Bright Horizons Children's Ctrs., LLC v Arthur C. Klem, Inc.
2023 NY Slip Op 33446(U)
September 5, 2023
Supreme Court, Kings County
Docket Number: Index No. 508130/2014
Judge: Ingrid Joseph

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 5th day of Sept 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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Index No: 508130/2014

BRIGHT HORIZONS CHILDREN'S CENTERS, LLC,

Plaintiff(s)

-against-

ORDER

ARTHUR C. KLEM, INC., JOY CONSTRUCTION CORPORATION, POLAR BEAR MECHANICAL INC., MELTZER MANDL ARCHITECTS PC, NAF PAK PLUMBING & HEATING CORP., JTP WATERWORKS, INC., DAGHER ENGINEERING, PLLC, 175 KENT AVENUE LLC, 224 WYTHE AVENUE, LLC and EQUITY RESIDENTIAL MANAGEMENT, L.L.C.,

Defendant(s)

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In this matter, Defendant Equity Residential Management, LLC ("Equity") moves (Motion Seq. 17) pursuant to CPLR § 3212 for summary judgment dismissing Bright Horizons Children's Centers, LLC ("Plaintiff's) complaint and all cross-claims against Equity, or in the alternative, summary judgment on its cross-claim for common law indemnification against Defendant Arthur C. Klem, Inc. ("Klem"). Plaintiff and Klem have opposed Equity's motion. Klem also moves (Motion Seq. 19) pursuant to CPLR § 3212 for summary judgment dismissing Plaintiff's complaint and all cross-claims against Klem. Plaintiff and Equity have opposed Klem's motion.

This action arises out of a property damage incident that occurred on May 8, 2013, at 175 Kent Avenue, Brooklyn New York ("Subject Premises"), wherein heavy rainfall overwhelmed the lower level of the building's waste lines, dislodged a rubber cap on one of the lines and caused a flood. Plaintiff initiated this action on September 5, 2014, against Defendant Klem, Joy Construction Corporation ("Joy"), Polar Bear Mechanical Inc. ("Polar Bear"), and Meltzer Mandl Architects ("Meltzer"). On or about July 9, 2015, the parties stipulated to allow Plaintiff

to amend its Summons and Complaint to name Naf Park Plumbing & Heating Corp. ("Naf") and JTP Waterworks Inc. ("JTP") as defendants. Neither Naf nor JTP have appeared or answered the Complaint. On April 28, 2016, Plaintiff filed a separate action under Index # 506858/2016 against Defendants Dagher Engineering, PLLC ("Dagher"), 175 Kent Avenue LLC ("175 Kent"), 224 Whyte Avenue LLC ("224 Whyte"), and Equity. Neither 175 Kent nor 224 Whyte have answered or appeared in the action. The matters were consolidated into this action on March 15, 2017. On July, 29, 2020, Plaintiff filed a Stipulation of Discontinuance solely as to Polar Bear.

Prior to 2011, Joy owned the subject premises with Plaintiff Bright Horizons as a tenant. Thereafter, Equity took over management from Joy and on March 23, 2012, Equity entered into a lease agreement, ("The Agreement"), for the subject premises, with Plaintiff. Equity claims that this matter is a subrogation property damage action brought by first party property insurer Travelers Property Casualty Insurance Company of America ("Travelers") in the name of its insured, the Plaintiff, for amounts that were fully paid under its insurance policy for the loss of Plaintiff's water infiltration system.

Equity argues that Plaintiff is barred from bringing a subrogation action against it pursuant to the waiver of subrogation clause in Section 9-J subsection 1 of the lease agreement which provides that Plaintiff waives all rights of subrogation for damages caused by fire or other loss covered by insurance. Additionally, the same section states that Plaintiff was required to procure and maintain commercial general liability insurance coverage for the daycare, "including but not limited to fire damage liability, … water damage liability …" Pursuant to the requirements of the Agreement, Equity maintains that Plaintiff procured an insurance Policy with Travelers. Equity states that it is self-insured and that Section 9-J(6) paragraph 4 on page 25 of the Agreement states that as the landlord, it will not be obligated to carry insurance on and will not be responsible for "tenant's property, alteration work, or alterations." Equity further states that since it is self-insured, an insurance policy does not exist, thus there is no waiver of any subrogation clause, however Equity's excess insurance policy does indicate that it waived subrogation. In support of its argument that the claims submitted on behalf of Plaintiff with respect to the incident have been paid, Equity cites to the February 3, 2016, deposition testimony of Raymond Bongiovani ("Bongiovani"), a general adjuster for Travelers, who stated that all claims submitted by Plaintiff in connection with the subject incident have been paid and that

