

<b>Greenbaum v City of New York</b>
2006 NY Slip Op 30856(U)
March 29, 2006
Supreme Court, New York County
Docket Number: 110215/2004
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X  
PHOEBE GREENBAUM and BERNARD  
GREENBAUM,

Plaintiffs

against

CITY OF NEW YORK and CONSOLIDATED  
EDISON CO. OF NY, INC., HENKLES & MCCOY,  
WELSBACH ELECTRIC CORP. and  
PETROCELLI ELECTRIC, CO., INC.,  
Defendants.

Index Number 110215/2004  
Oral Arg. Date Jan. 11, 2006  
Mot. Seq. No. 005  
Cal. No. 11

**DECISION AND ORDER**

-----X  
WELSBACH ELECTRIC CORP.,  
Third-Party Plaintiff,

against

POWER CONCRETE CO. INC.,  
Third-Party Defendant.

Third Party Index No.  
591081/2004

**FILED**  
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**For Plaintiff:**  
Mitchell First, Esq.  
First & First  
299 Broadway  
New York NY 10007  
(212) 962-6338

**For Defendant/Third-Party Plaintiff:**  
Stephanic L. Bross, Esq.  
London Fischer LLP  
59 Maiden Lane, 41<sup>st</sup> Fl.  
New York NY 10038  
(212) 972-1000

**For Third-Party Defendant:**  
Michael Cannella, Esq.  
White & McSpedon, P.C.  
875 Avenue of the Americas, Suite 800  
New York NY 10001  
(212) 564-6633

Papers considered in review of this motion for partial summary judgment and cross-motion to strike:

Papers	Numbered
Notice of Motion, Affidavits, & Memo of Law .....	<u>1,2</u>
Notice of Cross-Motion.....	<u>3</u>
Plaintiffs' Affirmation in Opposition.....	<u>4</u>
Third-Party Defendant's Affirmation in Opp.....	<u>5</u>
Third-Party Defendant's Reply.....	<u>6</u>

**PAUL G. FEINMAN, J.:**

The only defendant remaining in the main action is Welsbach Electric Corp., the other defendants having all been granted summary judgment by decision and order of this Court dated November 30, 2005. The third-party action by Welsbach against Power Concrete Co., Inc. was also

continued. Power Concrete now moves for partial summary judgment seeking dismissal of Welsbach's claims for common law and contractual indemnity. At oral argument on January 11, 2006, the cross-motion was withdrawn. For the reasons which follow, the motion is granted in part and denied in part.

*Factual and Procedural Background*

On July 21, 2001, plaintiff Phoebe Greenbaum tripped and fell over a hole/depression located at the crosswalk on Jay Street near One Metrotech Center, Brooklyn, New York, and suffered injuries including a broken right hip. She alleges that the hole was the result of Welsbach's negligently failing to properly excavate and maintain the roadway at that location. Welsbach installed and removed various electrical traffic signal equipment throughout the five boroughs pursuant to a contract with the City of New York (Not. of Mot. Ex. H, Contract). In turn, Welsbach, who had subcontracted with Power Concrete to remove roadway and temporary asphalt for trenches in which Welsbach installed conduit, and then restore and replace the protected and concrete roadways,<sup>1</sup> commenced a third-party action against Power Concrete seeking indemnification and contribution, as well as a claim for failure to acquire necessary insurance (Not. of Mot. Ex. C, Third-Party Complaint).

Testifying on behalf of Welsbach was John Kiernan, consultant and assistant project manager (Not. of Mot. Ex. J, hereinafter Kiernan EBT). According to Kiernan, Welsbach applied for City permits in May 1999 to do work on Jay Street in Brooklyn (Kiernan EBT 6). Its work at the Jay Street location involved installing two-inch conduit in the roadway from the two traffic poles and putting in temporary asphalt (Kiernan EBT 20). It dug the trench, installed the conduit, and re-filled the hole, topping it with temporary asphalt (Kiernan EBT 35-36). It then contacted Power Concrete which

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<sup>1</sup>The contract between Welsbach and Power Concrete is contained in the Notice of Motion as Exhibit I (hereinafter "Subcontract").

removed the temporary asphalt and installed permanent roadway (Kiernan EBT 20). The City's procedures for re-filling the trenches were to be followed (Kiernan EBT 35). Welsbach did not do any of the street restoration work, nor did it do anything further to the asphalt after Power Concrete finished its work (Kiernan EBT 19, 21). It did not inspect its own work nor that of Power Concrete (Kiernan EBT 27). City inspectors appeared on the job site "sometimes" (Kiernan EBT 41). If a hole developed in work previously done, Welsbach would notify Power Concrete to repair it (Kiernan EBT 62).

