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

PRESENT: York Justice PART 2

Torres

- v -

Allied Tubes & Conduit

INDEX NO. 115592/93

MOTION DATE 4-17-02

MOTION SEQ. NO. #16

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	SCANNED
Answering Affidavits — Exhibits	AUG 28 2002
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 8/20/02

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Supreme Court of the State of New York
County of New York
Part 2

INDEX NO. 115592193

HERMINIO TORRES and ESMELDA TORRES,

Plaintiffs,

– against –

ALLIED TUBES & CONDUIT, CRESCO LINES, BLASS EMPLOYMENT CORP., FRIARTON ESTATES CORP., and JOHN DOE, Nos. 1 through 5,

Defendants.

CRESCO LINES,

Third-Party Plaintiff,

– against –

H.T.S. RACKS, INC.,

Third-party Defendant.

CRESCO LINES,

Third-party Plaintiff,

– against –

QUALITY INDUSTRIES,

Third-Party Defendant.

CRESCO LINES,

Third-party Plaintiff,

– against –

BLASS EMPLOYMENT CORP.,

Third-Party Defendant.

Decision/Order

Present:
Hon. Louis B. York
Justice, Supreme Court

HERMINIO TORRES and ESMELDA TORRES,

Plaintiffs-Appellants,

– against –

QUALITY INDUSTRIES,

Third party Plaintiff-Respondent.

Action No. : 2
Index NO. : 121057/96

In this motion, defendant Allied Tubes and Conduit Corporation ("Allied") moves to reargue its earlier motion for summary judgment on its cross-claim against Cresco Lines, Incorporated ("Cresco") and granting Allied judgment against Cresco in the amount of $112,066.26 plus interest, costs and disbursements; or, in the alternative, severing the cross claim against Cresco for separate trial. Initially, the court denied the motion as moot because the action had already been tried to a verdict. However, in its request for reargument Allied notes that the cross-claim against Cresco - along with the third-party action of Cresco against H.T.S. Racks, Incorporated ("Racks") - was severed from the main action in an August 1, 2001 stipulation, which Justice Heitler so-ordered. The stipulation also provided that the trials of these portions of the litigation could proceed following the trial of the underlying issues in the case. Thus, the motion was ripe for argument; and, accordingly, the court grants reargument. The court does note, however, that in light of the so-ordered stipulation there is no need to consider movant's application to sever and grant the right to a separate trial. Moreover, in light of the severance and the stipulation, Cresco's arguments relating to Allied's standing and to the timeliness of this motion are no longer applicable.

Cresco's Attempt to Submit Late Opposition Pauers

The court must also address another initial point before proceeding. Approximately 10 days after this motion was argued in court, and over 3 ½ months after the papers were fully submitted in room 130, Cresco submitted additional opposition papers. According to Cresco, at oral argument the court agreed to accept this late submission. However, the court does not have a record of this on the motion file; and, generally, there is such a marking when late papers are to be submitted. Moreover, Allied immediately wrote to the court challenging Cresco's right to submit the late papers, stating that the court did not grant Cresco permission to do so and pointing out that in its original opposition papers Cresco stated that "[*i*]f oral argument is not granted, this party requests that the court review the Opposition as submitted as Exhibit E to the moving papers." Aff. in Opp. to Allied's Motion for Rearg't, at ¶ 6.

In an effort to determine whether it is fair to consider the papers in light of their substance, the court glanced through the late submission and also read Allied's letter objecting to the submission. First, the court notes that Cresco did not comply with the rules of the courts of New York County, which require it to use exhibit tabs in all formal court submissions. Second, Cresco discusses its arguments in opposition without including any case law for support; and this court will not research to determine whether there is an adequate factual and legal basis for the various theories Cresco has raised at this late date.

