

**Fuster v 421 Kent Dev., LLC**

2024 NY Slip Op 31316(U)

April 12, 2024

Supreme Court, Kings County

Docket Number: Index No. 522545/2016

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12<sup>th</sup> day of April, 2024.

P R E S E N T :  
HON. WAVNY TOUSSAINT  
Justice.

\_\_\_\_\_  
WILFREDO FUSTER,

Plaintiff,

-against-

Index No.: 522545/2016  
**DECISION AND ORDER**

421 KENT DEVELOPMENT, LLC, WONDER  
WORKS CONSTRUCTION CORP. and WONDER  
WORKS CONSTRUCTION & DEVELOPMENT  
CORP.,

Defendants.

\_\_\_\_\_  
421 KENT DEVELOPMENT, LLC., and WONDER  
WORKS CONSTRUCTION CORP.,

Third-Party Plaintiffs,

-against-

TOP SHELF ELECTRIC CORP.,

Third-Party Defendant.

\_\_\_\_\_  
TOP SHELF ELECTRIC CORP.,

Second Third-Party Plaintiff,

-against-

DENTON STONEWORLD, INC.,

Second Third-Party Defendant.

421 KENT DEVELOPMENT, LLC., and WONDER  
WORKS CONSTRUCTION CORP.,

Third Third-Party Plaintiffs,

-against-

DENTON STONEWORLD, INC.,

Third Third-Party Defendant.

The following papers numbered 1 to read herein	Papers Numbered
Notice of Motion/Order to Show Cause/ and Affidavits (Affirmations) Annexed	<u>234-236</u>
Cross Motion and Affidavits (Affirmation) Annexed	<u>243-247</u>
Answers/Opposing Affidavits (Affirmations)	<u>248</u>
Reply Affidavits (Affirmations)	<u>        </u>
Affidavit (Affirmation)	<u>        </u>
Other Papers	<u>        </u>

Upon the foregoing papers in this personal injury action brought by plaintiff Wilfredo Fuster (plaintiff), defendants, first third-party plaintiffs and third third-party plaintiffs 421 Kent Development, LLC (Kent) and Wonder Works Construction Corp. (Wonder Works), move (Seq. 11) for an order, pursuant to CPLR §3212, granting summary judgment on their third-party claims for contractual indemnification and breach of contract (failure to procure insurance), asserted

against third-party defendant and second third-party plaintiff Top Shelf Electrical Corp. (Top Shelf). Top Shelf opposes.

### ***Background***

At all times relevant herein, Kent owned the jobsite located at 421 Kent Avenue, Brooklyn, NY (the “premises”), a residential development project. Kent contracted Wonder Works as the construction manager. Wonder Works contracted with Top Shelf to perform electrical work, pursuant to a written June 18, 2014 subcontract (the “subcontract”), which contained indemnity and “additional insured” provisions (*See* the subcontract annexed at Exhibit “A” to Plaintiff’s Notice to Admit; NYSCEF Doc. No. 71). Top Shelf was plaintiff’s employer.

On the September 22, 2016 accident date, plaintiff was directed by his Top Shelf foreman, Juan Cruz (Cruz), to begin installing permanent lighting in the basement of the premises. The basement was also used for storage of material and equipment by the various subcontractors on the job site. Plaintiff alleges that as he was walking with his foreman between the stored materials along a path that extended approximately 60 to 70 feet in length, with varied widths from two to five feet, his right foot came into contact with debris, causing him to trip and fall backwards, ultimately landing on the floor. As a result of the fall, plaintiff alleges he sustained a left leg comminuted transverse fracture through the mid portion of the patella with distraction of fracture fragments, a left shoulder superior labrum anterior

and posterior tear, various lumbar and thoracic spine herniations and bulges, and other related injuries.

In this personal injury action commenced by Summons and Complaint, filed December 20, 2016 against defendants Kent, Wonder Works and Wonder Works Construction & Development Corp., plaintiff seeks to recover damages for violations of Labor Law §§200, 240, 241(6) and for common law negligence. Issue was joined by Kent and Wonder Works on February 17, 2017; and by Wonder Works Construction & Development Corp. on March 31, 2017.<sup>1</sup> The first third-party action was filed on May 5, 2017 by Kent and Wonder Works against Top Shelf (NYSCEF Doc. No. 8); the second third-party action was filed on October 28, 2021 by Top Shelf against Denton Stoneworld, Inc. (NYSCEF Doc. No. 125); and the third third-party action was filed on February 27, 2023 by Kent and Wonder Works against Denton Stoneworld, Inc. (NYSCEF Doc. No. 226). Issue has been joined in all third-party actions.

