

**Adams v Boston Props Ltd. Partnership**

2006 NY Slip Op 30621(U)

August 21, 2006

Sup Ct, NY County

Docket Number: 106409/2004

Judge: Carol R. Edmead

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PRESENT: HON. CAROL EDMEAD Justice

PART 35

Adams, Ivan

INDEX NO.

106409/04

MOTION DATE

6/15/06

MOTION SEQ. NO.

003

MOTION CAL. NO.

Boston Properties Limited, etal.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for amend pleadings

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Boston Properties Limited Partnership, Boston Properties, Inc., Turner Construction Company, Turner Construction-International, LLC i/s/h/a Turner Construction-International, LLC, 42<sup>nd</sup> St. Development Project, Inc. i/s/h/a 42<sup>nd</sup> Street Development Project Inc., No. 1 Times Square Development LLC, and Permasteelisa Cladding Technologies, Ltd. for leave pursuant to CPLR 3025(b) to amend their third-party action to include Permasteelisa as a third-party plaintiff is denied, with leave to renew upon resolution of the pending appeal; and it is further

ORDERED that the cross-motion by Masco and ICI to reargue this Court's order, dated April 28, 2006, is granted, and upon reargument, the application to dismiss the common law indemnification and contribution claims is denied; and it is further

ORDERED that the cross-motion by Ritter to dismiss the first and second cross-claims of defendants Boston Properties and Permasteelisa for breach of contractual indemnification and failure to procure insurance is denied, with leave to renew upon resolution of the appeal.

Dated: This constitutes the decision and order of the Court.

8/21/06

HON. CAROL EDMEAD

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

FILED  
AUG 23 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
IVAN ADAMS,

Plaintiff,

Index No. 106409/2004

-against-

DECISION/ORDER

BOSTON PROPERTIES LIMITED PARTNERSHIP,  
ET. AL.,

Defendants.

And Third-Party Action, Index No. 590692/2005

-----X  
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

**FILED**  
AUG 23 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiff, Ivan Adams, allegedly fell from a ladder while working at a construction site located at 1 Times Square, New York, New York (the "worksite"). Consequently plaintiff commenced this action against the owners and the general contractor alleging Labor Law violations and common law negligence. In turn, the owners and general contractor commenced a third-party action against the subcontractors. The defendants/third-party plaintiffs allege that third-party defendants owed a duty to defend and indemnify third-party plaintiffs and procure insurance on their behalf. Plaintiff was recently granted leave to add one of the subcontractors, Permasteelisa Cladding Technologies ("Permasteelisa"), as a party-defendant in the main action.

Defendants Boston Properties Limited Partnership, Boston Properties, Inc. (collectively, "Boston Properties"), Turner Construction Company, Turner Construction-International, LLC i/s/h/a Turner Construction-International, LLC (collectively, "Turner"), 42<sup>nd</sup> St. Development Project, Inc. i/s/h/a 42<sup>nd</sup> Street Development Project Inc., (collectively, "42<sup>nd</sup> St. Development") No. 1 Times Square Development LLC ("No. 1 Times Square") and Permasteelisa (hereinafter,

the “movants”) now move for leave pursuant to CPLR 3025(b) to amend their third-party action to include Permasteelisa as a third-party plaintiff.

Third-party defendants Masco Contractor Services East, Inc. (“Masco”) and Superior Contracting Corporation d/b/a Insulation Contractors (“ICI”) cross move to reargue that portion of the Court’s order, dated April 28, 2006, which denied ICI’s request to dismiss all claims and cross-claims for common law contribution and indemnification asserted against ICI, and as against Masco, to the extent that it is alleged that Masco was plaintiff’s employer.

Defendant Ritter Contracting, Inc. (“Ritter”) cross moves for summary judgment dismissing the first and second cross-claims of defendants Boston Properties and Permasteelisa for breach of contractual indemnification and failure to procure insurance.

