

Dawyot v Goldman Sachs Headquarters LLC

2014 NY Slip Op 30499(U)

March 7, 2014

Supreme Court, New York County

Docket Number: 110845/2011

Judge: Lucy Billings

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: LUCY BILLINGS
J.S.C. Justice

PART 46

Index Number : 110845/2011
DAWYOT, EDWARD
VS.
GOLDMAN SACHS HEADQUARTERS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2-3</u>
Replying Affidavits _____	No(s). <u>4</u>

Upon the foregoing papers, it is ordered that ~~this motion is~~:

The court grants third party defendant Welshbach Electric Corp.'s motion for summary judgment in part and denies its motion in part and denies the cross-motion for summary judgment by third party plaintiffs Structure-Tone, Inc., Select Safety Consulting Services, Inc., and Select Safety LLC, pursuant to the accompanying decision. C.P.L.R. § 3212(b) and (e).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

MAR 05 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/7/14

Lucy Billings, J.S.C.

LUCY BILLINGS

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----x

EDWARD DAWYOT, JR.,

Index No. 110845/2011

Plaintiff

- against -

GOLDMAN SACHS HEADQUARTERS LLC, GOLDMAN
SACHS GROUP., INC., TISHMAN
CONSTRUCTION CORPORATION,
STRUCTURE-TONE, INC., ELEVEN ELEVEN
CONSTRUCTION CORPORATION, SELECT SAFETY
CONSULTING SERVICES, INC.,
SELECT SAFETY LLC, AECOM TECHNICAL
SERVICES, INC., and AECOM TECHNICAL
SERVICES NORTHEAST INC.,

Defendants

-----x
-----x

FILED

MAR 05 2014

COUNTY CLERK'S OFFICE
NEW YORK

GOLDMAN SACHS HEADQUARTERS LLC, GOLDMAN
SACHS GROUP., INC., TISHMAN
CONSTRUCTION CORPORATION,
STRUCTURE-TONE, INC., ELEVEN ELEVEN
CONSTRUCTION CORPORATION, SELECT SAFETY
CONSULTING SERVICES, INC., and
SELECT SAFETY LLC,

Index No. 590436/2012

Third Party Plaintiffs

- against -

WELSBACH ELECTRIC CORP. and TECH SERVE,
a Division of WELSBACH ELECTRIC CORP.,

Third Party Defendants

-----x

DECISION and ORDER

LUCY BILLINGS, J.:

In this action for personal injuries plaintiff sustained
November 26, 2008, this decision concerns only the dispute

between defendants-third party plaintiffs and third party defendant Welsbach Electric Corp. It moves for summary judgment dismissing the third party complaint and any claims by parties in the main action or cross-claims in the third party action against this third party defendant. C.P.L.R. § 3212(b).

Welsbach Electric identifies only the claims by third party plaintiffs Structure-Tone, Inc., Select Safety Consulting Services, Inc., and Select Safety LLC against this third party defendant, for contribution, implied indemnification, contractual indemnification, and breach of contract. All other third party plaintiffs except Eleven Eleven Construction Corporation discontinued their claims against Welsbach Electric. Hence only Eleven Eleven Construction, Structure-Tone, and the Select Safety parties oppose the motion. Structure-Tone and the Select Safety parties also cross-move for summary judgment on their contribution and indemnification claims, but not on their breach of contract claim. Since the court already dismissed all claims against defendants-third party plaintiffs Eleven Eleven Construction and Structure-Tone, their claims against Welsbach Electric are moot.

I. UNDISPUTED FACTUAL BACKGROUND

Plaintiff's verified bill of particulars alleges that plaintiff was working for Welsbach Electric at a construction site at 200 Murray Street, New York County, when he was injured. The parties do not dispute that he received Workers' Compensation for his injuries under a Workers' Compensation insurance policy

issued to Welsbach Electric. Plaintiff claims he sustained a torn ligament and torn meniscus in his right knee and lumbar disc herniations or bulges.