Plaintiff was reimbursed for the loss.[1] Furthermore, Bongiovani testified that Plaintiff was indemnified from Travelers for the incident. [2]

Equity also argues that it is entitled to summary judgment because it was not negligent, did not have prior notice of the dangerous condition, nor did it cause the incident, or breach any contractual agreement with the Plaintiff. Equity claims that Klem was retained to handle plumbing services at the Subject Premises and that Klem installed and was aware of the rubber cap that existed on the date of the incident, and their failure to rectify the issue was a superseding intervening act interrupting any link between the alleged negligence of Equity and Plaintiff's alleged damages. In support, Equity cites the deposition testimonies of Thomas Campbell ("Campbell"), David Hannon ("Hannon"), Michael Tucker ("Tucker"), Richard Pearson ("Pearson"), and Chris Plati ("Plati").

Campbell served as a Regional Property Manager for the Plaintiff and was the site superintendent during the original construction of the Subject Premises. In his disposition dated March 1, 2016, Campbell testified that he was initially working at a different location on the date of the incident and that he was informed of the leak.[3] After arriving at the Subject Premises, Campbell testified that he inspected all the rooms and discovered water dripping out of the waste line in the mechanical room.[4] Campbell was shown photographs of the site taken after the incident, and identified a temporary rubber cap on the waste line.[5] Campbell testified that when he inspected the waste line on the date of the incident, there was not a permanent cap on the line and that the temporary cap shown in the photo was on the ground in the water.[6] Campbell states that he picked up the cap but left it in the room and that in his opinion, he did not believe the cap was code compliant.[7] Campbell also testified that he was told by Plati that the cause of the leak was the rubber cap.[8] At Hannon's December 18, 2018 deposition, Hannon, an employee of Klem, testified that Klem had been to the Subject Premises less than two months before the incident to perform work on the building.[9] Hannon testified that prior to the incident, Klem's

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[1] (Bongiovani Dep. 46 lines 7-12).
[2] (Bongiovani Dep. 32 lines 9-22).
[3] (Campbell Dep. 13 lines 3-13).
[4] (Campbell Dep. 20 lines 10-20).
[5] (Campbell Dep. 33 lines 2-13; 35 lines 10-12; 36 lines 4-8).
[6] (Campbell Dep. 34 lines 2-6).
[7] (Campbell Dep. 34 lines 13-19; 36 lines 10-11).
[8] (Campbell Dep. 40 lines 11-14).
[9] (Hannon Dep. 15 lines 20-25; 16 lines 2-9).

work included opening up and cleaning the traps as well as the main sewer line.[10] Hannon stated that an employee from Klem named "Steve", who is no longer employed by Klem, performed the cleanout of the traps prior to the incident and that the rubber caps were present on the traps prior to when Steve performed the clean out.[11] Hannon also testified that there are other options than rubber "jimmy" caps to seal the traps including brass plugs, fit-alls, lead plugs, grip plugs, and brass caps.[12] Hannon stated while a rubber cap can be used to secure a trap, that the brass cap is preferred over the rubber caps because there may be a risk that the rubber caps will blow off if there is a backup in the system depending on how it is installed.[13] Hannon testified that Klem was called back after the incident to clean the main drain and install brass caps.[14]

Tucker, the Vice President of Field Operations of Defendant Joy appeared for a deposition on February 12, 2019. He testified about the specified materials to be used on storm lines. Tucker testified that when the Subject Premises was being built, both rubber and brass caps should have been installed in order to get the city plumbing inspection sign off but also that a rubber cap ultimately would not have passed inspection.[15] Similarly, Pearson, a former Principal of Defendant Dagher, appeared for a deposition on May 14, 2019, and testified that prior to May 2013, Dagher provided engineering services at the subject premises.[16] Pearson states that Dagher designed a set of plumbing plans and the sewer drainage system including the design for the cleanout plug for the building.[17] Based on the spec designs, Pearson testified that Dagher recommended the installation of a cast iron with bronze plugs for the pipes.[18] Pearson states that Dagher chose a bronze plug because the standardized specification was consistent with New York's building code.[19] Additionally, Pearson testified that he was unaware of what other types of plugs would have been acceptable to use but that the proper plugs would have been installed