### ***The Parties' Contentions***

Kent and Wonder Works now move for summary judgment against Top Shelf on their third-party claims for contractual indemnification and breach of contract.<sup>2</sup>

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<sup>1</sup> The action was discontinued without prejudice against Wonder Works Construction & Development Corp. on July 23, 2019 (NYSCEF Doc. No. 73).

<sup>2</sup> By order dated October 26, 2022, plaintiff's motion (Seq. 07) for partial summary judgment was granted against defendants as to his claim for violation of Labor Law §§ 240(1) and 241(6).

In support of their motion, Kent and Wonder Works first assert they are entitled to contractual indemnification from Top Shelf based on the express indemnification provision found at Exhibit "G" to the subcontract which, they allege, obligates Top Shelf to indemnify and hold them harmless for injuries sustained by plaintiff in the course of his work at the premises. Second, as to their breach of contract claim, Kent and Wonder Works assert Top Shelf was obligated to procure insurance coverage naming Kent and Wonder Works as additional insureds, but failed to do so.

In opposition to the indemnification claim, Top Shelf contends there are material factual issues in dispute regarding whether Wonder Works' laborers had a duty to clean up the debris which caused plaintiff's accident and, thus, Wonder Works is not free from liability as is required on an indemnification claim. Top Shelf also contends Kent and Wonder Works have failed to submit evidence that Top Shelf created the subject debris condition. As to the breach of contract claim, Top Shelf contends it purchased the requisite insurance as required. Top Shelf further contends that the denial of the insurance coverage claim, submitted by Kent and Wonder Works following plaintiff's accident, is a matter for Kent and Wonder Works to take up with the insurance carrier and is not a basis to support their breach of contract claim.

In reply, Kent and Wonder Works argue that plaintiff's accident was connected to the work performed by Top Shelf at the job site, and that it is "undisputed" they did not create the alleged condition that caused plaintiff's accident. Movants assert there is no evidence to prove their negligence, either under Labor Law §200 or the common law, and that though plaintiff prevailed under his Labor Law §241(6) claim, such liability is purely statutory and cannot defeat their claims for contractual indemnification. Kent and Wonder Works further argue that whether or not other subcontractors created the conditions that caused plaintiff's accident does not change Top Shelf's contractual obligations to indemnify them. As to their breach of contract claim, Kent and Wonder Works argue Top Shelf has not submitted its insurance policies or other proof establishing they actually complied with the requirement to procure the requisite insurance, notwithstanding Top Shelf's submission of a Traveler's letter dated April 5, 2021 (NYSCEF Doc. No. 245) denying their claim.

### *Discussion*

#### *Standard of Review*

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers"



(*Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dep't 2023]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 499 [2d Dept 1989]; *Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067-1068 [1979]).

When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Derise v Jaak*, 127 AD3d 1011, 1011 [2d Dept 2021]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Spilman v Matyas*, 212 AD3d 859, 860 [2d Dep't 2023]). It “must clearly appear that no material triable issue of fact is presented” to grant summary judgment (*Rebecchi v Whitmore*, 172 AD2d 600, 600 [2d Dept 1991]).

### ***The Indemnity Claim***

Kent and Wonder Works move for summary judgment on their contractual indemnification claim against Top Shelf, relying on the relevant subcontract indemnity language, which states, in part, as follows:



To the fullest extent of the law, Subcontractor agrees to indemnify, defend, save, and hold the Owners - 421 Kent Development, LLC, and Contractor - Wonder Works Construction Corp . . . harmless from and against all liability . . . which arise out of or are connected with, or any act or omission of Subtractor: . . . 2. Any accident or occurrence which happens . . . in or about the place where the Work is being performed or in the vicinity thereof . . . 4 . . . whether or not the indemnitee is partially negligent or at fault . . . Subcontractor's obligation hereunder shall not be limited by the provision of any workmen's compensation act (*id.* at p. 39; *emphasis supplied*).

“A party's right to contractual indemnification depends upon the specific language of the relevant contract” (*Gurewitz v. City of New York*, 175 AD3d 658, 664 [2d Dep't 2019]). “The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances” (*id.* at 664). Further, “[a] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified” (*Fedrich v Granite Bldg. 2, LLC*, 165 AD3d 754, 756 [2d Dep't 2018]; *Mohan v Atlantic Ct., LLC*, 134 AD3d 1075, 1078 [2d Dep't 2015]).