Welsbach Electric's president attests that Welsbach Electric entered a contract with defendant Tishman Construction Corporation to perform electrical work at the construction site. No evidence indicates Welsbach Electric ever contracted with the Select Safety defendants-third party plaintiffs. In the contract with Tishman Construction, Welsbach Electric agreed to indemnify the "Owner," defendants Goldman Sachs Headquarters LLC and Goldman Sachs Group, Inc.; the "Construction Manager" Tishman Construction; and their "agents, consultants," and "servants." Aff. of Kenneth Brouwer Ex. A ¶ 7. Welsbach Electric also agreed to procure insurance for "the Owner, Construction Manager and all other Indemnitees named in this contract." Id. ¶ 8. At oral argument, the parties stipulated that the court consider this contract and the Select Safety defendants-third party plaintiffs' contract with Tishman Construction authenticated and admissible for purposes of the current motion and cross-motion for summary judgment.

II. WELSBACH ELECTRIC'S DEFENSES TO THE SELECT SAFETY PARTIES' NON-CONTRACTUAL CLAIMS

The Select Safety defendants-third party plaintiffs seek contribution and indemnification from Welsbach Electric for any liability to plaintiff. These third party claims may not be maintained against plaintiff's employer absent a "grave injury" to plaintiff or a written contract providing for contribution or

[* 5]

indemnification by his employer to the Select Safety parties. N.Y. Workers' Comp. Law § 11; Fleming v. Graham, 10 N.Y.3d 296, 299 (2008); Flores v. Lower E. Side Serv. Ctr., 4 N.Y.3d 363, 367 (2005); Tonking v. Port Auth. of N.Y. & N.J., 3 N.Y.3d 486, 490 (2004); Cifone v. Andros Broadway, Inc., 40 A.D.3d 549 (1st Dep't 2007). See Rodrigues v. N & S Bldg. Contrs., Inc., 5 N.Y.3d 427, 431-32 (2005); Portelli v. Trump Empire State Partners, 12 A.D.3d 280, 281 (1st Dep't 2005); Hansen v. 510 Affordable Hous., 2 A.D.3d 274 (1st Dep't 2003); Petrillo v. Durr Mech. Constr., 306 A.D.2d 25, 26 (1st Dep't 2003). No party disputes that the injuries plaintiff claims he sustained are not a grave injury.

The Select Safety defendants-third party plaintiffs offer no basis on which to sustain their contribution or implied indemnification claim, nor does the court perceive any. Therefore the court grants third party defendant Welsbach Electric Corp.'s motion for summary judgment to the extent of dismissing the Select Safety defendants-third party plaintiffs' contribution and implied indemnification claims against third party defendant Welsbach Electric Corp. C.P.L.R. § 3212(b) and (e). Given this disposition, the court denies the Select Safety defendants-third party plaintiffs' cross-motion for summary judgment on their contribution and implied indemnification claims. C.P.L.R. § 3212(b).

III. THE SELECT SAFETY PARTIES' CONTRACTUAL CLAIMS

A. Contractual Indemnification

The Select Safety defendants-third party plaintiffs contracted with the construction manager Tishman Construction to manage the construction site safety and to provide safety consulting services for the site. These services included developing and administering a site safety program, orienting the construction workers on safety, monitoring their compliance with safety regulations, filing safety plans required by the New York City Department of Buildings, and maintaining safety records. The Select Safety parties were to assist Tishman Construction with training the workers and conducting meetings on safety and to post safety instructions and warnings provided by Tishman Construction. Although the Select Safety parties were responsible to "be on the job at all times while work is in progress," Tishman Construction expressly retained authority over decisions affecting the construction site. Aff. of Thomas P. Jaffa Ex. I, Rider G at 3.

These contractual terms indicate not only that the Select Safety parties were to provide safety consulting services, as "consultants," but also that they were to act as Tishman Construction's on-site "agents" to assure safety throughout the construction project. Brouwer Aff. Ex. A ¶ 7. Neither the Select Safety parties nor Welsbach Electric, however, provides conclusive evidence that the Select Safety parties were or were not agents or consultants under the indemnification provision of

* 7]
Welsbach's contract with Tishman Construction.

