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

PRESENT: Hon. HON. CAROL EDMEAD PART 35

Justice

Adams, Ivan

-v-

Boston Properties Ltd.

INDEX NO. 106409/04

MOTION DATE 4/21/06

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits...	
Answering Affidavits - Exhibits	
Replying Affidavits	

FILED

MAY 03 2006

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers

Plaintiff, Ivan Adams, fell from a ladder while working at a construction site located at 1 Times Square, New York, New York (the "subject worksite"). Plaintiff commenced this action against, *inter alia*, Boston Properties Limited Partnership and Boston Properties, Inc., as the owners, and the general contractor alleging Labor Law violations and common law negligence. The defendants/third-party plaintiffs allege that third-party defendants were subcontractors at the construction site who owed a duty to defend and indemnify third-party plaintiffs and procure insurance on their behalf.

By way of background, the series of contracts pertinent to this motion are as follows: The owner of the site, No. 1 Times Square Development, Inc. ("Times Square") engaged Turner Construction Company and Turner Construction-International, LLC (collectively, "Turner") as the general contractor at the subject worksite. Turner entered into an agreement with Permasteelisa (a nonparty) (the "Turner/Permasteelisa Contract"), which contained an indemnification and insurance procurement provision under Article XXIII therein. Thereafter, Permasteelisa entered into a subcontract with Ritter Contracting Inc. ("Ritter") (the "Permasteelisa/Ritter back-to-back Subcontract"), which purportedly "incorporated" the "terms and conditions" of the Turner/Permasteelisa Contract (see Third-parties' opposition, ¶13). Ritter then entered into a Subcontract with Insulation Contractors ("ICI") for work to be performed a the worksite (the "Ritter/ICI Subcontract"). The Ritter/ICI Subcontract expressly incorporates, *inter alia*, a "Prime Contract," which undisputedly does not exist, between the Owner, defined

Dated _____ ENTER: _____, J.S.C.

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therein as Boston Properties, and the Contractor, defined therein as Ritter. The Ritter/ICI Subcontract also contains an assumption of obligations provision (Article 2), and indemnification provision (Article 4.5), and describes the "Work" of the Ritter/ICI Secondary Contract as inclusive of the Permasteelisa/Ritter back-to-back Subcontract (Article 8).

Defendants Masco Contractor Services East ("Masco") and Superior Contracting Corporation d/b/a ICI now move pursuant to CPLR 3211 dismissing the third-party claims for contractual indemnification (first cause of action), breach of contract in failing to procure insurance (the second cause of action), contribution based on negligence (third cause of action), and common law indemnification (fourth cause of action), and all cross claims for failure to state a cause of action. In support, Masco contends that it is a separate and distinct corporation, which had no connection to the project, the subject construction site, the subject premises, the plaintiff, or the plaintiff's accident. Masco further contends that it was not a party to any contract related to this worksite, nor referred to in any agreement.

ICI seeks dismissal of the first cause of action for contractual indemnification, arguing that the contract upon which third-party plaintiffs rely, *i.e.*, the Ritter/ICI Subcontract specifically defines "owner" and "contractor," and third-party plaintiffs Turner Construction, 42nd Street Development, and No. 1 Times Square, and cross claimant Ritter are not included in the definition. Thus there can be no contractual obligation to provide a defense or indemnification to such parties.

ICI also contends that neither the Turner/Permasteelisa Contract nor the Permasteelisa/Ritter back-to-back Subcontract, to which ICI was not a party, create a contractual duty upon ICI to procure insurance on behalf of the third-party plaintiffs. And, Ritter/ICI Subcontract did not contain any agreement to defend or indemnify such parties.

ICI also seeks dismissal of the third and fourth causes of action for common law contribution and indemnification, and all cross claims, arguing that workers' compensation laws insulate ICI, as plaintiff's employer, from such claims since plaintiff did not suffer a grave injury. ICI asserts that plaintiff has not demonstrated a total and permanent loss of the hand or arm nor permanent paraplegia or quadriplegia associated with a back or neck injury.

ICI further contends that the third-party complaint and all cross claims should be dismissed for the additional reason that the mediation clause in the Ritter/ICI Subcontract specifically requires that such claims be mediated prior to commencement of an action, and such condition precedent was not satisfied.