Third, and most significantly, Allied has moved to reargue and renew the original motion. In so doing, it raises arguments in favor of reargument and annexes the original set of submitted papers - including Cresco's opposition papers. It has not made

a new and/or alternate motion; and, thus it does not attempt to raise and argue new issues or provide new justifications for relief. To the extent that Cresco's newly submitted papers raise the same arguments as its original papers, the court has those issues before it. To the extent that it may be attempting to raise new issues, "[r]eargument [should] not provide a party an opportunity to advance arguments different from those tendered on the original application . . . , and renewal is not a second chance freely given to parties who have not exercised due diligence in making their first . . . presentation." Rubinstein v. Goldman, 225 A.D.2d 328, 328-29, 638 N.Y.S.2d 469, 470 (1st Dept. 1996). Moreover, it would be prejudicial to consider the papers because Allied has not had a chance to respond to these new arguments. Therefore, the court shall not consider the supplemental submission.

Background

Now, the court turns to the underlying lawsuit. Blass Employment, a temporary employment agency, supplied Racks with temporary workers who helped plaintiff Herminio Torres, a shop steward for a piping company, to unload the piping and various other equipment, which was supplied by Allied, from Cresco's truck. While plaintiff was onsite at the property of Friarton Estates Corporation ("Friarton"), during the unloading of the equipment, some of the equipment fell onto plaintiffs leg, resulting in serious injuries that led to the leg's partial amputation.

Plaintiff sued Allied, Cresco, Blass and Friarton. In 1999, the Supreme Court dismissed the claims, third-party claims and cross claims against Allied, Cresco, Blass and third party defendant Quality Industries. The Appellate Division issued a decision on March 15, 2001 which reinstated the complaint against Cresco on the issue of

whether the stake pockets on the truck, which restrained the tubing and equipment, were defective. However, the portion of the decision dismissing the claims against Allied was affirmed.

Plaintiff went to trial in August of 2001. At trial, plaintiff received a verdict of $3.7 million, which was reduced to $2.8 million due to plaintiffs contributory negligence. Plaintiffs wife, co-plaintiff Esmerelda Torres, received a verdict of $1 million which was reduced to $750,000.

Motion

Finally, the court can examine the motion before it. Allied bases its motion on Cresco's alleged duty to indemnify. This duty stems from a May 19, 1989 contract between Allied and Grinnell Corporation, Allied's parent company. Allied quotes the following passage from the contract:

> a). [Cresco] shall indemnify, defend and save harmless [Allied] from and against any and all losses, damages, claims, demands, costs, expenses, suits and liabilities (including reasonable attorney's fees) that arise from:
> 1. Injuries . . . persons . . . caused by [Cresco's] acts or omission to act, or the acts or omissions to act of those persons furnished by [Cresco], or in any way arising out of the performance of this contract by [Cresco];
> . . .
> **4.** Any failure by [Cresco] to perform any of [its] obligations under this contract.
> b) [Cresco], at its own expense, shall maintain during the term of this contract the following insurance policies:
> . . .
> **3.** Comprehensive Auto Liability insurance with limits of at least $1,000,000 for bodily injury . . . to any one person. . . .
> **4.** Comprehensive General Liability insurance including contractual Liability Coverage covering the contractual obligations accepted under this clause,

> with limits of at least $1,000,000 for each occurrence of bodily injury . . . .
>
> (c) All such insurance described . . . above shall name [Allied] as a named additional insured. [Cresco] will provide a waiver of subrogation against [Allied] for insurance described . . . above.

Cresco initially denied indemnification on the basis that Allied may have been responsible for the accident. Now, however, Allied has prevailed on its summary judgment motion; thus, it notes, it is clear that Allied did not cause the accident and that it was entitled to indemnification. Therefore, although it is not responsible for any of the damages awarded in the case, it claims that is entitled to recoup its costs and expenses, including attorney's fees. It alleges that these fees amount to $112,066.26.

