

HEBER GAMEZ,

Index No.: 28003/2017

Plaintiff,

- against -

DECISION and ORDER

SANDY CLARKSON LLC and MCALPINE
CONTRACTING., CO.,

Defendants.

and Third-Party action.

	<u>PAPERS NUMBERED</u>
Third-Party Defendant Security Management System, Inc's. Notice of Motion, Memorandum of Law in Support, Affidavit in Support, Exhibits	1, 2, 3, 4
Plaintiff's Affirmation in Partial Opposition	5
Defendants/Third-Party Plaintiffs' Affirmation in Opposition, Exhibits	6, 7
Third-Party Defendant Security Management System Inc's. Reply Memorandum of Law, Exhibits	8, 9

Upon the enumerated papers, Third-Party Defendant Security Management Systems, Inc's. summary judgment motion is granted, in accordance with the annexed decision and order.

Dated: **4/30/2020**

Hon. _____
LUCINDO SUAREZ, J.S.C.

HEBER GAMEZ,

Index No.: 28003/2017

Plaintiff,

- against -

SANDY CLARKSON LLC and MCALPINE CONTRACTING.,
CO.,

Defendants.

DECISION and ORDER

SANDY CLARKSON LLC and MCALPINE CONTRACTING.,
CO.,

Third-Party Plaintiffs,

- against -

CECERE & SONS, INC., BEDROCK PLUMBING & HEATING
INC., CAPITOL FIRE SPRINKLER COMPANY INC., CCI
CONTRACTING INC., CONTROLLED ENERGY SERVICES INC.,
DENTON STONE WORLD INC., HUDSON INSULATION
OF NEW YORK LLC, IGM IMPERIAL GLASS & METAL
WORKS INC., JDR METAL & GLASS INC., KNS BUILDING
RESTORATION INC., KONE INC., KINGSPAN, INC.,
POURED FLOORS OF NEW YORK & NEW JERSEY,
R&R FLOORING LLC, ROSEMOUNT INTERIORS INC.,
SECURITY MANAGEMENT SYSTEMS INC., UNIQUE GLASS &
METAL INC.,

Third-Party Defendants.

PRESENT: Hon. Lucindo Suarez

The issue in Third-Party Defendant Security Management Systems, Inc., (“SMS”)

summary judgment motion is whether it established its *prima facie* burden for a dismissal of the third-party complaint asserting third-party claims for contractual indemnification, common law indemnification, and contribution.¹ This court finds that SMS established its burden for dismissal of the third-party complaint.²

I. Contractual Indemnification

SMS seeks to dismiss Defendants/Third-Party Plaintiffs Sandy Clarkson LLC and Mcalpine Contracting., Co's., ("Sandy & Mcalpine") third-party claim for contractual indemnification.

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 statutory liability. *Correia v. Professional Data Mgt., Inc.*, 259 A.D.2d 60, 693 N.Y.S.2d 596 (1st Dep't 1999); *see also* GOL §5-322.1. Further, 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. *Torres v. Morse Diesel Int'l, Inc.*, 14 A.D.3d 401, 788 N.Y.S.2d 97 (1st Dep't 2005).

Here, SMS argues that Sandy & Mcalpine's third-party claim for contractual indemnification must fail because Plaintiff's accident did not arise out of or was connected with its contracted work. SMS also relies upon SMS Vice President, Craig Albrecht's, affidavit that averred the following: (1) Plaintiff was not SMS' employee; (2) SMS did not provide any materials, tools or equipment to Plaintiff; (3) on the day of loss SMS' work consisted of installing electrical devices inside of apartment units; (4) that the only work SMS completed in

¹ SMS' application to dismiss all cross-claims went unopposed, therefore, same is granted without opposition.

² Plaintiff's affirmation in partial opposition took no position as to SMS' application to dismiss the third-party complaint.

internal stairwells was installing lighting and emergency signs, which was completed approximately three weeks prior to the date of Plaintiff's accident; and (5) that SMS did not store any of its work materials, tools or equipment in any stairwell of the construction site at any time. In opposition, Sandy & Mcalpine contend that discovery may reveal evidence that will trigger SMS' contractual obligation to indemnify them.

This court finds that SMS Vice President, Mr. Albrecht's, uncontroverted averments coupled with Plaintiff's testimony that his injuries derived from the dangerous and uneven conditions of stairs he was traversing at the time of his injury established that Plaintiff's accident did not arise out of or was connected with SMS' contracted work. Therefore, since SMS' contractual duty to indemnify was limited to: its own negligent acts or omissions; (2) the negligent acts or omissions of its sub-subcontractors; or (3) the negligent acts or omissions of anyone directly or indirectly employed by SMS, this court finds that the subject indemnity clause is not enforceable against SMS.

II. Common Law Indemnification and Contribution

SMS seeks to dismiss Sandy & Mcalpine third-party claims for common law indemnification and contribution.

A party cannot obtain common law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part. *McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369, 953 N.E.2d 794, 929 N.Y.S.2d 556 (2011). Liability for common law indemnification may only be imposed against those parties who exercise actual supervision over Plaintiff's injury-producing work. *Id.*

In addition, the right to contribution and apportionment of liability among alleged multiple wrongdoers arises when they each owe a duty to plaintiff or to each other and by

breaching their respective duties they contribute to plaintiff's ultimate injuries. *Trustees of Columbia Univ. v. Mitchell/Giurgola Assoc.*, 109 A.D.2d 449, 492 N.Y.S.2d 371 (1st Dep't 1985). This is so regardless of whether the parties are joint tortfeasors, or whether they are liable under different theories, so long as their wrongdoing contributes to the damage or injury involved. *Id.* Thus, to sustain a claim for contribution, it would be necessary to find that the party which contribution is sought from either owed a duty either to plaintiff or to the various defendants. *Id.*

Here, SMS argues that it was not negligent or responsible for Plaintiff's accident. Further, SMS posits that it did not supervise, direct or control Plaintiff's injury-producing work nor was it responsible for the building, repairing or maintaining the stairwell where Plaintiff's accident occurred. In opposition, Sandy & Mcalpine argue that discovery may produce evidence concerning the cause of the accident, which may implicate SMS.

This court finds that SMS established by way of admissible evidence that Plaintiff's accident did not arise out of or was connected with its contracted work. Moreover, this court finds that it was uncontroverted that SMS did not supervise, direct or control Plaintiff's injury-producing work. Therefore, this court finds that Sandy & Mcalpine failed to raise any issues of triable fact to preclude the dismissal of its third-party claims for common law indemnification and contribution.

Accordingly, it is

ORDERED, that SMS' summary judgment motion for a dismissal of the third-party complaint is granted; and it is further

ORDERED, that Sandy & Mcalpine's third-party complaint against SMS is dismissed in its entirety;

ORDERED, that all cross-claims asserted against SMS are dismissed; and it is further
ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: April 30, 2020

Lucindo Suarez, J.S.C.