

Abrego v 451 Lexington Realty LLC

2016 NY Slip Op 32215(U)

October 27, 2016

Supreme Court, New York County

Docket Number: 156180/2013

Judge: Kelly A. O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

-----X
ALEJANDRO ABREGO,

Plaintiff,

-against-

451 LEXINGTON REALTY LLC, MCCARTY
CONSTRUCTION INC. and FLINTLOCK
CONSTRUCTION SERVICES, LLC,
ARCHITECTURAL MOLDED COMPOSITES, INC.,

Defendants.

-----X
451 LEXINGTON REALTY LLC and FLINTLOCK
CONSTRUCTION SERVICES, LLC,

Third-Party Plaintiffs,

-against-

ARCHITECTURAL MOLDED COMPOSITES, INC.,

Third-Party Defendant.

-----X
ARCHITECTURAL MOLDED COMPOSITES, INC.,

Fourth-Party Plaintiff,

-against-

ROCKLEDGE SCAFFOLD CORP.,

Fourth-Party Defendant.
-----X

Kelly O'Neill Levy, J.:

Fourth-Party Defendant Rockledge Scaffold Corp. ("Rockledge") moves pursuant to CPLR 3212 for summary judgment against Defendant/Third-Party Plaintiff Flintlock Construction Services, LLC ("Flintlock") for the attorneys' fees and other defense costs incurred

Index No. 156180/2013
Motion Sequence # 003

DECISION & ORDER

by Rockledge in defending itself in the action brought by Defendant/Third-Party Defendant/Fourth-Party Plaintiff Architectural Molded Composites, Inc. ("AMC"). Flintlock opposes the motion. Rockledge's motion is granted for the reasons stated below.

Background

Plaintiff Alejandro Abrego brought the primary action against 451 Lexington Realty LLC., McCarty Construction, Inc., Flintlock, and AMC for negligence and violation of Labor Law for the personal injuries he allegedly sustained after falling from scaffolding during the course of his work for subcontractor Cavalier Construction Services, LLC. 451 Lexington Realty LLC. and Flintlock brought a third party action against AMC, and AMC subsequently commenced a fourth party action against Rockledge for common law indemnification and contribution. By decision/order dated December 10, 2015, this court granted summary judgment for Rockledge dismissing the fourth-party action it.

Rockledge now moves, pursuant to CPLR 3212, for summary judgment on its contractual indemnification cross-claim against Flintlock for the attorneys' fees and other defense costs it incurred in defending itself in the fourth party action. The indemnification provision in the subcontract with Flintlock that Rockledge seeks to enforce (§6 of the General Terms and Conditions of the Agreement) provides:

The Customer agrees to indemnify, defend and save Subcontractor, its employees and agents harmless from all claims for death or injury of persons, including Subcontractor's employees, of all loss, damage or injury to property, including the equipment, arising directly, indirectly, or in any matter out of Customer's work, use, operation and possession of the equipment. Customer's duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorney's fees and costs of settlement.¹

¹ The next sentence was stricken and initialed by Flintlock: "Customer shall be required to indemnify Subcontractor for Subcontractor's own negligence or fault; whether the fault of Subcontractor be direct, indirect, or derivative in nature and whether the damages claimed are

As a preliminary matter, Flintlock's argument that the indemnification provision Rockledge seeks to enforce is ambiguous in that it does not identify the "Customer" is clearly refuted by the third page of the General Terms and Conditions which identifies Flintlock as "Customer."

Flintlock further argues that because Rockledge did not seek summary judgment on any cross claims it asserted in the fourth party action, when that action was dismissed, the entire case against it and the cross claims were dismissed. This is not the case in that an indemnification cross claim such as the one asserted here survives the granting of a summary judgment motion. In a similar case cited by Rockledge, *Ezzard v. One E. Riv. Place Realty Co.*, the owners were granted summary judgment dismissing the complaint against them, and then sought to enforce an indemnification provision against the remaining defendant. 137 AD3d 648 (1st Dep't 2016). The court there granted the owners' indemnification claim for defense costs and fees though the contractual indemnification cross claim was the only claim remaining at that time.

Flintlock also argues that the indemnification provisions in the contract did not establish a clear and unmistakable intent between the parties for the provisions to be enforceable and the clause it seeks to enforce is in violation of General Obligations Law § 5-322.1. In *Eversfield v. Bush Hollow Realty*, the Second Department denied a subcontractor's motion for summary judgment on the general contractor's contractual indemnification claim against it. 75 AD3d 492 (2d Dep't 2010). The court stated that "[a] party is entitled to full contractual indemnification

caused in whole, or in part by the acts, errors and omissions of Subcontractor or its employees and agents." The remainder of the provision states "However, the indemnification above shall not be limited in any way by any limitation on the type of damage, compensation, or benefits payable by or for the Customer under workman's compensation acts, disability benefits payable by or for the Customer under workman's compensation acts, disability benefits acts, or other employee benefits acts."