Although the contract defines the Select Safety parties' services and responsibilities, it nowhere defines "agents" or "consultants" as used in the contract. Labor Law §§ 240(1) and 241(6), however, use the term "agents" in imposing liability on construction site general contractors "and their agents for any breach of the statutory duty which has proximately caused injury." Sanatass v. Consolidated Inv. Co., Inc., 10 N.Y.3d 333, 338 (2008). See Ferluckaj v. Goldman Sachs & Co., 12 N.Y.3d 316, 320 (2009); Walls v. Turner Constr. Co., 4 N.Y.3d 861, 863-64 (2005). If Tishman Construction, as the construction manager, qualifies as the general contractor that contracted with the Select Safety parties, they would be the general contractor's agents under Labor Law §§ 240(1) and 241(6), if the contract delegated from Tishman Construction to the Select Safety parties the authority to supervise and control all safety at the construction site. Burke v. Hilton Resorts Corp., 85 A.D.3d 419, 420 (1st Dep't 2011); Pacheco v. Kew Garden Hills Apt. Owners, Inc., 73 A.D.3d 578 (1st Dep't 2010); Weber v. Baccarat, Inc., 70 A.D.3d 487, 488 (1st Dep't 2010). Even if Tishman Construction retained "concomitant or overlapping authority to supervise" the entire construction project, including site safety, Tishman Construction's authority would not negate the Select Safety parties' authority. Weber v. Baccarat, Inc., 70 A.D.3d at 488.

The Select Safety parties would be Tishman Construction's statutory agents, even if they "did not exercise that supervisory

* 8]

authority with respect to plaintiff's particular task." Burke v. Hilton Resorts Corp., 85 A.D.3d at 420. See Weber v. Baccarat, Inc., 70 A.D.3d at 488. In any event, since they were responsible for safety, plaintiff's injury well may have arisen from an omission in the responsibilities Tishman Construction delegated to them as its agents. Welsbach Electric has not shown to the contrary.

The contract between Tishman Construction and Welsbach Electric also requires it to indemnify any "consultants," a role to be filled by the Select Safety parties that the contract specifically delineates. For these reasons, the court denies third party defendant Welsbach Electric Corp.'s motion for summary judgment insofar as it seeks to dismiss the Select Safety defendants-third party plaintiffs' contractual indemnification claim. C.P.L.R. § 3212(b).

On the other hand, an intent by the contracting parties, Welsbach Electric and Tishman Construction, to confer a direct benefit on parties, the Select Safety parties, that are neither signatories to Welsbach Electric's contract with Tishman Construction, nor named in the contract, must be unambiguous. Otherwise the contract must be construed to avoid reading in a duty to indemnify that statutorily Welsbach Electric did not bear. Bradley v. Earl B. Feiden, Inc., 8 N.Y.3d 265, 274 (2007); Tonking v. Port Auth. of N.Y. & N.J., 3 N.Y.3d at 490; Cordeiro v. TS Midtown Holdings, LLC, 87 A.D.3d 904, 906 (1st Dep't 2011); Suazo v. Maple Ridge Assoc., L.L.C., 85 A.D.3d 459, 460 (1st

Dep't 2011). "Not only the intent to indemnify, but also the scope of the indemnification," including the identity of the indemnitees, must be "unmistakably clear." Fresh Del Monte Produce N.V. v. Eastbrook Caribe A.V.V., 40 A.D.3d 415, 418 (1st Dep't 2007).

Even if the terms "agents" and "consultants" in the contract are unambiguous, the record of the Select Safety parties' role in the construction project consists mainly of the contract itself and not the actual services performed or responsibilities undertaken by the Select Safety parties. The contract neither defines those terms expressly, nor expressly identifies the Select Safety parties as "agents" or "consultants," nor expresses that the identity of indemnitors be determined by how their roles and responsibilities are delineated in the contract, as opposed to how parties exercise their roles and responsibilities in practice.

