

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

	x	Index Number <u>15485</u> 2006
WILSON SILVA, et al.,		
Plaintiffs,		Motion Date <u>January 7,</u> 2009
-against-		
WEST 64 TH STREET, LLC, et al.,		Motion Cal. Number <u>20</u>
Defendants.		Motion Seq. No. <u>4</u>
	x	
WEST 64 TH STREET, LLC, et al.,		
Third-Party Plaintiffs,		
-against-		
REMCO MAINTENANCE, LLC,		
Third-Party Defendant.		
	x	

The following papers numbered 1 to 10 read on this motion by third-party defendant Remco Maintenance, LLC (Remco) for summary judgment dismissing the third-party complaint, and for sanctions against third-party plaintiffs pursuant to 22 NYCRR 130-1.1.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-7
Reply Affidavits.....	8-10

Upon the foregoing papers it is ordered that the motion is determined as follows:

On February 9, 2006, plaintiffs, who are Remco employees, allegedly fell while engaged in metal refinishing and maintenance

work at a building owned by West 64th and managed by Glenwood. Plaintiffs commenced this action against West 64th and Glenwood; thereafter, those defendants commenced a third-party action against Remco. At an August 28, 2008 mediation, plaintiffs settled their claims with defendants and the matter was disposed, leaving only the third-party action pending. The remaining parties subsequently appeared before Referee Leonard Florio on October 27, 2008 for a pre-trial conference. The parties agree that Referee Florio advised West 64th and Glenwood to purchase a new index number and commence a separate action against Remco. However, West 64th and Glenwood contend that Referee Florio indicated that the entire case was disposed due to the August 28 settlement, while Remco asserts that the third-party action had not been disposed vis-à-vis the settlement.

As a preliminary matter, this court notes that there seems to be a misunderstanding as to whether the instant motion is properly before this court given the settlement between plaintiffs and defendants. Since the parties have not come forth with, inter alia, a stipulation of discontinuance, an order of this court disposing of the third-party action, or an order severing said action, the third-party action has not been disposed, notwithstanding the settlement of plaintiffs' claims against defendants. As such, this court will entertain Remco's motion on the merits.

Workers' Compensation Law § 11 generally bars claims against employers for indemnification and contribution which stem from injuries sustained by an employee during the course of employment (see also Mantovani v Whiting-Turner Contr. Co., 55 AD3d 799 [2008]; Martelle v City of New York, 31 AD3d 400 [2006]). However, the statute does not vitiate a third-party claim against plaintiffs' employer in either one of these two circumstances: (1) where plaintiffs have suffered a "grave injury" as narrowly defined by § 11; or (2) where plaintiffs' employer has entered into a written contract to indemnify the owner of the property prior to such accident or occurrence (Workers' Compensation Law § 11; see also Flores v Lower E. Side Serv. Ctr., Inc., 4 NY3d 363 [2005]; Mentesana v Bernard Janowitz Constr. Corp., 36 AD3d 769 [2007]).

In the case at bar, Remco uncontestedly established its entitlement to judgment as a matter of law on the common-law indemnification claim by demonstrating that plaintiffs were compensated via Workers' Compensation after the injuries they sustained during the course of their employment (see Reinoso v Ornstein Layton Mgt., Inc., 34 AD3d 437 [2006]), and, further, that neither plaintiff sustained a "grave injury" as a result (see Ramos

v DEGI Deutsche Gesellschaft Fuer Immobilienfonds MBH, 37 AD3d 802 [2007]; Mentesana, 36 AD3d at 770). Since plaintiffs' alleged injuries, as described in their bills of particulars, and further supplemented in their deposition testimonies, clearly do not fall within any of the categories set forth within the statute, it follows that any claim by West 64th and Glenwood for common-law indemnification is barred (see Rego v 55 Leone Lane, LLC, 56 AD3d 748 [2008]; Spiegler v Gerken Bldg. Corp., 35 AD3d 715 [2006]).

Moreover, Remco also submits evidence to demonstrate that no valid indemnification agreement existed prior to plaintiffs' accident, and that the parties did not intend for any such subsequent agreement to apply retroactively (see e.g. Quality King Distributions, Inc. v E & M ESR, Inc., 36 AD3d 780 [2007]). First, the contract between Remco and Glenwood, dated December 6, 2005 and executed on December 27, 2005, clearly contains no indemnity language. The deposition testimony of James DuBon, Vice-President of Sales for Remco, confirmed that he was responsible for negotiating said contract. During these negotiations, the issue of indemnification was never discussed, nor were any requests made, between the date of execution and the date of the accident, by either West 64th or Glenwood, to supplement the contract to include an indemnification clause. The testimony of Eugene Wetzel, Senior Management Supervisor for Glenwood, confirms that no document containing an indemnification clause was ever provided to him prior to the date of plaintiffs' accident.

Second, Remco submitted a copy of a facsimile sent by Wetzel to Remco, dated February 9, 2006 (the date of the accident). Wetzel's cover sheet message, which preceded, inter alia, an unsigned and unexecuted indemnification clause, stated the following, in relevant part: "Please fax me back completed copies today with the effective date of our service contract which is 1/1/06." DuBon unequivocally testified that he communicated to Wetzel that, while he would agree to execute an indemnification agreement, he would not agree to sign it for a date that had already passed. Chief Financial Officer for Remco, William Naples, also testified that he spoke with Wetzel regarding indemnity, and that Naples would not "back date" the indemnification agreement prior to the date of the accident, as he felt that such an action would constitute "fraud."

Third, the submitted copy of the parties' indemnification agreement exhibits that it was made and executed on June 2, 2006, approximately four months after the date of accident. A letter from Naples was sent to Wetzel in tandem with said agreement, stating the following: "This letter will confirm that

Remco Maintenance, LLC will not seek to hold you responsible for the accident to our workers on February 9, 2006 at the captioned location to the extent permitted by law and our insurance obligations." Naples explained the latter document, testifying that it was not his intent to indemnify West 64th or Glenwood for plaintiffs' incident, but rather, that it was a "contract going forward" and that "[Remco] wouldn't seek damages against [West 64th and Glenwood] if [Remco] had to pay them." Wetzel stated that, after having received the executed indemnification agreement, he realized that Remco did not comply with his request to back-date the document to a date prior to the subject accident date. With reference to Naples' letter, Wetzel agreed that nowhere did it state that Remco agreed to be held responsible for plaintiffs' injuries.

The aforementioned discussion establishes that the indemnification agreement among the parties did not apply to the subject accident. "Indemnity contracts are to be strictly construed to avoid reading into them duties which the parties did not intend to be assumed" (Quality King Distribs., Inc., 36 AD3d at 782; see also Great N. Ins. Co. v Interior Constr. Corp., 7 NY3d 412, 417 [2006]; Vigliarolo v Sea Crest Constr. Corp., 16 AD3d 409 [2005]), and this court will not read the agreement so as to apply a retroactive effect when the express words used or their implications do not intend to include "'past obligations'" (Quality King Distribs., Inc., 36 AD3d at 782, quoting Kane Mfg. Corp. v Partridge, 144 AD2d 340 [1988]).

The opposition submitted by West 64th and Glenwood is unavailing. First, the supposition that the subject indemnification clause does not specify that the indemnification is prospective, as opposed to retroactive, does not thereby create an issue of fact. This Court will not hold that all indemnification agreements must necessarily include language indicating that the parties intend only to apply the agreement prospectively, as such proposition is already implied based upon the date these agreements are signed.

Second, the June 2, 2006 correspondence from Naples to Wetzel does not create an ambiguity as to whether said letter demonstrated intent to retroactively apply the indemnification agreement. A reading of the language in Naples' letter demonstrates that Remco would neither hold West 64th nor Glenwood responsible for the accident; it did not demonstrate that it would agree to indemnify them for the subject accident. Furthermore, the fact that the proffered Certificate of Insurance names West 64th and Glenwood as additional insureds for the period encompassing the accident date does not speak to indemnity, as said certificate is entirely

independent of any indemnity agreement they may have (see e.g. McNamee Constr. Corp. v City of New Rochelle, 29 AD3d 544 [2006] [calling the issues of insurance and indemnity "legally-distinct" concepts]).

Finally, the reliance by West 64th and Glenwood on, inter alia, Podhaskie v Seventh Chelsea Assoc. (3 AD3d 361 [1st Dept 2004]), is misplaced. Podhaskie held that an indemnification clause executed after a plaintiff's accident can be applied retroactively where evidence establishes that the clause was made "as of" a pre-accident date and it was the parties' intent to apply it as of that date (id. at 362). The evidence in the case at bar clearly establishes that no indemnification clause existed "as of" the accident date; the only document that existed at the time was the initial service contract, which contained no such clause. The indemnification clause dated post-accident also contained no such language.

Turning now to the claim made by West 64th and Glenwood for breach of contract, this Court finds that Remco has met its prima facie burden of establishing its entitlement to judgment as a matter of law, and West 64th and Glenwood have failed to raise a triable issue of fact in opposition. The record clearly demonstrates that the December 27, 2005 service contract contained no insurance procurement obligation to name West 64th and Glenwood as additional insureds. Furthermore, there was no document executed by the parties which made the obligation to procure insurance retroactive. The claim made by West 64th and Glenwood that it was "the understanding that [Remco] would insure and indemnify [West 64th and Glenwood] for any accidents involving their employees at the premises" is simply unsupported by the record (see e.g. Zuckerman v City of New York, 49 NY2d 557, 563 [1980]). Finally, this court finds that the third-party action commenced by West 64th and Glenwood does not rise to the level of such "frivolous conduct," pursuant to 22 NYCRR 130-1.1, where awarding costs and sanctions to Remco would be appropriate.

Accordingly, the portion of Remco's motion for summary judgment dismissing the third-party complaint is granted. That portion of its motion seeking an order awarding it costs, fees, and sanctions, is denied.

Dated: March 12, 2009

J.S.C.