Power Concrete has provided notice that it intends to call an expert witness who will testify that its own work was carried out properly, but that the trench dug by Welsbach was improperly filled, thus causing settlement which created the pothole (Not. of Mot. Ex. L, Not. of Expert Discl.). Testifying on behalf of the company was its vice president, Jose Casimiro (Not. of Mot. Ex. M, hereinafter Casimiro EBT). Casimiro testified that Power Concrete does "all kinds of concrete, roadway work" (Casimiro EBT 18:14). He corroborated that his company had performed work at the location of Jay Street and Metrotech for Welsbach beginning in late 1998 (Casimiro EBT 7). According to Casimiro, if Power Concrete's name was on the permit, then it applied for the permit (Casimiro EBT 13). The work involved the "milling out" or removal of the temporary asphalt installed by Welsbach, the placement of the new asphalt and then sealing the edges with hot tar (Casimiro EBT 8,10). The work was done according to City requirements (Casimiro EBT 42). There were City inspectors present at the job site "at all times" (Casimiro EBT 16). Casimiro presumed someone from Welsbach inspected the work when it was completed in order for his company to be paid (Casimiro EBT 38-39).

Power Concrete moves for partial summary judgment as concerns the third-party complaint. It concedes that Welsbach would be entitled to common law contribution from Power Concrete (Not. of Mot. Cannella Aff. ¶ 16). However, it argues that Welsbach is not entitled to common law

indemnification, and that the parties' contract concerning indemnification violates the General Obligations Law. It seeks dismissal of the third-party complaint's causes of action sounding in common law indemnification and contractual indemnification.

### *Legal Analysis*

#### 1. Common Law Indemnification

Common law indemnification shifts the entire loss from the one who is compelled to pay for the loss without regard to fault, to the party who bears actual responsibility for the loss (*County of Westchester v Welton Becket Assoc.*, 102 AD2d 34, 47 [2d Dept. 1984], *aff'd* 66 NY2d 642 [1985]). It is rooted in principles of equity and fairness (*McDermott v City of New York*, 50 NY2d 211, 217 [1980]). In the "classic indemnification case," the one entitled to indemnity has committed no wrong, but by virtue of its relationship with the tortfeasor, is nonetheless held liable to the injured party (*D'Ambrosio v New York*, 55 NY2d 454, 461 [1982]). Because "the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee," indemnity is not available to a party who has participated in the wrongdoing (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1<sup>st</sup> Dept. 1985]; *see also, Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 646 [1988]). However, where a party is compelled to make payment when another should have, the law will find an implied contract to reimburse or indemnify (*McDermott v New York*, 50 NY2d at 217 [citation omitted]). To be entitled to indemnification, the party seeking indemnity must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought (*17 Vista Fee Assoc. v Teachers Ins. and Annuity Assn. of America*, 259 AD2d 75, 80 [1<sup>st</sup> Dept. 1999]).

Power Concrete argues that it is an independent contractor because Welsbach delegated it

exclusive responsibility for its work at the job site, and that therefore Welsbach could not be held vicariously liable for its work, citing among others *Adams v Hilton Hotels, Inc.*, 13 AD3d 175, 177 (1<sup>st</sup> Dept. 2004) (quoting from *Chainani v Bd. of Educ. of City of New York*, 87 NY2d 370, 380-381 [1995], that “a principal is not liable for the acts of an independent contractor because, unlike the master-servant relationship, principals cannot control the manner in which independent contractors perform their work”). Although Welsbach attempts to dispute Power Concrete’s claim that it is an independent contractor, it offers nothing other than its attorney’s affirmation suggesting that the question of whether Power Concrete is an independent contractor has not been determined by the court and therefore the motion is premature (Not. of Cross-Mot. Bross Aff. ¶ 8). Nothing in the deposition testimony refutes Power Concrete’s claim. Welsbach’s witness testified that it did not inspect Power Concrete’s work, although admittedly Power Concrete’s vice president assumed its work was inspected before Welsbach paid. Welsbach’s witness also testified that if it were notified of a problem with a piece of roadway that it had worked on, it would call Power Concrete to fix it.

Where a movant demonstrates its entitlement to summary judgment, the burden shifts to the party opposing such a motion and that party must demonstrate by proof in admissible form the existence of a material issue of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Bare conclusory allegations are insufficient to defeat a motion for summary judgment (*See, Thanasoulis v. National Assn. for the Specialty Foods Trade, Inc.*, 226 AD2d 227 [1<sup>st</sup> Dept 1996]; *Lee v Weinstein*, 116 AD2d 700 [2d Dept], *lv denied* 68 NY2d 601 [1986]). It is insufficient to offer suspicions, surmises, and accusations (*Zuckerman v City of New York, supra*, at 557). Here, where Welsbach fails to offer any evidence whatsoever to contradict Power Concrete’s assertion that it is an independent contractor, and nothing exists in the deposition testimony to cast doubt on such an

assertion, a fact-finder could only conclude that Power Concrete was acting as an independent contractor and that Welsbach could not be held liable for its independent subcontractor's negligent actions.

