

**K&J Jewelry Corp. v Nobu 57 LLC**

2014 NY Slip Op 30809(U)

March 28, 2014

Sup Ct, New York County

Docket Number: 150237/2011

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
K & J JEWELRY CORP. d/b/a KENJO JEWELRY  
57<sup>TH</sup> STREET, INC.,

Plaintiff,

Index No. 150237/2011

Mot. seq. no. 003

-against-

**DECISION AND ORDER**

NOBU 57 LLC, *et al.*,

Defendants.

-----X  
BARBARA JAFFE, J.:

**For Bodak:**

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**For Nobu:**

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Defendant Laszlo Bodak Engineer P.C. d/b/a Laszlo Bodak Engineering P.C. moves pursuant to CPLR 3212 for an order granting it summary judgment on its contractual indemnification cross claim and for dismissal of Nobu 57 LLC's cross claims. Nobu opposes and cross-moves for summary judgment dismissing Bodak's cross claims, which Bodak opposes.

I. BACKGROUND

On or about April 2, 2004, Nobu, the occupant of premises located at 40 West 57<sup>th</sup> Street in Manhattan, retained Bodak to provide, *inter alia*, plumbing engineering services at Nobu's premises. In accordance with the agreement, Bodak prepared plumbing specifications, including one-inch thick fiberglass sectional pipe covering with vapor barrier jacketing insulation for cold water and hot water pipes, and was responsible for reviewing the contractor's documents and drawings. (NYSCEF 106, 107, 108, 111). In June 2005, Bodak prepared a punch list identifying, among other things, the contractor's need to "insulate and weatherproof all exposed drain lines,

and the balance of the hot water supply and detergent pipes and fittings above the roof.”

(NYSCEF 109). In November 2005, as a result of a dispute between Nobu and other parties employed on the project, the parties entered into a settlement agreement, whereby Bodak paid Nobu \$70,000 and Nobu agreed to defend, indemnify, and hold harmless Bodak in any present or future lawsuit “relating to claims which were made or could have been made concerning the design and construction [of the project].” (NYSCEF 110).

On January 31, 2010, a pipe allegedly froze and burst at the premises. Plaintiff, who occupied the floor below Nobu, sued Nobu and Bodak, alleging that the property damages it sustained resulted from a failure to insulate the pipe. (NYSCEF 101, 102). Nobu and Bodak thereafter asserted contribution and indemnification cross claims against each other. (NYSCEF 103, 104).

## II. CONTENTIONS

Bodak argues that it is entitled to indemnification from Nobu pursuant to the November 2005 agreement, which it claims is not a construction contract within the meaning of General Obligations Law (GOL) § 5-322.1. It also maintains that the agreement clearly reflects Nobu’s intention to indemnify and hold harmless Bodak in any lawsuit relating to any claims, including its own negligence, that could be advanced regarding the design and construction of Nobu’s premises. In any event, it denies the existence of any evidence that it was negligent. (NYSCEF 100, 113). Bodak submits the affidavit of its principal, who states that it performed its services in accordance with generally accepted engineering standards and that the pipes were installed by another contractor. He denies that Bodak supervised or controlled the contractor’s work in insulating or heat tracing the piping that was subject to freezing, or that it was responsible for the

contractor's means and methods. (NYSCEF 106).

In opposition, Nobu contends that Bodak's principal's conclusory and self-serving affidavit is insufficient to establish its freedom from negligence, and argues that Bodak's punch list reflects its responsibility for ensuring that its design plans were followed. Thus, Nobu claims that triable issues exist as to whether Bodak negligently designed the pipes or otherwise performed its duties, thereby precluding indemnification. And, as discovery has not yet commenced, it maintains that Bodak's motion is premature. (NYSCEF 145).

### III. BODAK'S MOTION

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853). Courts may not assess credibility on a motion for summary judgment, and the facts must be viewed in the light most favorable to the nonmoving party. (*Forrest*, 3 NY3d 314; *Ferrante v Am. Lung Assn.*, 90 NY2d 623, 631 [1997]).