The court holds that the indemnification provision is broad enough to apply to the type of lawsuit involved here. Cresco raises several arguments to the contrary that are of no merit. First, it states that because the accident did not occur in the actual course of shipping the piping and equipment but in the process of unloading them from the truck, the injury did not arise from Cresco's "acts or omission to act, or the acts or omissions to act of those persons furnished by [Cresco], or in any way arising out of the performance of this contract by [Cresco]." Contract ¶ 8(a)(1). Where the language of the indemnification provision is this broad, the intent to have broad coverage "cannot be gainsaid." Abreu v. Vardo Constr. Corp., 204 A.D.2d 178, 179, 611 N.Y.S.2d 201, 202 (1st Dept. 1994); cf. Vev v. Port Auth. of New York and New Jersey, 54 N.Y.2d 221, 226-37, 445 N.Y.S.2d 84, 86 (1981)(subcontractor liable to indemnify under broad indemnification provision). The reading that Cresco suggests - that the shipping and delivery was complete before the goods in question were off the vehicle - is overly

restrictive, especially in light of this broad purpose.

Moreover, a broad reading of the provision is not necessary to apply the indemnification provision to the injury that occured in this case, either in light of the law or the factual findings that have already been made. Under the Vehicle and Traffic Law, the phrase "use or operation" for liability purposes includes the activity of loading and unloading the vehicle in question. Argentina v. Emery World Wide Delivery Corp., 93 N.Y.2d 554, 693 N.Y.S.2d 493 (1999). As Cresco was required to carry, inter alia, automobile insurance for the vehicle, this law is relevant to the interpretation of the contractual provision. In addition, the First Department found that issues of fact existed as to whether problems with the vehicle supplied by Cresco contributed to the accident during the unloading process that injured plaintiff Herminio Torres. To this extent, the accident might have arisen in part because of the manner in which Cresco performed its duties. Thus, the accident would fall neatly within the provision at issue.

Third, Cresco raises a series of arguments relating to Allied's negligence or lack thereof. Cresco argues that because Allied was not found to be negligent the indemnification agreement does not apply. However, nothing in the indemnification provision conditions Cresco's obligation to indemnify on a finding that Allied was at fault. See Di Prena v. American Broadcating Co., Inc., 200 A.D.2d 267, 269-70, 612 N.Y.S.2d 564, 567 (1st Dept. 1994). It is only where the indemnification agreement explicitly limits itself to covering damages "caused in part or whole by the negligence" of the party that a finding that the party is not negligent absolves the indemnitor of its responsibility. See, e.g., Lentino v. Rosedale Gardens, Inc., 79 A.D.2d 554, 555, 433 N.Y.S.2d 805, 806 (1st Dept. 1980).

In addition, Cresco states that because the indemnification agreement does not expressly state that Cresco agreed to indemnify Allied for negligence claims, negligence is not included in the indemnification agreement. However, the "specific reference to the active negligence of the indemnitee [is] unnecessary . . . as [are] talismanic phrases such as 'of whatsoever kind or nature' and 'or otherwise.'" New York Telephone Co. v. Gulf Oil Corp., 203 A.D.2d 26, 28, 609 N.Y.S.2d 244, 246 (1st Dept. 1994). Moreover, the "general rule is liberalized where the agreements are negotiated at arm's length between sophisticated business entities, with the probable intent of allocating the risk of liability. . . ." Tibbetts v. I.B.M. Corp., 161 A.D.2d 581, 583, 555 N.Y.S.2d 160, 161 (2nd Dept. 1990). Here, the language "in any way arising out of the performance of this contract," Contract ¶ 8(a)(1), is broad enough to encompass claims based on negligence.

Fourth, Cresco notes that Allied did not sign the contractual agreement until after the date of Mr. Torres' accident. Accordingly, Cresco argues that the contract was not in effect on that date, and the indemnification agreement within the contract is therefore not enforceable. However, as Allied notes, the parties both performed under the contract as if it had been signed - that is, Cresco delivered goods on behalf of Allied in exchange for payment under the terms of the unsigned contract. The fact that the parties respected the terms of the agreement can be used to infer that they intended to be bound by it. See Brown Bros. Elec. Contractors, Inc. v. Beam Contruction Corp., 41 N.Y.2d 397, 393 N.Y.S.2d 350 (1977). Here, where the parties used the same indemnification language that existed in earlier binding contracts between the parties and where the parties had already operated under the terms of the agreement, the