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[10] (Hannon Dep. 48 lines 3-7).
[11] (Hannon Dep. 48 lines 23-25; 49 lines 2-25; 50 lines 10-13).
[12] (Hannon Dep. 50 lines 15-23).
[13] (Hannon Dep. 51 lines 18-25; 52 lines 2-14).
[14] (Hannon Dep. 54 line 25; 55 lines 2-7; 56 lines 24-25; 57 lines 2-4).
[15] (Tucker Dep. 37 lines 20-24; 38 lines 10-16).
[16] (Pearson Dep. 15 lines 6-12).
[17] (Pearson Dep. 24 lines 8-16).
[18] (Pearson Dep. 27 lines 15-25; 28 lines 2-25).
[19] (Pearson Dep. 28 lines 21-25).

by the plumbing contractor during the construction of the building, and that it was the full responsibility of the plumbing contractor to purchase the parts and install them.[20]

Plati, the Vice President of Construction Services for Equity, appeared for a deposition on February 6, 2020, wherein he testified that he was unaware of which party was the original plumbing contractor during the construction phase of the building and that he had not heard of JTP before.[21] Plati states that prior to the incident he did not notice the caps over the clean out traps, nor was Equity aware of any prior water back-ups infiltrations into the building.[22] Plati testified that he was told by Equity's Property Service Manager "John" Themeli, and Equity's Regional Facility Manager Esau Ali that a rubber cap came loose and caused the incident.[23] Additionally, Plati testified that based on reading Hannon's testimony, he was aware that prior to the incident, Equity hired Klem to clean out the trap located in the basement that eventually got backed up.[24]

Equity also cites to the expert report of Professional Engineer Steven Pietropaolo ("Pietropaolo") of LGI Foresic Engineering, P.C., who was retained to determine the cause and origins of the flood. Pietropaolo noted that Klem preformed cleaning of the ejector pit and the sewer prior to the incident and that Klem's use of rubber caps was not compliant with industry standards. Pietropaolo stated that the plugs used should have been brass and included raised square or countersunk square heads. In his expert opinion, Pietropaolo opined that the water damage to the Subject Premises was a result of water backing up into the basement from the building's storm and sewer lines as the result of an improper cleanout plug affixed by Klem. Pietropaolo also noted that after the incident, a code compliant screw-in cleanout plug was installed.

In its alternative argument, Equity claims that it is entitled to summary judgment on its cross-claim against Klem pursuant to common law indemnification because Klem, as a plumber, should have realized that a brass cap was to be used instead of a rubber cap. Equity claims that Klem was aware of what caps were going on to which pipes and had been to the subject premises

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[20] (Pearson Dep. 30 lines 12-25; 31 lines 2-25; 32 line 4; 49 lines 21-24).
[21] (Plati Dep. 18 lines 15-21).
[22] (Plati Dep. 27 lines 24-25; 28 lines 2-8).
[23] (Plati Dep. 33 lines 5-12; 38 lines 2-12).
[24] (Plati Dep. 41 line 25; 42 lines 2-6).

In partial opposition, Klem argues that Equity has not met its burden of establishing entitlement to summary judgment because there is an issue of fact as to whether any damage that may have been sustained by the Plaintiff was due to the actions and/or omissions of Equity, as the property manager. Klem also argues that Equity's common law indemnification claim should be dismissed because Equity's responsibilities as the property manager included inspection and control of the premises and it cannot attribute the incident solely to Klem. Klem states it was only hired on an "as needed basis" by Equity and that the parties did not enter into a comprehensive maintenance agreement. Furthermore, Klem states that the scope of its role did not include inspection and maintenance and that Equity should have been aware of what was installed during the construction phase of the building. Klem also cites Hannon's testimony, that rubber caps are commonly used and not barred by local or state codes as far as he is aware.[25] Therefore, Equity has failed to show that it was not negligent nor that Klem was solely responsible.

Plaintiff also opposes the motion on the grounds that the purported waiver of subrogation clause does not bar Plaintiff's claim against Equity because Equity breached its obligation to procure any primary insurance covering the loss at issue. Plaintiff states that the lease agreement required both parties to obtain insurance to cover their own potential casualty losses, but only Plaintiff did. Furthermore, Plaintiff states that "self-insurance" or an excess insurance policy does not constitute insurances and thus cannot be subject to the waiver clause. Plaintiff also argues that Section 9-J(6) paragraph 3 on page 24 of the Agreement, imposes a duty upon Equity to keep in full force an insurance policy with minimum limits of liability in an amount of not less than $5,000,000, and that any such policy purchased by Equity include a waiver of subrogation in favor of Tenant, neither of which was done. Additionally, Plaintiff argues that Equity had a non-delegable duty to keep the Subject Premises free from defects, and that Equity had constructive notice of prior issues regarding the building's sewer system that required Klem to clean it a few weeks prior to the incident based on the testimonies of Plati and Hannon.

In support of its motion, Klem argues that it is entitled to summary judgment because it could not have caused any condition that gave rise to the Plaintiff's damages since it did not perform work that caused or contributed to the incident. Klem claims that the evidence in the record establishes that it was the heavy rainstorm that overwhelmed the drain system and caused

[25] (Hannon Dep. 76 lines 7-12).

the flood. Klem also states that nothing in the record establishes that it installed the cap in question, nor was Klem asked to replace it prior to the incident and therefore it had no notice of any dangerous condition. In fact, Klem claims that it was JTP who installed the plumbing lines and caps in question during the building's initial construction.[26] Moreover, Klem argues that it is entitled to summary judgment because it did not owe a duty to Plaintiff as a non-contracting third party and therefore cannot be liable under theories of negligence or breach of contract. Klem claims that since Plaintiff was paid in full by its insurer, that awarding damages in this action would amount to double recovery and unjust enrichment and that Plaintiff has also failed to properly plead a subrogation action.

In opposition to Klem's motion, Equity and Plaintiff claim that Klem's motion should be denied as untimely since it was made after the Note of Issue was filed. In the alternative, Equity claims that Klem's motion must be denied because issues of fact exist as to whether Klem knowingly placed the rubber cap onto the trap, had notice of the dangerous condition and failed to warn Equity about the dangerous condition. Equity cites Campbell's testimony, wherein he stated that he not only found the rubber cap floating in the water but also was told that the cause of the incident was the installation of the rubber cap.[27] Equity cites Tucker's testimony wherein he stated that both rubber and brass caps should have been installed in order to get the city plumbing inspection sign off.[28] Tucker later testified that a rubber cap ultimately would not have passed inspection.[29] Similarly, Equity cites Pearson's testimony wherein he states that the designs for the drainage system called for the installation of "cast iron with bronze plug" because the standardized specification was consistent with New York's building code.[30] Moreover, Equity states that Peitropaolo's expert opinion found that the water damages to the subject premises was a result of water backing up into the basement from the building's combination storm and sewer line as the result of an improper cleanout plug affixed by Klem to the ferrule fitting on the building's sewer house trap. In support of its opposition, Equity submits the invoices from Klem to demonstrate that prior to the accident and during the period from December 14, 2011 to May 8, 2013, Klem rendered plumbing services at the premises at least

[26] (Tucker Dep. 29 lines 3-8; 35 lines 24-25; 36 lines 2-5).
[27] (Campbell Dep. 34 lines 13-19; 36 lines 10-11; 40 lines 11-14).
[28] (Tucker Dep. 38 lines 10-16).
[29] (Tucker Dep. 37 lines 20-24).
[30] (Pearson Dep. 28 lines 21-25).

fifty times and that none of the invoices indicate that Klem used a proper brass cap at the subject fitting nor do they demonstrate that Klem advised Equity that any rubber cap should be replaced with a brass cap.

