

Alvarez v 513 W. 26th Realty, LLC

2024 NY Slip Op 31265(U)

April 10, 2024

Supreme Court, New York County

Docket Number: Index No. 150516/2019

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS, JSC

PART 36

Justice

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INDEX NO. 150516/2019

JONATHAN CRUZ ALVAREZ, BIANCA MARIE CRUZ
RAMIREZ,

MOTION SEQ. NO. 003

Plaintiffs,

- v -

**DECISION + ORDER ON
MOTION**

513 WEST 26TH REALTY, LLC and INTEGRITY
CONTRACTING, INC.,

Defendants.

-----X

513 WEST 26TH REALTY, LLC and INTEGRITY
CONTRACTING, INC.

Third-Party
Index No. 595683/2019

Third-Party Plaintiffs,

-against-

SC CONTRACTING MANAGEMENT CORP.,
ENVIRONMENTALLY CONSCIOUS BUILDING INC. and
ENVIRONMENTALLY CONSTRUCTION CORP.

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 146, 170, 171, 172, 173, 174, 179, 180, 181, 182, 183, 184, 187, 188, 205, 206

were read on this motion to/for

SUMMARY JUDGMENT¹

This action stems from an accident on November 16, 2018, where plaintiff allegedly slipped on water and snow while delivering plywood to the fifth floor of a construction project at the premises located at 525 West 26th Street, New York, NY. Integrity Contracting, Inc. (“Integrity”) hired SC Contracting Management Corp. (“SC”) to perform drywall and carpentry work at the building located at 525 West 13th Street, New York, NY, which is owned by defendant/third-party plaintiff 513 West 26th Realty, LLC (“513”). SC subcontracted the work to Environmentally Construction Corp. (“ECC”), plaintiff’s employer at the time of the accident.

SC now moves the court, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint against it and dismissing all cross-claims against it, and for summary judgment on its cross-claims for contractual indemnity and for breach of contract for failure to procure the requisite insurance against co-third-party defendant, ECC. (NYSCEF Doc. No. 119).

¹ This motion is decided together with Mot. Seq. 001; 002; and 004.

SC argues that the absence of negligence on its part requires dismissal of all negligence-based claims against it, including those for common law indemnity and contribution. It maintains that Integrity, as the general contractor of the project, was responsible for site safety and for maintaining the floors of the workplace clear of slipping hazards. According to SC, ECC directed the plaintiff as to the means and methods of his work. Moreover, SC affirms that it had no employees present on the accident date, had no responsibility over worksite conditions and no control over the means and methods of plaintiff's work. The contractual indemnity claim, argues SC, must also be dismissed because Integrity cannot be indemnified for its own negligence. Insofar as Integrity was responsible for the overall site safety, maintenance of the tarp it placed to keep the weather elements out of the fifth-floor work area, and for removing any ice/snow from the fifth-floor work area, its motion should be granted.

Additionally, SC maintains that it is entitled to summary judgment as a matter of law as against ECC because, under the subcontract agreement, ECC agreed to indemnify, defend, and hold it harmless against any and all claims arising out of the work of ECC. The subcontract also provides that ECC would procure and maintain primary and excess/umbrella insurance coverage in the amounts of \$1 million and \$5 million, naming SC as an additional insured. Insofar as ECC has not furnished proof that it has procured a \$5 million excess/umbrella policy as was required by the subcontract, and ECC's carrier, Hudson Excess Insurance Company, has not responded to any of SC tenders, SC contends this proves ECC breached the subcontract by not naming SC as an additional insured on its policy with Hudson.

SC also argues that, even under the broad indemnity provision of the Integrity/SC subcontract, it cannot be held liable to 513 or Integrity for contractual indemnification (NYSCEF Doc. No. 122).

ECC opposes the motion. ECC argues that the sub-subcontract is not a valid contract because it lacks several essential terms. It does not refer to any specific project and there is no indication, based on the face of the contract, that ECC intended to indemnify SC, Integrity, or any other party for this project. Robert Silvia Aguiar and James Duffy, who executed the subcontract on behalf of ECC and SC, respectively, have not been deposed nor do they provide any proof that the sub-subcontract applied to 513-526 West 26th Street Renovation & Penthouse Additions. Thus, ECC contends that there is no clear promise to indemnify that can be implied from the language and purpose of the entire agreement. As to the cross-claim based on ECC's alleged failure to procure insurance, ECC argues that it maintained both a commercial general liability insurance policy and commercial excess liability insurance policy with Hudson (NYSCEF Doc. No. 172).

513/Integrity also opposes the motion, arguing, *inter alia*, that SC's motion must be denied because they neither created the claimed condition on which plaintiff fell, nor did they have any prior or constructive notice of such condition. SC maintains that a claimed lack of negligence by an indemnitor such as SC is irrelevant when SC's duty to indemnify is triggered by the work subject to the subcontract agreement between Integrity and SC. The indemnification provision clearly contemplates both 513 as the Owner and Integrity as the contractor as parties to be indemnified and relates to any claims "arising out of or in connection with or as a consequence of the performance of the Work...whether caused in whole or in part by the

Subcontractor including any subcontractors therefore and their employees.” Since there is no dispute that ECC was retained by SC, as a subcontractor, and that plaintiff’s injuries arose out of his performance of his duties for ECC, indemnification is triggered. To SC’s point that Integrity was in control of the premises, 513/Integrity argues that there is at least some proof that ECC would be known to do at least some of the cleaning (NYSCEF Doc. No. 187).