Third-party defendant Ritter cross moves for dismissal of the first cause of action for contractual indemnification, arguing that Ritter had nothing to do with the accident, plaintiff's work, or the ladder in question. Therefore, under GOL 5-322, indemnification agreements that impose liability on a contractor or subcontractor for the fault of others over whom it had no control is void as against public policy. Further, third-party plaintiffs cannot establish that they

are free from negligence. Additionally, argues Ritter, the Permasteelisa/Ritter back-to-back Subcontract does not incorporate Article XXIII of the Turner/Permasteelisa Contract, which obligated Permasteelisa to name the Owner and Turner as additional insureds. Ritter's Permasteelisa/Ritter back-to-back Subcontract does not expressly state that all of Permasteelisa's obligations pass down to Ritter. Instead, only "relevant obligations" contained in the Turner/Permasteelisa Contract pass down. Further, the additional clauses of the Permasteelisa/Ritter back-to-back Subcontract refer to the "Works" of the Turner/Permasteelisa Contract.

Ritter also seeks dismissal of the second cause of action based on procurement of insurance, arguing that the Turner/Permasteelisa Contract, to the extent that it even applies to Ritter, required only that Permasteelisa obtain certain insurance "satisfactory to Turner" and that other entities as may be reasonably requested shall be named as additional insureds. Ritter claims that it did not receive any such request from any party. And, the proper measure of damages, if at all, would be the full cost of insurance, and not the damages sustained by plaintiff.

Further, since Ritter had nothing to do with the work, ladder, or accident complained of, the third and fourth causes of action for contribution and indemnification based on negligence or based on alleged Labor Law violations, must be dismissed as against Ritter.

Finally, Ritter claims that to the extent any claims survive against Ritter, Ritter is entitled to judgment against ICI based on contractual indemnification.

Third-party plaintiffs oppose the motions on various grounds, and the movants and cross-movant submitted their reply.

Analysis

Based on an in-court conference and the submissions, the Court determines that Masco failed to establish its entitlement to dismissal of the third-party complaint pursuant to CPLR 3211. In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d

802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993]). On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a] [7] where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

Masco's contention that it is separate and distinct corporation, which had no connection to the project, the worksite, materials, or plaintiff, is based solely on an affidavit of its Vice-President and is unsupported by any documentary evidence. As such, Masco's submissions are insufficient to warrant dismissal. In any event, Masco's reply papers failed to overcome the contradictory information contained in the Accident Investigation Report and the Employee Injury form, submitted by third-party plaintiffs. The Accident Investigation Report and Employee Injury forms are both on Masco's letterhead. Such documents 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." Thus, as the documents flatly refute Masco's claim that it bore no connection to the accident in question, it cannot be held that third-party complaint fails to state a cause of action against Masco.

With respect to ICI's request to dismiss of the first cause of action for contractual indemnification, such request is denied as to the Boston third-party plaintiffs and Ritter, in light of, *inter alia*, the ICI/Ritter Subcontract. Under paragraph 4.5.1 of the ICI/Ritter Subcontract, ICI expressly agreed to indemnify the "Owner" and "Contractor," and the first page of said Subcontract expressly identifies "Boston Properties" as the "Owner" and "Ritter" as the "Contractor." Boston Properties' denial, in its response to Masco's notice to admit, of ownership of the premises located at "7" Times Square, New York, New York, does not overcome the showing that ICI expressly agreed to indemnify Boston Properties for the work being performed at "1" Times Square, New York, New York, the location at issue. Therefore, conditional indemnification in favor of the owner, Boston Properties, as identified in the ICI/Ritter contract is granted. However, ICI's motion to dismiss the contractual and common indemnification claims by third-party plaintiffs Turner, 42nd Street Development, and No. 1 Times Square is granted. Contrary to third-party plaintiffs' contention, ICI's duty as outlined in paragraph 4.5.1 to indemnify the "Owner's agents" does not extend to Turner, the general contractor. That Turner is the "statutory agent" of the owner for purposes of Labor Law, does not render Turner

an "agent" as contemplated by the ICI/Ritter Subcontract.