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.’” 75 A.D.3d at 493 (quoting *Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 (1987)).

In *Rainer v. Gray-Line Dev. Co.*, 117 A.D.3d 634 (1st Dep’t 2014), the First Department found that where one indemnification provision indemnified the subcontractor and another provision indemnified the general contractor, the two indemnification provisions in the contract at issue were clear and unambiguous. Reading the indemnification provisions here together shows that they are not in conflict. The language in the General Terms and Conditions of the Agreement that was stricken and initialed by Flintlock states: “Customer [Flintlock] shall be required to indemnify Subcontractor for Subcontractor’s own negligence or fault; whether the fault of Subcontractor be direct, indirect, or derivative in nature and whether the damages claimed are caused in whole, or in part by the acts, errors and omissions of Subcontractor or its employees and agents.” The indemnification provisions in paragraph 4.6.1 and 13.5 in the subcontract require Rockledge to indemnify Flintlock where Rockledge is at fault, a position which is not inconsistent with the General Terms and Conditions.² Therefore, the court finds that indemnification provisions here are not ambiguous or at odds.

² ¶4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect’s consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney’s fees, arising out of or resulting from performance of the Subcontractor’s Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to (a) the acts or omissions of the Subcontractor, the Subcontractor’s Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, including strict liability under Labor Law §240(1), or (b) the failure of the Subcontractor to comply with the provisions of this Agreement, in each case regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder, except that nothing in this Section obligates the Subcontractor to indemnify or hold harmless any indemnitee from or against liability for damage arising out of bodily injury to persons or damage to property to the extent contributed to, caused by, or resulting from the negligence of that indemnitee or its agents or employees. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6. The Subcontractor’s obligations in this Section 4.6 will survive the termination of the Agreement.

¶13.5 [. . .] HOLD HARMLESS: The Subcontractor hereby assumes the entire responsibility and liability for any and all injury to or death of any and all persons, including the Owner’s General Contractor’s and Subcontractor’s

The court has considered the remaining arguments and finds them to be without merit.

In light of the above, the court finds that Rockledge has the right to contractual indemnification against Flintlock and refers the issue of the amount of attorneys' fees to be recovered by Rockledge to a Special Referee to hear and report with recommendations (*see W & W Glass Sys., Inc. v Admiral Ins. Co.*, 2010 NY Slip Op 32120[U], *affd* 91 AD3d 530 [1st Dep't 2012] [referring the amount of defense costs incurred in underlying action to date to Special Referee to hear and report]).

Accordingly, it is hereby

ORDERED that Rockledge's motion for summary judgment against Flintlock for the attorneys' fees and other defense costs incurred by Rockledge in defending itself in the action brought by Defendant/Third-Party Defendant/Fourth-Party Plaintiff Architectural Molded Composites, Inc. is granted; and it is further

ORDERED that the issue of the amount of attorneys' fees incurred by Fourth-Party Defendant Rockledge Scaffold Corp. for which Defendant/Third-Party Plaintiff Flintlock Construction Services, LLC is responsible is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

employees and for any and all damage to property caused by or resulting from or arising out of any negligent act or omission on the part of the Subcontractor in connection with this Agreement, or of the prosecution of the work hereunder, and this clause shall be made part of all contracts with Subcontractors or Materials Suppliers and the Subcontractor shall save and suffer or pay as a result of claims or suits due to, because of or arising out of any and all such injuries, deaths and/or legal proceedings arising therefrom, including but not limited to [. . .]

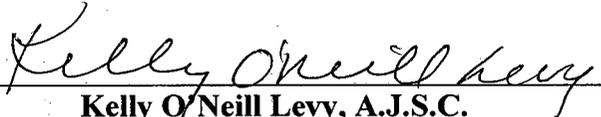
ORDERED that counsel are directed to the Rules of the Special Referees' Part¹ and Rockledge shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,² upon the Special Referee Clerk who is directed to place this matter on the calendar of the Special Referees' Part for the earliest convenient date.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

Dated: October 27, 2016



Kelly O'Neill Levy, A.J.S.C.

HON. KELLY O'NEILL LEVY

¹ Available at www.nycourts.gov/courts/1jd/supctmanh/SR-JHO/Rules-SRP.pdf

² Available at www.nycourts.gov/supctmanh