In opposition to Klem's motion, Plaintiff argues that Klem was negligent in its prior clean out services of the same trap involved in the incident just weeks before the occurrence. Plaintiff claims that Klem has failed to provide any admissible evidence or an expert report to rebut its claims that Klem secured the cap improperly after their clean-out and removal of debris in the trap in March 2013. Additionally, Plaintiff argues that even though Klem was a non-contracting party, it did owe a duty to Plaintiff because its failure to exercise reasonable care in the performance of its duties launched a force or instrument of harm that either created or exasperated an already existing dangerous condition that caused Plaintiff's injuries.

It is well established that "the proponent of a summary judgment motion must make 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" (*Ayotte v. Gervasio,* 81 NY2d 1062, 1063 [1993], *citing Alvarez v. Prospect Hospital,* 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration 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. (*Zuckerman v. City of New York,* 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v. Nassau County*, 111 A.D.2d 212, [2d Dept. 1985]; *Steven v. Parker*, 99 AD2d 649, [2d Dept. 1984]; *Galeta v. New York News, Inc.*, 95 AD2d 325, [1st Dept. 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept. 1990]; *Rebecchi v. Whitemore,* 172 AD2d 600 [2d Dept. 1991]).

Subrogation is the principle by which an insurer, having paid losses of its insured, is placed in the position of its insured so that it may recover from the third party legally responsible for the loss (*Winkelmann v Excelsior Ins. Co.,* 85 N.Y.2d 577 [1995]). Parties to a commercial transaction are free to allocate the risk of liability to third parties through insurance and deployment of a waiver of subrogation clause (*Gap, Inc. v Red Apple Companies, Inc.,* 282

A.D.2d 199 [1st Dept. 2001]; see *Board of Ed., Union Free School Dist. No. 3, Town of Brookhaven v Valden Associates, Inc.,* 46 N.Y.2d 653 [1979]). A waiver of subrogation clause implies that the parties are insured (*Liberty Mut. Ins. Co. v. Perfect Knowledge*, 299 A.D.2d 524 [2d Dept. 2002]; *Duane Reade v Reva Holding Corp.,* 30 A.D.3d 229 [1st Dept. 2006]). If the parties are not insured, there is no need to waive subrogation claims, which are brought by the parties' insurers (*Duane Reade* at 233; citing *American Motorist Ins. Co. v Morris Goldman Real Estate Corp.,* 277 F.Supp.2d 304 [S.D.N.Y 2003]). Moreover, a waiver of subrogation clause cannot be enforced beyond the scope of the specific context in which it appears (*Kaf-Kaf Inc. v Rodless Decorations, Inc.*, 90 NY2d 654,660 [19971]). A reference to "other insurance" in e.g., an "excess provision" of an insurance contract has been found to contemplate a separate second kind of insurance policy issued by another insurance company in exchange for a premium charged (*Consolidated Edison Co. of New York, Inc. v Liberty Mut.,* 2002 N.Y. Slip Op. 22694 [Sup. Ct. NY Cnty. 2002]; see also *Wake County Hospital System, Inc. v National Casualty Co.,* 804 F.Supp. 768 [E.D.N.C.1992]). Self-insurance however is not insurance at all but rather a representation by the self-insured entity that it has the financial means to pay any judgments against it (*Guercio v Hertz Corp.,* 40 N.Y.2d 680 [1976]; *Consolidated Edison Co. of New York, Inc.* at 404).

While Equity has an excess insurance policy that waives subrogation and covers losses in excess of $25,000,000.00, Plaintiff's claimed damages are for $696,492.78, which is below the threshold. Here, Equity has conceded that while Plaintiff obtained insurance, Equity itself was self-insured. However, Section 9-J(6) paragraph 3 page 24 of the Lease Agreement states that "Landlord shall obtain and keep in full force and effect during the term of this Lease a policy of Commercial General Public Liability Insurance, written on an occurrence basis with minimum limits of liability in an amount of not less than $5,000,000.00." Additionally, both "landlord and tenant shall each procure and appropriate clause in, or endorsement on, any all-risk or fire or extended coverage insurance covering the Premises…" Equity's contention that pursuant to Section 9-J(6) paragraph 4 on page 25 of the Agreement that the landlord is not obligated to carry insurance, directly contradicts its argument that it is entitled to waiver of the subrogation clause because if the parties are not insured, there is no need to waive subrogation claims, which are brought by the parties' insurers. Consequently, Equity has breached the provision of the lease

with respect to the procurement of insurance and thus is not entitled to enforcement of the waiver provisions.