Pursuant to GOL § 5-322.1, an agreement

in, or in connection with or collateral to a contract or agreement relative to the construction, alteration or repair or maintenance of a building . . . purporting to indemnify or hold harmless the promisee against liability for . . . damage to property contributed to,

caused by or resulting from the negligence of the promisee is against public policy and is void and unenforceable . . .

Similarly, GOL § 5-324 prohibits agreements purporting to indemnify engineers and architects for damages arising from defects in their “maps, plans, designs or specifications.”

Here, the parties agreed that Nobu would indemnify Bodak for any claims relating to the design and construction of the pipes. The agreement is thus a contract “relative to the construction of a building” (GOL § 5-322.1), and entered into in connection with or collateral to Nobu’s initial retention of Bodak in April 2004 to prepare plumbing plans. (*Id.*). Bodak cites no authority for the proposition that a settlement agreement is or should be excluded from the statutory prohibition. The agreement is also governed by GOL § 5-324. (*See generally Bennett v Bank of Montreal*, 161 AD2d 158, 159 [1<sup>st</sup> Dept 1990], *lv denied* 81 NY2d 704 [1993] [agreement between contractor, hired to perform design services in connection with renovation project, and subcontractor, hired to perform engineering consulting services, at least collateral to construction-related contract]).

A party to a contract who is a beneficiary of an indemnification provision has the burden of establishing it is free from negligence, when such negligence would bar it from enforcing the provision. (*O’Connor v William Metrose Ltd. Bldr./Dev.*, 38 AD3d 1207, 1208-09 [4<sup>th</sup> Dept 2007]; *Reynolds v County of Westchester*, 270 AD2d 473, 474 [2d Dept 2000]; *see also Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1<sup>st</sup> Dept 2004]).

Bodak’s denial of fault is insufficient to establish its freedom from negligence, which Bodak must show in order to demonstrate its entitlement to to indemnification from Nobu,

particularly when discovery has not commenced. (CPLR 3212[f]; *see also Blech v W. Park Presbyt. Church*, 97 AD3d 443 [1<sup>st</sup> Dept 2012] [summary judgment motion premature as matter in early stages of discovery, and no depositions had been taken]; *Tucker v New York City Tr. Auth.*, 42 AD3d 316, 317 [1<sup>st</sup> Dept 2007] [summary judgment should not be granted before affording opponent opportunity to pretrial discovery]; *Gonzalez v Vincent James Mgt. Co., Inc.*, 306 AD2d 226 [1<sup>st</sup> Dept 2003] [even if movant established *prima facie* entitlement to summary judgment, opponent, who had yet to depose knowledgeable witnesses, had acceptable excuse for failing to raise triable issues]).

### III. NOBU'S CROSS MOTION

Nobu offers no evidence demonstrating Bodak's negligence as a matter of law. (*See Tarpey v Kolanu Partners, LLC*, 68 AD3d 1099, 1101 [2d Dept 2009] [summary judgment dismissing subcontractor's contractual indemnification cross claims precluded in absence of finding that it was actually negligent]).

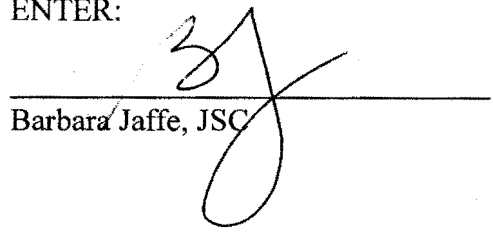
### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Laszlo Bodak Engineer P.C. d/b/a Laszlo Bodak Engineering P.C.'s motion for summary judgment is denied as premature; and it is further

ORDERED, that Nobu 57 LLC's cross motion for summary judgment is denied as premature.

ENTER:

  
Barbara Jaffe, JSC

DATED: March 28, 2014  
New York, New York