As to ICI's request to dismiss the third-party plaintiff's claim for breach of agreement to procure insurance, such request is granted. Under section 2.1 of the Ritter/ICI Subcontract, ICI agreed to "assume toward [Ritter] all obligations and responsibilities which [Ritter] . . . assumes toward the Owner," which is defined as "Boston Properties" on the first page of such Subcontract. Under New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor (*see, Bussanich v 310 East 55th Street Tenants*, 282 AD2d 243, 723 NYS2d 444 [1st Dept 2001], *citing S. Leo Harmonay Inc. v Binks Mfg. Co.*, 597 F.Supp. 1014, 1023-1024, *affd.* 2d Cir., 762 F.2d 990, *citing Guerini Stone Co. v P.J. Carlin Constr. Co.*, 240 US 264, 277, 36 S.Ct. 300, 60 L.Ed. 636; *U.S. Steel Corp. v Turner Constr. Co.*, 560 F.Supp. 871). "Provisions other than scope, quality, character and manner of the work must be specifically incorporated to be effective against the subcontractor" (2 N.Y. PJI ¶ 4:1, comment, at 635 [2005] *citing Bussanich, supra*). Thus, in the absence of an express assumption of Ritter's obligation to procure insurance, the Ritter/ICI Subcontract cannot serve as a basis for the breach of insurance procurement claim. Further, the Court notes that the Ritter/Permasteelisa back-to-back Subcontract obligated Ritter to carry out and complete the "Works" as part of the "Primary [Permasteelisa] Sub Contract works." And, Appendix B and other documents expressly incorporated into the Ritter/Permasteelisa back-to-back Subcontract refer to the work at the site. Thus, Ritter's subcontract with Permasteelisa does not constitute an agreement by Ritter to undertake *all* of the duties that Permasteelisa owed to the Owners and Turner. Consequently, any assumption by Ritter of Permasteelisa's obligation to the Owners and Turner covers only the "Work." The affidavit of Carlos Eisner Eisenhoff submitted by third-party plaintiffs to the contrary is unavailing. Thus, although Permasteelisa was obligated to obtain insurance naming the Owner and Turner as additional insureds, such obligation was not assumed by Ritter, and therefore, could not have been assumed by ICI.

Further, ICI's request for dismissal of the third and fourth causes of action for common law contribution and indemnification, and the cross claims, is denied. The record fails to establish, as a matter of law, that ICI was plaintiff's employer, as ICI argues.

Further, the alleged failure of third party plaintiffs to comply with the mediation clause in the Ritter/ICI contract does not serve as a basis to dismiss the third-party complaint. Even assuming such condition applies to the third-party complaint, ICI and Masco filed its answer which contained no such affirmative defenses, and engaged in substantial discovery and motion practice. Therefore, ICI consented to this judicial forum.

As to the cross-motion by third-party defendant Ritter, the first cause of action for contractual indemnification is dismissed as to Ritter. Again, the Permasteelisa/Ritter back-to-back Subcontract does not expressly state that the parties thereto intended for Ritter to undertake all of the duties Permasteelisa owed to the Owners and Turner. Instead, such Subcontract

obligated Ritter to carry out and complete the "Works" as part of the "Primary (Permasteelisa) Sub Contract works." Therefore, there is no basis for the third-parties' contractual indemnification claim against Ritter, and such claim is dismissed.

As to Ritter's cross-motion to dismiss the second cause of action based on procurement of insurance, such request is denied, for the reasons noted above. Therefore, dismissal of the second cause of action for failure to procure insurance is granted.

Further, Ritter's application for dismissal of the third and fourth causes of action for common law contribution and indemnification on the ground that it had nothing to do with the work, ladder, or accident complained of and that it cannot be based on negligence or based on alleged Labor Law violations is denied. Under the Ritter/ICI Subcontract, Ritter was obligated to cooperate and participate in employee scheduling, and arguably, was authorized to give order to the subcontractor's designated representatives, receive progress reports and suspend the work without cause. In light of the possibility that Ritter had some involvement with the plaintiff's work, the common law contribution and indemnification claims cannot be dismissed at this juncture.

In light of the above, Ritter's application for judgment against ICI based on contractual indemnification, is granted to the extent of conditional indemnification pursuant to paragraph 4.5.1 of the Ritter/ICI contract.

This constitutes the decision and order of the Court.

Dated 4/28/06 **ENTER:** _____, **J.S.C.**

HON. CAROL EDMEAD

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