Plaintiffs argue that there are many exceptions to the general rule that a contractor will not be held liable for the negligent work of its independent subcontractor, citing *Allen v Cloutier*, 44 NY2d 290 (1978) (Labor Law), and *Parsons v City of New York*, 195 AD2d 282 (1<sup>st</sup> Dept. 1993) (employer-employee). Among the exceptions include statutes and regulations holding a permittee liable for work done on behalf of the City or State. Plaintiffs point to New York City Department of Transportation regulations that hold permittees liable for the "permanent restoration and maintenance of street openings and excavations for a period of three years on unprotected streets, and up to five years on protected streets commencing on the restoration completion date"(34 RCNY § 2-11[e][16]).<sup>2</sup> They argue that because the permits for the Jay Street work were taken out in about September 1998 and the work was done thereafter by Welsbach and Power Concrete, the DOT regulation creates a non-delegable duty on the part of Welsbach as permittee, toward the public. However, unlike the Labor Law statutes, to which plaintiffs analogize in their reliance on *Allen v Cloutier*, 44 NY2d 290, there is nothing in the DOT regulations that sets forth any sort of vicarious liability to the public. The regulations are solely concerned with regulating the nature and quality of contractors' work in the city streets and can be understood to be more of a guaranty of fitness. Plaintiffs' other arguments concerning non-delegable duty as set forth in the Restatement (Second) of Torts and the Pattern Jury Instructions are equally unavailing in the factual scenario before the court. Accordingly, Power

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<sup>2</sup>Plaintiffs have attached a copy of the particular section of the Rules of the City of New York in their Opposition, at Exhibit E).

Concrete's motion to dismiss the first cause of action sounding in common law indemnification contained in the third-party complaint is granted.

2. Contractual Indemnification

Power Concrete argues that its subcontract with Welsbach improperly requires it potentially to indemnify Welsbach for Welsbach's own negligence, in violation of section 5-322.1 of the General Obligations Law. The subcontract requires in significant part that

To the fullest extent permitted by law [Power Concrete] shall indemnify and hold harmless [Welsbach] . . . against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of [Power Concrete's] work under this Subcontract, provided that such claim, damage, loss or expense is attributable to bodily injury . . . but only to the extent caused in whole or in part by negligent acts or omissions of [Power Concrete] . . . regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

(Not. of Mot. Ex. G, Subcontract ¶ 4.6.1).

Section 5-322.1 of the General Obligations Law states that agreements concerning excavation work which exempt contractors from liability for personal injuries that arise from their own negligence, are void and unenforceable. Thus, if a general contractor is found partially negligent, an indemnification agreement between it and a subcontractor that provides for full indemnification of the contractor, is void and unenforceable (*see, Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 789-790 [1997]). Contrary to Welsbach's arguments, which are based on post-trial decisions, the broad contractual indemnification agreement is void only if Welsbach is found negligent (*see, Reilly v Newireen Assocs.*, 303 AD2d 214 [1<sup>st</sup> Dept.], *lv denied* 100 NY2d 508 [2003]; *Zeigler-Bonds v Structure Tone, Inc.*, 245 AD2d 80 [1<sup>st</sup> Dept. 1997]). Here, it remains to be determined whether Welsbach's work in refilling the trench was a factor in causing the depression into which plaintiff fell. Accordingly, the motion to dismiss the third cause of action of the third-party complaint,

sounding in contractual indemnification, is denied as premature. It is

ORDERED that the motion for partial summary judgment is granted only to the extent that the first cause of action of the third-party complaint sounding in common law indemnification is dismissed, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the remainder of the third-party action is severed and shall continue to trial along with the main action between plaintiff and defendant Welsbach; and it is further

ORDERED that the cross-motion is withdrawn; and it is further

ORDERED that the parties are to appear as previously scheduled for trial on April 27, 2006 in Part 40 of Supreme Court.

This constitutes the decision and order of the court. The court has mailed copies of this decision to counsel who submitted papers on the motion. Movant shall serve copies of this decision with notice of entry on all parties and third-parties, as well as upon the Clerk of the Court (60 Centre, Basement) who shall enter partial summary judgment on the third-party complaint in accordance with the foregoing.

Dated: March 29, 2006  
New York, New York

  
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J.S.C.

**HON. PAUL G. FEINMAN**

**FILED**

APR 04 2006

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