#### Motion by Defendants to Amend

The movants contend that defendant Turner Construction Company (“Turner”) was the general contractor at the worksite, Permasteelisa was a subcontractor that subcontracted work to Ritter Contracting Inc. (“Ritter”), which in turn subcontracted work to third-party defendant ICI and/or third-party defendant Masco. The movants contend that plaintiff was previously granted leave to serve an amended complaint naming Permasteelisa as a party defendant, and Permasteelisa served its Answer to plaintiff’s third amended complaint and appeared in this Action. The movants maintain that leave to amend a pleading is to be freely given, and that there is no prejudice to third-party defendants if the instant motion is granted, since the proposed third-party complaint asserts the same causes of action as the original, with the only change being the addition of Permasteelisa as an additional third-party plaintiff. Further, third-party defendants were aware of Permasteelisa’s involvement in this matter since it was Permasteelisa that retained

third-party defendant Ritter, which in turn, retained Masco or ICI. Also, since Permasteelisa would have a right, pursuant to CPLR 1007, to file its own third-party complaint against third-party defendants, which would be consolidated with the third-party action, leave should be granted in the interest of judicial economy.

In opposition, Ritter argues that there is no basis to amend in light of the fact that Permasteelisa, as a direct defendant, is asserting the same four cross-claims against Ritter as it would be seeking to assert in its proposed amended third-party complaint.

Masco and ICI also oppose leave to amend, to the extent that it seeks to assert that Masco and ICI are contractually obligated to indemnify Permasteelisa and that Masco and ICI failed to procure insurance naming Permasteelisa as an additional insured. Masco and ICI contend that they previously moved to dismiss the third-party complaint and all cross-claims on the ground that Masco and ICI owe no duty to defend and indemnify third-party plaintiffs Boston Properties and Ritter. This Court granted Boston Properties and Ritter conditional contractual indemnification as against ICI, based on the ICI/Ritter Subcontract, in which ICI agreed that if it were found to be negligent, it would indemnify the "Owner" and "Contractor." However, the third-party claim by Turner Construction Company, Turner Construction-International, LLC, 42<sup>nd</sup> Street Development Project and No 1 Times Square Development LLC for contractual indemnification claims by said parties was dismissed since "Owner" and "Contractor" as defined by the ICI/Ritter Subcontract did not include said parties. Further, the ICI/Ritter Subcontract did not contain an express assumption of Ritter's obligation to procure insurance, and thus, the third-party plaintiff's claim based on failure to procure insurance was dismissed as well. Therefore, since the movant's application is based on the same facts and contracts, Permasteelisa cannot

assert that Masco and ICI are contractually obligated to indemnify it and that Masco and ICI failed to procure insurance naming them as additional insureds.

In reply, the movants argue that without the amendment, Permasteelisa would have no avenue to interpose claims against Masco and ICI, as they are only named as third-party defendants. Further, to the extent the claims against Ritter are duplicative, this is not a reason to deny the motion. Defendant can recover only once for damages caused by Ritter regardless of whether their claims are asserted in the form of a cross claim or third party complaint.

#### Cross-Motion by Masco and ICI

Masco and ICI cross move to reargue that portion of the Court's order which denied ICI's request for dismissal of all causes of action and cross-claims for common law contribution and indemnification asserted against ICI, and as against Masco, to the extent that it is alleged that Masco was plaintiff's employer. Masco and ICI point out that its prior motion to dismiss the common law contribution and indemnification claims against ICI was based on the uncontested fact that ICI was plaintiff's employer, and that plaintiff did not sustain a grave injury. Masco and ICI point out that the plaintiff's Bill of Particulars state that plaintiff was employed by ICI, and records pertaining to plaintiff's Worker's Compensation claim state that plaintiff was employed by ICI. Boston Properties, Turner, 42<sup>nd</sup> Street Development and No. 1 Times Square did not argue that plaintiff was not employed by ICI, but argued that it was not yet clear whether plaintiff did not sustain a grave injury. Yet, the Court denied ICI's application on the ground that the record failed to establish, as a matter of law, that ICI was plaintiff's employer. Masco and ICI further argue that as there was no evidence before the Court to suggest that plaintiff was not employed by ICI at the time of this accident, and none of the parties have alleged otherwise, the

Court should modify its order and dismiss all common law claims as against ICI.

Also, Masco and ICI contend that they argued that common law contribution and indemnification claims asserted against Masco should be dismissed because Masco was not a party to any contract related to this action, Masco was not plaintiff's employer, and Masco did not perform any work at the site. The opponents to their motion never argued that plaintiff was employed by Masco. And, assuming there is an issue of fact as to whether or not Masco is also plaintiff's employer, the common law indemnification and contribution claims must be dismissed as against Masco in that Workers' Compensation Law § 29(6) shields a "special employer" from an action at law by a "special employee" if said employee has elected to receive workers' compensation benefits from the general employer. Further, Ritter did not oppose dismissal of its common law claims for contribution and indemnification.