Accordingly, that branch of Equity's motion for summary judgment as to waiver of the subrogation clause in the lease agreement is denied.

An owner of land has a duty under the common law to maintain its premises in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk (*Kellman v 45 Tiemann Assoc.,* 87NY2d 871 [1995]; *Basso v Miller,* 40 NY2d 233, 241 [1976]). An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct (*Casson v McConnell,* 148 AD3d [2017]; *see Guzman v Haven Plaza Hous. Dev. Fund Co.,* 69 NY2d 599 [1987]; *Alnashmi v Certified Analytical Group, Inc.,* 89 AD3d 10 [2011]; *Ritto v Goldberg,* 27 NY2d 887, 889 [1970]).

The issue of control is both a question of law and of fact (*Gronski v County of Monroe,* 18 NY3d 374, 379 [2011]; *Ritto v Goldberg,* 27 NY2d 887 [1970]). When a landowner and one in actual possession have committed their rights and obligations with regard to the property to a writing, courts look not only to the terms of the agreement, but to the parties' course of conduct, including but not limited to, the landowner's ability to access the premises – to determine whether the landowner in fact surrendered control over the property such that the landowner's duty is extinguished as a matter of law (*Gronski* at 380-81; *citing Butler ex rel. Butler v Rafferty,* 100 NE2d 265 [NY 20003]). Thus, a landowner remains in presumptive control over its property and subject to the attendant obligations of ownership until it is found that control was relinquished, either as a matter of law or by the finder of fact after presentation of all the evidence (*Gronski* at 382).

Here, Equity has not proffered any evidence establishing that it fully relinquished control of the Subject Premises thus releasing it of its non-delegable duty to maintain its premises in a reasonably safe condition. In Equity's Reply, Equity concedes that it has responsibility over the maintenance of the building but attempts to shift responsibility of the incident solely to Klem. However, the parties did not have a maintenance agreement that unambiguously assigned the responsibility to implement safe practices and remedy unsafe conditions on the Subject Premises to one party. Moreover, Section 102.3 of the 2008 New York City Plumbing Code states that the

to one party. Moreover, Section 102.3 of the 2008 New York City Plumbing Code states that the owner or the owner's designated agent shall be responsible for maintenance of plumbing systems. Similarly, section 6(D) of the lease states that "landlord shall be responsible for preparing all necessary plans and specifications for Landlord's Work, and for obtaining any necessary building and other permits and approvals." Section 8(A) states "Tenant shall make, at its own expense, all repairs and replacements required to keep the Premises and fixtures in good working order and condition, except those for which Landlord is responsible hereunder, including without limitation: (i) structural repairs, including… such repairs necessary to maintain the Premises in a weather-tight condition…" Section 8(B)/(D) states "Tenant shall not make or perform or permit the making or performance of, any alterations, installations, improvements, additions or other physical changes in or about the Premises without Landlord's prior written consent." Section 10 of the Agreement, states in part that the "landlord shall use commercially reasonably efforts to keep, manage and maintain the building consistent with other similar first-class mixed-use office properties in the rental market in which the building is located, and in full accordance with the applicable laws, codes, ordinances and regulations." Finally, Section 20 of the Agreement, states that the landlord possesses the right of re-entry upon the Subject Premises. Consequently, Equity has not satisfied its burden of establishing that it relinquished all rights and control of the Premises to Klem or any other party as a matter of law, and the issue as to whether Equity, through the course of its conduct, exercised sufficient control over the facility such that it owed Plaintiff a duty to prevent and remedy any defects should be determined by the finder of fact.

Accordingly, that branch of Equity's motion for summary judgment is denied.

The next issue to be addressed is whether Equity had notice of the dangerous condition that caused Plaintiff's' damages. In a premises liability case, a property owner, or a party in possession or control of real property, who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged defective condition nor had actual or constructive notice of its existence (see *Gordon v American Museum of Natural History,* 67 N.Y.2d 256 [1996]; *Kyte v Mid Hudson Wendico, Inc.,* 131 A.D.3d 452 [2d Dept. 2015]; *Pampalone v FBE Van Dam, LLC,* 123 A.D.3d 988 [2d Dept. 2014]). A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected (*Gordon*

862 [2d Dept. 2014]). While a party remains liable for all normal and foreseeable consequences of his acts, an intervening act will constitute a superceding cause and will serve to relieve that party of liability when the act is of such an extraordinary nature or so attenuates that party's conduct from the ultimate injury that responsibility for the injury may not be reasonably attributed to that party (*Huber v Malone,* 229 A.D.2d 469 [2d Dept. 1996]; *Derdiarian v Felix Contr. Corp.,* 51 N.Y.2d 308 [1980]). No duty is imposed on a defendant to prevent a third-party from causing harm to another unless the intervening act which caused the plaintiff's injuries was a normal or foreseeable consequence of the situation created by the defendant's negligence (*Huber* at 470).

Here, genuine issues of material fact exist as to whether Equity had actual or constructive notice of a defective or dangerous condition that caused the incident. While Equity states that it was never informed of the rubber caps being used or replaced by Klem, that alone does not absolve Equity from its duty as owner to perform regular inspections of the Subject Premises. While Plati testified that he was not aware of any prior backups of the system at the Subject Premises, a March 25, 2013 invoice from Klem states that the work performed included "releasing stoppage causing drains to back-up in school....flushed and...restored normal drainage." Moreover, Hannon also testified when Klem was hired to clean the traps several weeks before the incident, that the rubber caps were already installed and that he was unaware who installed them.[31] Thus, Plaintiff has raised an issue of fact as to whether Equity had notice of the defective or dangerous condition.

Accordingly, that branch of Equity's claim for summary judgment is denied.

The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party (*Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507). In order to establish a claim for common-law indemnification, a party must prove not only that it was not negligent, but also that the proposed indemnitor's actual negligence contributed to the accident, or in the absence of any negligence, that the indemnitor had the authority to direct, supervise, and control the work giving rise to the injury (*Mohan v Atlantic Ct., LLC*, 134 AD3d 1075, 1078-1079 [2nd Dept 2015]; *Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118-1119 [2nd Dept 2011]). Where a defendant's alleged liability is purely statutory and vicarious, conditional

[31] (Hannon Dep. 50 lines 10-16).

summary judgment in that defendant's favor on the basis of common-law indemnification is premature absent proof, as a matter of law, that the party from whom indemnification is sought was negligent or had authority to direct, supervise, and control the work giving rise to the plaintiff's injury (*McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1097-1098 [2nd Dept 2018]; *Shaughnessy v Hutington Hosp. Assn.*, 147 AD3d 994, 999 [2nd Dept 2017]).

Here, Equity has failed to satisfy its prima facie burden by demonstrating that it relinquished all rights and control of the Subject Premises to Klem regarding inspection and maintenance of the building. Assuming, arguendo that Equity could satisfy its prima facie burden, in opposition, Plaintiff and Klem have raised triable issues of fact as to whether Equity as the property owner, by reserving its right to enter the leased premises, to inter alia, make repairs, and maintain the plumbing system, had a duty imposed by statute to hold it liable for the property damage caused as a result of a subsequently-arising dangerous condition.

Accordingly, that branch of Equity's motion for summary judgment is denied.

With regard to Equity's motion to dismiss Defendants' Dagher and Meltzr's cross-claims, since there has not been a finding that Equity is not liable to plaintiff for the injuries sustained, the defendants cross-claims for indemnification and contribution are not defeated (see *Stone v. Williams*, 64 N.Y.2d 639, 485 N.Y.S.2d 42 [1984]; *Rodriguez v. Yosi Trucking*, 151 A.D.2d 556 [2d Dept. 1989]).

Accordingly, that branch of Equity's motion for summary judgment is denied.

On a motion for summary judgment premised on failure to state a cause of action, the court must consider evidentiary material in addition to the pleadings" in order to determine whether the plaintiff actually has a cause of action (*Wedgewood Care Center, Inc.,* 198 A.D.3d 124 [2d Dept. 2021]; *Seidler v. Knopf*, 186 A.D.3d 889,[2d Dept. 2020]). Where the parties' agreement is before the court in a breach of contract action, "its provisions establish the rights of the parties and prevail over conclusory allegations of the complaint" (*Wedgewood Care Center, Inc.* at 132; *805 Third Ave. Co. v. M.W. Realty Assoc.*, 58 N.Y.2d 447 [1983]). The interpretation of an unambiguous contract is a question of law for the court (*Id.*; *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143 [1st Dept. 2001]).

