

**HRH Constr. Corp. v Sorbara Constr.  
Corp.**

2007 NY Slip Op 30887(U)

April 19, 2007

Supreme Court, New York County

Docket Number: 0401328/2006

Judge: Doris Ling-Cohan

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: LELAND DeGRASSE  
*Justice*

PART 25

HRH Construction

- v -

Subara Construction

INDEX NO. 401328/06  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 1  
MOTION CAL. NO. \_\_\_\_\_

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

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

*Motion is denied in accordance with accompanying Memorandum Decision.*

**FILED**  
APR 24 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: APR 19 2007

*[Handwritten Signature]*

*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):

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

-----X  
HRH CONSTRUCTION CORP. and ROCKROSE  
CONSTRUCTION (RIVER TERRACE-GC), LLC,

Plaintiffs,

-against-

Index No. 401328/06

SORBARA CONSTRUCTION CORP.,

Defendant.  
-----X

**FILED**  
APR 24 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**DeGrasse, J.:**

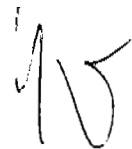
Plaintiffs move and defendant, Sorbara Construction Corp., cross-moves for summary judgment. Peter Datello, a Sorbara employee who had sustained a herniated disc and other related injuries in a construction site accident, brought an action against plaintiffs in the Supreme Court, Richmond County. The court (Giacobbe, J.) granted Datello's cross motion for summary judgment on his Labor Law § 240 (1) claim against plaintiffs. Datello subsequently settled with plaintiffs for the sum of \$3.5 million. Following the settlement, plaintiffs' third-party claims against Sorbara were severed and transferred to this court. Plaintiffs' common-law and contractual indemnification claims are the subjects of the motion and cross motion.

The common-law indemnification claim is barred by Workers' Compensation Law § 11 because Datello did not sustain a "grave injury" as defined by the statute. Sorbara's written agreement with plaintiff Rockrose Construction (River Terrace - GC), LLC contains a provision by which Sorbara agreed to indemnify and defend plaintiffs from and against all claims arising out of any error, omission or breach on part of Sorbara in connection with its work. The said agreement forms the basis of the contractual indemnification claim.

Sorbara and plaintiffs were covered under Sorbara's \$1 million primary liability insurance policy with Investors Insurance Company. By letter dated September 22, 2003, AIU Insurance Company, Sorbara's excess carrier, disclaimed coverage to Sorbara and plaintiffs on the ground that the notice requirement of its policy had not been satisfied. Thereafter Sorbara brought a declaratory judgment action against AIU in this court. By order dated December 8, 2006 this court (Friedman, J.) declared that AIU has no obligation to defend or indemnify Sorbara in Datello's action. In support of its cross motion, Sorbara argues that plaintiffs failed to mitigate their damages by timely seeking coverage as additional insureds under the AIU excess policy. The argument is unavailing because the insurance secured by Sorbara cannot, in any event, serve to relieve or abrogate Sorbara's obligation to plaintiffs as a party vicariously liable under the Labor Law (*see Vestal v Yonkers Contr. Co.*, 268 AD2d 872 [2000]). The argument also ignores the judicially recognized distinction in the treatment of contracts to procure insurance and agreements to indemnify (*see generally Cavanaugh v 4518 Assocs.*, 9 AD3d 14, 20 [2004]). Also, there is no merit to Sorbara's argument that plaintiffs cannot be indemnified because their insurers made the payment to Datello under the settlement. An insurance carrier, upon payment of a loss, becomes subrogated to the rights and remedies of its assured to proceed against a party primarily liable without the necessity of any formal assignment or stipulation (*The New York Bd. of Fire Underwriters v Trans Urban Const. Co.*, 91 AD2d 115, 119 [1983] *affirmed* 60 NY2d 912 [1983]). Sorbara misplaces its reliance upon the antisubrogation rule articulated by the Court in *Pennsylvania General Insurance Company v Austin Powder Company* (68 NY2d 465 [1986]). The rule does not apply where distinct and separate insurance policies are involved (*United States Fid. & Guar. Co. v CNA Ins. Cos.*, 208 AD2d 1163 [1994]).

Sorbara asserts that discovery is needed to determine whether plaintiffs were guilty of negligence which would preclude their contractual indemnification claim. Yet Sorbara has not submitted a copy of any notice, demand or any other evidence of its attempt to obtain discovery. Summary judgment may not be defeated on the ground that discovery is needed where the party advancing such an argument has failed to ascertain the facts due to its own inaction (*Ward v New York City Hous. Auth.*, 18 AD3d 391, 392 [2005]). Sorbara's remaining arguments have been considered and lack merit. For the foregoing reasons, plaintiffs' motion is granted to the extent that the issue of liability is decided in favor of plaintiffs and against Sorbara on plaintiffs' contractual indemnification cause of action. In all other respects plaintiffs' motion is denied. Sorbara's cross motion is granted only to the extent that plaintiffs' common-law indemnification cause of action is dismissed. Damages shall be determined at trial.

Dated: April 19, 2007



J. S. C.

HON. LELAND DeGRASSE

**FILED**  
 APR 24 2007  
 NEW YORK  
 COUNTY CLERK'S OFFICE