In opposition to reargument, Ritter contends that it is filing a second-third party action against Superior Contracting Corporation, Masco Services Group Corp., and Masco Contractor Services East for contractual indemnification against them under the Ritter/ICI contract, and for appropriate common law contribution and indemnification. Ritter argues that its investigations and documents before the court demonstrate that issues of fact exist as to whether a Masco-entity is or can be considered to have been plaintiff's employer. Based on New York State Division of Corporation's database, ICI now does business as Superior Contracting Corporation, which is affiliated with Masco Services Group Corp. and Masco Contractor Services East, Inc., given the common principal executive office indicated for each of them. Therefore, Masco and ICI's motion to dismiss on the ground that it is purportedly plaintiff's employer does not remove both ICI and Masco from this case based on Ritter's claims. Further, the contention that Ritter did not

oppose their previous motion to dismiss is inconsequential, since Ritter had cross-claims against Masco and ICI as co-third-party defendants. Since third-party plaintiffs successfully opposed Masco and ICI's motion to dismiss, Ritter's cross-claims survive, and will be superceded by the new third-party action to be commenced against Superior Contracting and the Masco entities.

Boston Properties, Turner, 42nd St. Development and No. 1 Times Square also oppose reargument, contending that Masco and ICI failed to present additional proof to establish entitlement to summary judgment, and failed to establish that the Court overlooked or misapprehended a point of law.

In reply, Masco and ICI point out that third-party plaintiffs state that their claims against Masco do not arise from an employer/employee relationship, and never allege that plaintiff was not employed by ICI. Further, counsel for third-party plaintiffs never alleges that plaintiff sustained a grave injury. Rather, counsel merely alleges that the motion to reargue as to ICI should be denied because ICI failed to meet its burden on reargument. As to Masco, counsel merely alleges that Masco's application should be denied because there are triable issues of fact as to whether Masco supervised and controlled plaintiff's work, which is irrelevant to the grounds upon which Masco seeks relief. Further, third-party plaintiffs failed to submit any document or affidavit establishing that Masco had any role in the manner in which plaintiff performed his duties. Masco and ICI further argue that the Court should disregard Ritter's impending second third-party action in that Ritter failed to attach a draft copy of same, or detail the claims to be made therein, and any such action will have no bearing on plaintiff's employment status. As to the purported affiliation between Masco and ICI, it is well settled that the law respects the distinction between a parent/holding company and that of a subsidiary, and

the factors upon which such distinction may be ignored do not exist here. In any event, any affiliation between Masco and ICI is irrelevant to the issue of a grave injury.

#### Cross-Motion by Ritter

Ritter cross moves for summary judgment dismissing the first and second cross-claims of defendants Boston Properties and Permasteelisa for breach of contractual indemnification and failure to procure insurance. Ritter contends that Boston Properties' answer asserts four cross-claims against Ritter, namely breach of contractual indemnification, failure to procure insurance, common law indemnification and common law negligence, which were also asserted by these parties in the third-party action against Ritter. When Ritter moved to dismiss the third-party claims, the Court ruled, by Order dated April 28, 2006, that there was no basis for the third-parties' contractual indemnification or failure to procure insurance claims. Therefore, there is also no basis for such cross-claims, which are based on the same set of operative facts.

In opposition, Boston Properties contends that they have appealed the Court's order and therefore, Ritter's motion should be denied, with leave to renew upon resolution of the appeal.