contract finds that the agreement was binding upon them. See Jackson v. Northeast United Corp., 186 Misc. 259, 718 N.Y.S.2d 564 (Sup. Ct. Tompkins County 2000) (indemnification provision in unsigned construction contract held to be binding where identical form was used for prior projects and provision was standard); cf. Rudolph & Beer, LLP v. Roberts, 260 A.D.2d 274, 688 N.Y.S.2d 553 (1st Dept. 1999)(regarding enforceability of arbitration provision of unsigned retainer agreement). "Having performed work in conformity with the contract . . . and . . . accepted the contract benefits, [Cresco] cannot now assert that [the agreement] and its [provisions] do not apply." Libertv Management & Constr. Ltd v. Fifth Ave. & Sixtv-Sixth St. Corp., 208 A.D.2d 73, 79, 620 N.Y.S.2d 827 (1st Dept. 1995).

Fifth, Cresco argues that not Allied but to Grinnell, of which Allied is a subsidiary. However, the contract at issue expressly applies to not only Grinnell but its subsidiaries. Moreover, Allied has excerpted deposition testimony of one of its executives revealing that Grinnell acquired Allied in 1989 and therefore Allied was a subsidiary during the relevant time period. At no point has Cresco refuted these allegations or set forth the relevant caselaw. Therefore, and in light of Allied's showing to the contrary, the court will not merit this argument of Cresco's, either. Because Allied has not provided the contracts which would dispose of the issue by showing the relationship between itself and Grinnell, the court will allow Cresco to renew this prong of the argument on proper papers, including a legal brief outlining and'supporting its position. However, the court warns that both parties are required not to make frivolous motions on this or any other point. Therefore, if either side obtains conclusive knowledge about the relationship between Cresco and Allied, the court expects that the motion will become unnecessary.

Except as set forth with respect to the fifth argument of Cresco, the court has researched all the above issues despite the fact that Cresco, for the most part, has not provided significant legal support for its contentions. There are other issues, however, which Cresco has raised in a completely conclusory fashion. For example, in paragraph 43 of its brief, it states: "For instance, did Allied have insurance which paid for the legal fees. *(sic)* If so, then Allied may be the wrong party to bring an action." This conclusory argument, which the party presents without any explanation or elaboration, is insufficient to merit the court's attention.

Based on the above, therefore, the court grants summary judgment declaring that Cresco is obliged to indemnify Allied. The court will not award the amount sought - well over $100,000 in fees - without directing a hearing on the reasonable amount of attorney's fees. See Grullon v. South Bronx Overall Economic Develoopment Corp., 185 Misc. 2d 645, 712 N.Y.S.2d 911 (Civ. Ct. N.Y. County 2000); see also GA Ins. Co. of New York v. Naimberg Realty Assoc., 233 A.D.2d 363, 650 N.Y.S.2d 246 (2nd Dept. 1996)(directing hearing on issue of fees in declaratory judgment context). Moreover, the court notes that attorney's fees are not recoverable for the portion of the litigation based on the recovery of fees. Klock v. Grosdonia, 251 A.D.2d 1050, 674 N.Y.S.2d 187 (4th Dept. 1998), sets forth the applicable rule that attorney's fees are not awardable to compensate for the indemnification portion of the case. See also DiPerna v. American Broadcasting Corp., 200 A.D.2d 267, 270 n 3, 612 N.Y.S.2d 564 (1st Dept. 1994) (explaining the limitation on recoverable fees).

Accordingly, it is

ORDERED that the motion for summary judgment is granted; and it is further

ORDERED that Allied shall file a copy of this order with notice of entry with the Judicial Support Office, room 311, which is directed to refer this matter to a referee to hear and report on the issue of reasonable attorney's fees. This amount shall be limited to fees incurred during Allied litigation of the underlying lawsuit, and shall exclude fees incurred in litigating the issue of indemnification. The court notes that Allied must move to confirm the referee's report.

ENTER:

Dated: 2/20/08

Louis B. York, J.S.C.