Under the foregoing indemnification provision, Top Shelf's duty to indemnify Kent and Wonder Works is clear. However, for the reasons which follow, Kent and Wonder Works have failed to demonstrate, *prima facie*, their entitlement to summary judgment. Kent and Wonder Works' proof consisted of a statement of material facts (NYSCEF Doc. No. 236), submitted pursuant to Uniform Rules for Trial Courts, 22

NYCRR 202.8-g(a), and an attorney affirmation (NYSCEF Doc. No. 235), neither of which is sufficient to sustain their prima facie burden on summary judgment. The statement merely contains references to the deposition transcripts of plaintiff and Wonder Works' Director of Construction, Eric Brody (Brody), cited for basic, uncontroverted facts, such as confirmation that Top Shelf was plaintiff's employer, that Kent owned the job site, that Wonder Works was the construction manager, and that the indemnity provisions is as stated in the subcontract, with no other substantive references or discussions regarding the issue of any parties' negligence for plaintiff's accident.

Further, the factual assertions contained in the attorney affirmation were not based on personal knowledge and, thus, was of no probative or evidentiary significance (*Currie v Wilhouski*, 93 AD3d 816, 817 [2012]; *Palo v Principio*, 303 AD2d 478, 478 [2d Dep't 2003]). While the affirmation refers to and relies upon the depositions of plaintiff, Top Shelf witnesses Cruz (former Top Shelf foreman) and Colin Sholes, as well as Brody, the depositions do not make a prima facie showing.<sup>3</sup> In particular, the deposition of Brody, substantially relied upon by Kent and Wonder Works, upon review, undercuts rather than supports their motion.

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<sup>3</sup> The cited EBT's are found at NYSCEF Doc. Nos. 162 (Cruz), 163 and 164 (Brody), and 165 (Sholes), annexed to the supporting papers of plaintiff's motion (Seq. 07) regarding his Labor Law §241(6) claim.

Brody testified that Wonder Works typically employed project managers, superintendents and general laborers on its job sites, having used four superintendents at the subject premises (*See* May 26, 2021 EBT of Eric Brody, p. 15, lns. 3-8; p. 31, lns. 18-21). The superintendents were obligated, according to Brody, to “plan all safety requirements” (*id.*, p. 41, lns. 10-11). Project managers also were on the job site daily (*id.*, p. 30, ln. 25; p. 31, lns. 2-5). When asked whether superintendents and/or project managers walked through the site on a daily basis during the project, Brody answered: “they better have” (*id.*, p. 35, lns. 14-21). Brody himself tried “once a week” to walk the site as much as he could “just to get [his] eyes on everything, to understand where we were at” (*id.*, p. 83, lns. 3-61). He further testified that “everyone” was responsible for the basement (*id.*, p. 32, lns. 14-21). Brody further testified that the laborers were responsible for general labor services that included cleaning and housekeeping (*id.*, p.24, lns. 18-20; p. 25, lns. 4-13) yet, with respect to cleaning duties, he could not recall specifically what this job entailed (*id.*, p. 84, lns. 9-20). At the very least, the Brody’s testimony demonstrates Kent and Wonder Works were not free from negligence, given the admitted daily oversight of the premises, during which they would have had the opportunity to identify and correct any tripping hazards.

On the proof before the Court, Kent and Wonder Works have failed to satisfy their prima facie burden on their indemnification claim since they failed to eliminate

all triable issues of fact as to whether the plaintiff's accident arose out of or was connected to Top Shelf's negligence, or that they were free from negligence in connection with plaintiff's accident. Accordingly, that branch of Kent and Wonder Works motion for summary judgment on their contractual indemnification claim is denied (*Pena v. 104 N. 6th St. Realty Corp.*, 157 AD3d 709, 711 [2d Dep't 2018]; *Caban v Plaza Constr. Corp.*, 153 AD3d 488, 490 [2d Dep't 2017]).

### ***The Breach of Contract Claim***

A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured, must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with (*Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dep't 2003], *citations omitted*).

Here, subcontract Article XX "Indemnification and Insurance", and the corresponding annexed "Exhibit D", demonstrate Top Shelf was required to obtain insurance naming Kent and Wonder Works as additional insureds in its policy. Kent and Wonder Works, however, did not present prime facie evidence showing that Top Shelf did not comply with the "additional insured" provision and, thus, failed to establish their entitlement to judgment as a matter of law in connection with their breach of contract claim.

Accordingly, that branch of Kent and Wonder Works' motion for summary judgment on the breach of contract claim against Top Shelf is denied, regardless of the sufficiency of Top Shelf's opposition papers (*Winegrad*, 64 NY2d at 853).

**Conclusion**

Accordingly, it is hereby

**ORDERED**, that the motion (Seq. 11) of defendants Kent and Wonder Work's for summary judgment on the third-party claim for contractual indemnification and breach of contract for failure to procure insurance is denied in its entirety.

This constitutes the decision and order of the Court.

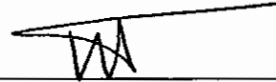
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E N T E R

  
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J.S.C.

**HON. WAVNY TOUSSAINT**  
**J. S. C.**