To plead a cause of action for breach of contract, a plaintiff must allege (1) the existence of a contract, (2) plaintiff's performance pursuant to the contract, (3) defendant's breach of the contractual obligations; and (4) damages resulting from that breach (*34-06 73, LLC v Seneca*

contractual obligations; and (4) damages resulting from that breach (*34-06 73, LLC v Seneca Insurance Company*, 39 NY3d 44 [2022]). In general, in order to plead a cause of action for breach of contract, the complaint must allege the provisions of the contract upon which the claim is based (*Atkinson v Mobile Oil Corp.*, 205 A.D.2d 720 [2d Dept. 1994]).

Here, it is undisputed that Klem did not contract with the Plaintiff but rather was hired on an "as needed basis" by Equity. Plaintiff has not alleged an actual contract exists with Klem nor has it produced one or testified that one existed.

Accordingly, that branch of Klem's claim for summary judgment is granted to the extent that Plaintiff's breach of contract cause of action is dismissed against Klem only.

A finding of negligence must be based on the breach of a duty, wherein a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 138, 746 N.Y.S.2d 120 [2002]). The general rule is that a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party (*Id.*). There are only three limited situations where a party's contractual obligation may be deemed to give rise to a duty of care toward noncontracting third-parties, so as to render such contracting party potentially liable in tort to the injured third-party (*Id.* at 140; *H.R. Moch Co. v Rensselear Water Co.*, 247 N.Y. 160 [1928]; *Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp.*, 76 N.Y.2d 220 [1990]; *Palka v Servicemaster Management Services Corp.*, 83 N.Y.2d 579 [1994]). The first situation is where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk, described as launching a force or instrument of harm (*Espinal* at 140). The second situation arises where a plaintiff has suffered an injury by reason of the plaintiff's reasonable reliance on the defendant's continued performance of its contractual obligations (*Id.*). The third arises when the contractor has entered into a contract that constitutes a "comprehensive and exclusive" property maintenance agreement that completely displaces the owner's duty to maintain the premises in a safe condition (*Id.*).

Here, the Court finds that Klem's motion is deemed timely and that Klem has proffered good cause for its late motion and no showing of prejudice to the other parties.[32] Additionally,

[32] Counsel for Klem believed their motion to be timely pursuant to the CPLR which allows for the filing of dispositive motions within 120 days of the filing of the Note of Issue as opposed to the Kings County Supreme Court Uniform Civil Term Rules which provides that motions cannot be made later than 60 days after filing a Note of Issue. When counsel for Klem called Part 83 for clarification, he states he was informed to follow the CPLR.

the Court finds that Plaintiff has properly pled a subrogation cause of action and that Plaintiff is the properly named party pursuant to CPLR § 1004 as evidence by the Travelers Insurance Policy submitted and Plaintiff's Bill of Particulars dated April 3, 2015. Addressing Klem's motion, the Court finds that Klem has failed to satisfy its prima facie burden establishing entitlement to summary judgment. Since, Plaintiff and Equity have raised triable issues of fact as to whether the incident was caused by heavy rainstorm that overwhelmed the system as Klem argues or whether Klem's prior maintenance of the system caused or contributed to the Plaintiff's damages therefore establishing that Klem breached a duty owed to Plaintiff.

Accordingly, it is hereby

ORDERED, that the branch of Equity's motion (Motion Seq. 17) pursuant to CPLR § 3212 for summary judgment dismissing Plaintiff's Complaint and all cross-claims as against Equity, is denied, and it is further

ORDERD, that the branch of Equity's motion for summary judgment in the alternative on its cross-claim for common law indemnification against Klem is denied, and it is further

ORDERED, that Klem's motion (Motion Seq. 19) for summary judgment pursuant to CPLR § 3212 for summary judgment dismissing Plaintiff's Complaint is granted to the extent that Plaintiff's breach of contract cause of action is dismissed as against Klem only.

This constitutes the decision and order of the Court.

Hon. Ingrid Joseph. J.S.C

Hon. Ingrid Joseph
Supreme Court Justice