In reply, SC argues that 513/Integrity’s failure to address that portion of the motion seeking dismissal of the third-party claims for contribution and common law indemnity renders those claims abandoned. Furthermore, it maintains that 513/Integrity are not entitled to indemnification given Integrity’s active negligence and Labor Law violations. In addition, they argue that it was Integrity’s responsibility to maintain the site safe, keep the weather elements out of the fifth-floor work area, and remove the ice and/or snow that infiltrated the fifth floor. SC posits that Integrity caused or contributed to the alleged condition and that the testimony of Cecil Paul, Integrity’s foreman, confirms that Integrity was on notice of the dangerous condition (NYSCEF Doc. No. 205).

In reply to ECC’s opposition, SC argues that contrary to ECC’s contentions, the fact that the sub-subcontract did not refer to the subject property by name or address does not render the same a nullity. Furthermore, ECC posits that there is no material issue of fact that this sub-subcontract pertained to the subject incident because James Duffy, president of SC, submitted a sworn affidavit authenticating the sub-subcontract in relation to the subject property. Since there is no evidence of active negligence on the part of SC, it maintains that SC is entitled to an unconditional order of contractual indemnity as a matter of law, including reimbursement of attorneys’ fees and costs, against ECC. It reiterates that Hudson’s lack of response to its tender is sufficient to establish that ECC breached its contract to name SC as an additional insured. (Crouse, 38 AD3d at 478 [citations omitted]) (NYSCEF Doc. No. 206).

A party seeking full contractual indemnification must establish “that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]). However, a court may grant conditional indemnification, which “serves the interest of justice and judicial economy in affording the indemnitee the earliest possible determination as to the extent to which he may expect to be reimbursed” (*Hong-Bao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 496-497 [1st Dept 2018] [internal quotation marks and citation omitted]). According to the First Department, an award of conditional indemnification is warranted where the indemnification provision does not purport to indemnify an indemnitee for his or her own negligence, even where there are issues of fact as to an indemnitee’s active negligence (see *Cerverizzo v City of New York*, 116 AD3d 469, 472 [1st Dept 2014]; *Hughey v RHM-88, LLC*, 77 AD3d 520, 522-523 [1st Dept 2010]).

Here, this court finds that SC has established that it was free from active negligence; therefore, it is entitled to unconditional summary judgment on its contractual indemnification cross-claim against ECC (see *Herrero v 2146 Nostrand Ave. Assoc., LLC*, 193 AD3d 421, 221 [1st Dept 2021]; *Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 463-464 [1st Dept 2014]; *Britez v Madison Park Owner, LLC*, 106 AD3d 531, 532-533 [1st Dept 2013]). There is no dispute that ECC agreed to indemnify SC for injuries connected to the work being performed,

triggering ECC's duty to indemnify under the sub-subcontract (see *Guido v Dormitory Auth. of the State of N.Y.*, 145 AD3d 591, 592-93 [1st Dept 2016]; *Cresser v 345 Park Avenue, L.P.*, 193 AD3d 526, 527 [1st Dept 2021]). Furthermore, contrary to ECC's position that the sub-contract agreement is a nullity and unenforceable, it has failed to demonstrate that the indemnification provision is ambiguous merely because it does not refer to the site or its work. (See *Serrano v Albee Dev. LLC*, 2019 NY Slip Op 32953[U], **26 [Sup Ct, NY County 2019] ["the indemnification provision is not ambiguous, even though it does not refer to the site or its work"].) Furthermore, George Duffy, manager for SC, testified that this project was the first and only project that ECC ever performed for SC, belying the argument that the sub-subcontract did not pertain to the site in question (see NYSCEF Doc. No. 133, *G. Duffy EBT, attached as Exhibit "H" to the 6/12/23 Kozoriz Aff.*, at pp 22; 54).

However, that branch of the motion seeking summary judgment on its claim for failing to procure insurance is denied. "A party moving for summary judgment on its claim for failure to procure insurance meets its prima facie burden by establishing that a contract provision requiring the procurement of insurance was not complied with" (*Dorset v 285 Madison Owner LLC*, 214 A.D.3d 402, 404 [1st Dept 2023], quoting *Benedetto v Hyatt Corp.*, 203 AD3d 505, 506 [1st Dept 2022]). After submission of ECC's policy and excess policy, SC's sole argument is that Hudson's unresponsiveness to its tender "leads to the conclusion that ECC breached its contract to name [SC] as an additional insured." The argument is unavailing and, absent any arguments refuting the validity of the policy and excess policy proffered, summary judgment is not warranted.

SC also seeks the dismissal of all negligence-based claims, including all third-party claims and cross-claims for common law indemnity and contribution. That branch of the motion is granted. Given SC's undisputed absence from the site and lack of actual supervision or any contribution to plaintiff's accident, SC has established that it was not actively negligent (see *Agurto v One Boerum Dev. Partners LLC*, 221 AD3d 442, 444 [1st Dept 2023]; *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]; *Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]). This court notes that 513/Integrity's opposition addresses solely the claim for contractual indemnification. For reasons set forth in the decision and order resolving 513/Integrity's separate motion for summary judgment, that branch of SC's motion seeking summary judgment dismissing the contractual indemnification claim is denied. Accordingly, it is hereby

ORDERED that that branch of SC Contracting Management Corp's motion seeking summary judgment on its cross-claim against Environmentally Construction Corp. based on contractual indemnification is granted; and it is further

ORDERED that that branch of the motion seeking summary judgment on its claim for failure to procure insurance is denied; and it is further

ORDERED that that branch of SC Contracting Management Corp's motion seeking summary judgment dismissing all negligence-based claims, including all third-party claims for common law indemnity and contribution, is granted; and it is further

ORDERED that that branch of SC Contracting Management Corp's motion seeking dismissal of the contractual indemnification claim asserted against it in the third-party complaint is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for SC Contracting Management Corp shall serve a copy of this decision and order, with notice of entry, upon all parties.

This constitutes the decision and order of this court.

April 10, 2024



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE