

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA PART 18
Justice

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PAUL BRENNAN, et al.

Index
Number 88 2001

- against -

Motion
Date May 14, 2003

R.C. DOLNER, INC., et al.

Motion
Cal. Number 3

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The following papers numbered 1 to 10 read on this motion by third-party defendant Navillus Tile, Inc. for summary judgment dismissing the third-party complaint and all other claims against it.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 4
Answering Affidavits - Exhibits	5 - 6
Reply Affidavits	7 - 10
Other (Memoranda of Law).....	11 - 12

Upon the foregoing papers it is ordered that:

Those branches of Navillus' motion which are for summary judgment dismissing all claims for common law contribution and common law indemnification asserted against it are granted.

Those branches of Navillus' motion which are for summary judgment dismissing all the claims for contractual indemnification asserted against it are denied.

(See the accompanying memorandum.)

Dated:

J.S.C.

M E M O R A N D U M

SUPREME COURT : QUEENS COUNTY
IA PART 18

PAUL BRENNAN, et al.	X	INDEX NO. 88/01
- against -		BY: HART, J.
R.C. DOLNER, INC., et al.		DATED:
	X	

Third-party defendant Navillus Tile, Inc. has moved for summary judgment dismissing the third-party complaint and all other claims against it.

Defendant Forest Hills Senior Housing (FCDO) LLC, the owner of premises located at 72-06 Grand Central Parkway, Forest Hills, New York, entered into a contract with defendant R.C. Dolner, Inc ("Dolner") whereby the latter agreed to act as the construction manager for work to be done on the premises. Defendant Dolner, which was responsible for safety at the site, retained All Safe as a site safety consultant/inspector, and All Safe would report to the construction manager any unsafe conditions found.

Dolner also hired third-party defendant Navillus to do masonry work. Article 21.3 of the contract between Dolner and Navillus contained an indemnification clause which provided in relevant part: "To the fullest extent permitted by law, the

subcontractor [Navillus] shall indemnify and hold harmless the owner, general contractor and/or construction manager *** from and against claims, damages, losses, or expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the work, provided that such claims, damage, loss or expense is attributable to bodily injury *** but only to the extent caused in whole or in part by negligent acts or omissions of contractor [Dolner], a subcontractor *** regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder ***." Article 26.1 of the contract between Dolner and Navillus contained a choice-of-law provision: "This Agreement shall be governed by, and construed under, the laws of the State of New Jersey and all rights and remedies under this Agreement shall be governed by said laws."

On September 29, 2000, plaintiff Paul Brennan, an employee of Navillus engaged in doing brick work, allegedly cut his forearm on the sharp edge of a piece of metal attached to a wall or ceiling. The plaintiff alleges that a U-metal track installed by carpenters was left in a dangerous condition. On or about January 3, 2001, the plaintiff began this personal injury action against the defendant owner and defendant construction manager, and on or about December 10, 2001 the latter began a third-party action against Navillus. The first cause of action in the third-party complaint is for common-law contribution and indemnification, the

second cause of action is also for common-law contribution and indemnification, the third cause of action is for contractual indemnification, the fourth cause of action is also for contractual indemnification, and the fifth cause of action is for common-law indemnification and contribution.

Third-party plaintiff Dolner's causes of action for common-law contribution and common-law indemnification have no merit. Third-party claims for indemnification and contribution against employers are prohibited by Workers' Compensation Law § 11 unless a third-party plaintiff can show that the employee sustained a "grave injury" or that a written agreement provides for the right to contribution and indemnification. (See, Guijarro v V.R.H. Const. Corp., 290 AD2d 485; Potter v M.A. Bongiovanni Inc., 271 AD2d 918.) The term "grave injury" is a "statutorily defined threshold for catastrophic injuries" (Kerr v Black Clawson Co., 241 AD2d 686) "and includes only those injuries which are listed in the statute and determined to be permanent ***." (Ibarra v Equipment Control, Inc., 268 AD2d 13, 17.) Insofar as causes of action for common-law indemnification and common law contribution are concerned, the burden is on the party bringing a third-party action against the employer to present competent medical evidence that the plaintiff worker sustained a grave injury with the meaning of Workers' Compensation Law § 11. (See, Ibarra v Equipment Control, Inc., *supra*; Fichter v Smith, 259 AD2d 1023.) In the case

at bar, the third-party plaintiff failed to adduce such evidence, and this court finds as a matter of law that the injured plaintiff did not sustain a grave injury within the meaning of the statute. (See, Schuler v Kings Plaza Shopping Center and Marina, Inc., 294 AD2d 556.)