Insofar as the term "agents" may be interpreted by reference to its interpretation under Labor Law §§ 240(1) and 241(6), the Select Safety parties' autonomy indicative of statutory agents in their sphere of responsibility, construction site safety, as delineated in the contract, was limited. As set forth above, they only assisted Tishman Construction with training the workers and conducting meetings on safety and posted safety instructions and warnings only as provided by Tishman Construction. They also were subject to Tishman Construction's approval before subcontracting their work and to its direction in coordinating

their work with other contractors.

Thus, whatever reference point is used to construe the contractual intent to confer a benefit on the Select Safety parties and to impose a duty on Welsbach Electric, that intent remains ambiguous. The contract may not be construed to provide indemnification except in a context where the obligation is unmistakable: a context that is not fleshed out in this record. E.g., Tonking v. Port Auth. of N.Y. & N.J., 3 N.Y.3d at 490; Hooper Assocs. v. AGS Computers, 74 N.Y.2d 487, 492-93 (1989); Bijak v. Gramercy Capital Corp., 95 A.D.3d 469, 471 (1st Dep't 2012); Gonclaves v. 515 Park Ave. Condominium, 39 A.D.3d 262, 263 (1st Dep't 2007). As the contract does not unquestionably provide for the Select Safety defendants-third party plaintiffs' indemnification by third party defendant Welsbach Electric Corp., which contracted only with Tishman Construction and not with the Select Safety defendants-third party plaintiffs, the court denies their motion for summary judgment on their contractual indemnification claim. C.P.L.R. § 3212(b).

B. Breach of a Contract to Procure Insurance

Insofar as a factfinder ultimately may determine that the Select Safety parties were Tishman Construction's "agents" or "consultants" and therefore owed indemnification by Welsbach Electric, Brouwer Aff. Ex. A ¶ 7, then the Select Safety parties also may be "Indemnitees" named as agents or consultants in the contract between Welsbach Electric and Tishman Construction. Id. ¶ 8. Welsbach Electric admits that it agreed to procure

insurance for "Indemnitees" named in the contract," but does not show that it did so. Id. Therefore the court denies third party defendant Welsbach Electric Corp.'s motion for summary judgment insofar as it seeks to dismiss the Select Safety defendants-third party plaintiffs' breach of contract claim. C.P.L.R. § 3212(b).

V. CONCLUSION

For the reasons explained above, the court grants third party defendant Welsbach Electric Corp.'s motion for summary judgment to the extent of dismissing the claims by third party plaintiffs Select Safety Consulting Services, Inc., and Select Safety LLC for contribution and implied indemnification against Welsbach Electric Corp. C.P.L.R. § 3212(b) and (e). Since Welsbach Electric Corp. has not identified any claims by parties in the main action or cross-claims in the third party action against Welsbach Electric Corp., let alone grounds to dismiss such claims, the court denies any such relief. C.P.L.R. § 3212(b).

The court denies Welsbach Electric Corp.'s motion for summary judgment seeking to dismiss the claims by third party plaintiffs Select Safety Consulting Services, Inc., and Select Safety LLC for contractual indemnification and breach of contract against Welsbach Electric Corp. and denies as moot its motion seeking to dismiss any other third party plaintiffs' claims. Id. Finally, the court denies the cross-motion for summary judgment by third party plaintiffs Select Safety Consulting Services, Inc., and Select Safety LLC on their contribution, implied

indemnification, and contractual indemnification claims against third party defendant Welsbach Electric Corp. Id. The court denies the cross-motion for summary judgment by third party plaintiff Structure-Tone, Inc., as moot. This decision constitutes the court's order.

DATED: February 7, 2014

Lucy Billings

LUCY BILLINGS, J.S.C.

MAR 05 2014

FILED

MAR 05 2014

COUNTY CLERK'S OFFICE
NEW YORK