract with Orrick provides that “[a]ll insurance required under th[e] Agreement in respect of Services related to the Project shall name...CBS Broadcasting,

² Both Consolidated Carpet and JRM oppose this branch of CBS’s motion but do not seek its dismissal.

Inc...provided that Orrick shall advise Consultant of the names of any such parties required to be named as additional insureds” (NYSCEF doc No. 129, p. 7). In its opposition, JRM submitted a copy of an insurance policy containing “General Contractors Blanket Additional Insured” (NYSCEF doc No. 158). The document provides that the “Additional Insured” shall refer to “any person or organization whom [JRM] is required by “written contract” to add as an additional insured on th[e] Coverage Part” (*Id.*). Thus, the policy incorporated JRM’s contractual obligation, if any, to obtain coverage for CBS (*see 77 Water St., Inc. v JTC Painting & Decorating Corp.*, 148 AD3d 1092 [2d Dept 2017])[“In support of their motion for summary judgment, JTC and Allied provided a copy of the commercial general liability insurance policy and the endorsement, which stated that coverage as an additional insured was provided to any entity that JTC was required by contract to have covered as an additional insured. Thus, the policy and endorsement expressly incorporated, and thereby fulfilled, JTC’s contractual obligation, if any, to obtain coverage for the plaintiffs”].

Therefore, the Court holds that the branch of CBS’s motion seeking summary judgment granting its claims against JRM and Consolidated Carpet for failure to procure insurance is denied.

Consolidated Carpet’s motion for summary judgment (Motion Seq. 006)

Consolidated Carpet moves for summary judgment dismissing JRM’s claims for contractual and common-law indemnification. Consolidated Carpet also seeks summary judgment granting its claims for common-law indemnification against JRM.

As discussed, it cannot be said at this juncture that the accident was caused by the acts or omissions of Consolidated Carpet so as to trigger the indemnification clause under its contract with JRM. Thus, the Court cannot dismiss JRM’s contractual indemnification claim.

As to Consolidated Carpet's and JRM's claims against each other for common-law indemnification, it is again noted that Consolidated Carpet has failed to demonstrate that it is free of negligence that led to Plaintiff's accident. A claim for common-law indemnification is actionable only where a party has been found to be "vicariously liable without proof of any negligence . . . on its own part" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]). Thus, Consolidated Carpet, at this juncture, is not entitled to either the dismissal of JRM's claims for common-law indemnification against it or a judgment in its favor for common-law indemnification against JRM.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the branch of defendant CBS Corporation's (CBS) motion (Motion Seq. 005), pursuant to CPLR 3212, for summary judgment dismissing Plaintiff Monica Hope's complaint and all cross-claims against it is granted, and Plaintiff's complaint is severed and shall continue as against the remaining defendants; and it is further

ORDERED that the branch of CBS's motion (Motion Seq. 005), pursuant to CPLR 3212, for summary judgment granting its Third-Party complaint and cross-claims against Consolidated Carpet/Consolidated Carpet Associates LLC (Consolidated Carpet) for contractual indemnification, common-law indemnification, and breach of contract for failure to procure insurance is denied; and it is further

ORDERED that the branch of CBS's motion (Motion Seq. 005), pursuant to CPLR 3212, for summary judgment granting its cross-claims against defendant JRM Construction Management LLC (JRM) for contractual indemnification, common-law indemnification, and breach of contract for failure to procure insurance is denied; and it is further

ORDERED that the branch of Consolidated Carpet's motion (Motion Seq. 006), pursuant to CPLR 3212, for summary judgment dismissing all claims against it is granted to the extent that CBS's Third-Party complaint and cross-claims for common-law indemnification are dismissed as moot; and the branch is otherwise denied; and it is further

ORDERED that defendant JRM's cross-motion (Motion. Seq. 006), pursuant to CPLR 3212, for summary judgment dismissing Plaintiff's complaint is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further;

ORDERED that the remainder of the claims against the parties in this action are severed and shall continue; and it is further

ORDERED that the counsel for defendant CBS shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.


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<u>9/15/2020</u> DATE					<u>CAROL R. EDMEAD, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
			DENIED	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/>	REFERENCE