#### Analysis

As to the movant's application for leave to amend the third-party complaint to add Permasteelisa as a third-party plaintiff, such request is denied, without prejudice to renew upon resolution of the pending appeal. Although leave to amend should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1<sup>st</sup> Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1<sup>st</sup> Dept 2001]; *Bencivenga & Co. v Phyfe*, 210 AD2d

22 [1<sup>st</sup> Dept 1994]; *Bankers Trust Co. v Cusumano*, 177 AD2d 450 [1<sup>st</sup> Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1<sup>st</sup> Dept 1990]). Third-party defendants point out that the third-party claim by Turner, 42<sup>nd</sup> St. Development and No. 1 Times Square Development for contractual indemnification was recently dismissed since the definition of “Owner” and “Contractor” in the ICI/Ritter Subcontract did not include said parties. This Court also dismissed the claim against ICI for failure to procure insurance, since the ICI/Ritter Subcontract did not contain an express assumption of Ritter’s obligation to procure insurance. However, given that the merits of this Court’s ruling, upon which Masco and ICI’s opposition rests, is now subject to appellate review, any consideration of Masco and ICI’s argument, at this juncture, would be improvident. Thus, whether Permasteelisa can assert claims that Masco and ICI are contractually obligated to indemnify it and that Masco and ICI failed to procure insurance naming them as additional insureds must await appellate resolution.

The Court notes that Masco and ICI cross-appealed the Court’s order, arguing, *inter alia*, that the Court should have dismissed the common law indemnification claims since Masco had no involvement with the work site, was not plaintiff’s employer, and not a party to any contract regarding the work being performed at the site. The cross-appeal also raises the claim that ICI is plaintiff’s employer, and is thus shielded by the Workers’ Compensation laws. Therefore, since the cross-appeal affects the common law indemnification claim already asserted by the existing third-party plaintiffs against Masco and ICI, the Court declines, without prejudice, the request to permit the third-party complaint to be amended to add common law claims by Permasteelisa against said defendants, at this juncture.

As to Masco and ICI’s cross-motion to reargue that portion of the Court’s order which

denied ICI's request for dismissal of all causes of action and cross-claims for common law contribution and indemnification asserted against ICI, and as against Masco, to the extent that it is alleged that Masco was plaintiff's employer, such request is granted. However, upon reargument, the Court adheres to its earlier determination. As to Masco, the documents before the Court raise an issue as to Masco's claim that it bore no connection to the accident in question, and whether plaintiff was in fact a Masco employee or an ICI employee. The information contained in the Accident Investigation Report and the Employee Injury form, which are on Masco's letterhead, identify plaintiff, Mr. Adams, as the "Employee," and make reference to ICI as a "Branch Name." Such incident reports, arguably prepared by Masco, also refer the location of the accident as a "Masco Loc. Code" and contain a claim number identified as "wrap-up." Further, Masco's argument that plaintiff's action is barred due to his election to receive Workers' Compensation benefits rests on the purported "special employer"/"special employee" relationship between plaintiff and Masco, which is not established, as a matter of law, from the record.<sup>1</sup> Thus, upon reargument, the application by Masco and ICI to dismiss the common law indemnification and contribution claims is denied.

As to the cross-motion by Ritter to dismiss the first and second cross-claims of defendants Boston Properties and Permasteelisa for breach of contractual indemnification and failure to procure insurance, such application is also denied, with leave to renew upon resolution of the appeal.

Based on the foregoing it is hereby

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<sup>1</sup> The Court notes that depositions of third-party defendants had not been conducted at the time of Masco and ICI's motion.


ORDERED that the motion by Boston Properties Limited Partnership, Boston Properties, Inc. (collectively, "Boston Properties"), Turner Construction Company, Turner Construction-International, LLC i/s/h/a Turner Construction-International, LLC (collectively, "Turner"), 42<sup>nd</sup> St. Development Project, Inc. i/s/h/a 42<sup>nd</sup> Street Development Project Inc., (collectively, "42<sup>nd</sup> St. Development") No. 1 Times Square Development LLC, and Permasteelisa Cladding Technologies, Ltd. for leave pursuant to CPLR 3025(b) to amend their third-party action to include Permasteelisa as a third-party plaintiff is denied, with leave to renew upon resolution of the pending appeal; and it is further

ORDERED that the cross-motion by Masco and ICI to reargue this Court's order, dated April 28, 2006, is granted, and upon reargument, the application to dismiss the common law indemnification and contribution claims is denied; and it is further

ORDERED that the cross-motion by Ritter to dismiss the first and second cross-claims of defendants Boston Properties and Permasteelisa for breach of contractual indemnification and failure to procure insurance is denied, with leave to renew upon resolution of the appeal.

This constitutes the decision and order of the Court.

Dated: August 21, 2006

  
Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**  
AUG 23 2006

COUNTY CLERK'S OFFICE  
NEW YORK