Accordingly, those branches of Navillus' motion which are for summary judgment dismissing all claims for common-law contribution and common-law indemnification asserted against it are granted.

Turning to the causes of action for contractual indemnification, Navillus agreed to indemnify Dolner against claims for bodily injury "but only to the extent caused in whole or in part by negligent acts or omissions of contractor [Dolner], a subcontractor *** regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder ***." Navillus agreed to indemnify not only where the injury arose from its own negligence, but Navillus also agreed to indemnify where the injury was caused in whole or in part by the negligence of Dolner. Thus, the court must reach the issues of (1) whether, in view of the choice-of-law provision in the parties' contract, New York or New Jersey law is to be applied in determining the validity of the indemnification clause and (2) if New York law applies, whether the indemnification clause violates General Obligations Law § 5-322.1, "Agreements exempting owners and

contractors from liability for negligence void and unenforceable; certain cases."

The court holds that New York law applies. "Where, as here, the parties have agreed on the law that will govern their contract, it is the policy of the courts of this State to enforce that choice of law *** provided that (a) the law of the State selected has a 'reasonable relationship' to the agreement *** and (b) the law chosen *** does not violate a fundamental public policy of New York ***." (Finucane v Interior Const. Corp., 264 AD2d 618, 620.) In the case at bar, the opening paragraph of the parties' agreement identifies Dolner as "a New York State Limited Liability Corporation, located at 375 Hudson Street, New York, New York 10014." Both parties to the contract are New York corporations, the parties entered into the contract in New York, and the work was performed in New York. The contractual selection of New Jersey law does not have a "reasonable relationship" to the agreement.

Reaching the issue of whether the indemnification clause violates General Obligations Law § 5-322.1, that statute provides in relevant part: "1. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith,

purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable ***." (See, Itri Brick and Concrete Corp. v Aetna Casualty and Surety Company, 89 NY2d 786.)

"[T]he statute applies to the indemnification agreements in their entirety *** where the general contractor/promisee is actually found to have been negligent." (Itri Brick and Concrete Corp. v Aetna Casualty and Surety Company, supra.) In other words, General Obligations Law § 5-322.1 does not bar an owner or contractor who was not actually negligent from receiving contractual indemnification, even if the contract language purports to provide indemnification for an owner's or general contractor's own negligence. (See, Itri Brick & Concrete Corp. v Aetna Casualty and Surety Company, supra; Brown v Two Exch. Plaza Partners, 76 NY2d 172; Lazzaro v MJM Industries, Inc., ___ AD2d ___, 733 NYS2d 500.) In the case at bar, the indemnity clause in the subcontract between Dolner and Navillus requires the subcontractor to indemnify the construction manager for the latter's own negligence. There are issues of fact pertaining to whether Dolner had sufficient supervision and control over the worksite to provide a basis for liability against it, and, if so, whether Dolner was

actually negligent in the performance of its duties. Thus, the court cannot determine here as a matter of law whether General Obligations Law § 5-322.1 operates to void the contractual indemnification clause in the subcontract. (See, Zeigler-Bonds v Structure Tone, 245 AD2d 80; Whalen v F.J. Sciame Construction Co., 198 AD2d 501.)

It may be seen from the foregoing analysis that Navillus would not be entitled to summary judgment merely by establishing its own lack of negligence. In any event, contrary to Navillus' contention, there are issues of fact pertaining to whether the subcontractor itself was negligent in permitting the plaintiff to work in the area where the injury occurred. Navillus had a foreman on the job site, and he was responsible for overseeing the safety of the company's workers. The foreman allegedly permitted the plaintiff to work right under a sharp metal brace in the ceiling while standing on a scaffold.

Accordingly, those branches of Navillus' motion which seek summary judgment dismissing all the claims for contractual indemnification asserted against it are denied.

Short form order signed herewith.

J.S.C.