

Matthius v Platinum Estates, Inc.

2007 NY Slip Op 32421(U)

August 2, 2007

Supreme Court, Richmond County

Docket Number: 0013353/2002

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

x DCM PART 3

ROBERT H. MATTHIUS and LINDA MATTHIUS,

Index No: 13353/02

Plaintiff(s),

-against-

**DECISION & ORDER
HON. JOSEPH J. MALTESE**

PLATINUM ESTATES, INC., GRYMES HILL
ESTATES, INC., TGC CONSTRUCTION CORP.,
JOHN CULOTTA and ROBERT RICCA,

Defendant(s).

-----X
PLATINUM ESTATES, INC.,

Third-Party Plaintiff(s),

Index No: A13353/02

-against-

JOHN CULOTTA and ROBERT RICCA,

Third-Party Defendant(s).

-----X
TGC CONSTRUCTION CORP.,

Second Third-Party Plaintiff(s),

Index No: B13353/02

-against-

JAC CONSTRUCTION CORP., ROBERT H. MATTHIUS,
ROBERT H. MATTHIUS d/b/a MAT-BRO CONSTRUCTION
and MAT-BRO CONSTRUCTION,

Second Third-Party Defendant(s).

-----X
PLATINUM ESTATES, INC.,

Third Third-Party Plaintiff(s),

Index No: C13353/02

-against-

ROBERT H. MATTHIUS, ROBERT H. MATTHIUS d/b/a
MAT-BRO CONSTRUCTION and MAT-BRO CONSTRUCTION,

Third Third-Party Defendant(s).

-----X

-----X
 PLATINUM ESTATES, INC.,

Fourth Third-Party Plaintiff(s),

Index No: D13353/02

-against-

JAC CONSTRUCTION CORP.,

Fourth Third-Party Defendant(s)

-----X

The following papers numbered 1 to 9 were submitted on the motions the 23rd day of March, 2007:

Notice of Motion with Supporting Papers and Exhibits (dated August 18, 2006).....	1
Notice of Cross Motion with Supporting Papers and Exhibits (dated September 25, 2006).....	2
Affirmation in Opposition (dated November 22, 2006).....	3
Affirmation in Opposition (dated December 7, 2006)	4
Reply Affirmation in Further Support of Platinum Estates' Cross Motion (dated January 18, 2007).....	5
Affirmation in Opposition (dated February 5, 2007)	6
Reply Affirmation in Further Support of Platinum Estates' Cross Motion Against Plaintiffs (dated February 28, 2007).....	7
Notice of Motion For Summary Judgment (dated March 5, 2007)	8
Affirmation in Opposition (dated March 28, 2007)	9

Upon the foregoing papers, the parties having settled plaintiffs' personal injury action (Index No: 13353/02) and Defendant /Third Third-Party Plaintiff Platinum Estates, Inc.'s action (Index No. C13353/02) on March, 2, 2007, (1) so much of the parties' respective motions as were addressed to the issue of liability in Motions Nos. 2706-006 and 3130-007 are permitted to be withdrawn; (2) the balance of these motions, addressed to the issue of contractual and common-law indemnification, together with the motion (No. 739-008) of Platinum for contractual indemnification against Second Third-Party Defendant JAC Construction Corp., is decided as hereinafter indicated.

This is an action to recover compensatory damages for personal injuries sustained by plaintiff Robert H. Matthius (hereinafter “plaintiff”) when he fell from the roof of a building under construction. Plaintiff is a carpenter doing business as Mat-Bro Construction. Platinum Estates was the record owner of the property at the time of the accident, prior to transferring title to Grymes Hill Estates in May, 2002. Defendants John Culotta and Robert Ricca, principals in Grymes Hill Estates, Inc., were in contract to buy the property at the time of the accident. At the time of the accident, defendant Grymes Hill, as general contractor, was in the process of framing the units on the foundations previously poured by Platinum Estates at the time of the accident.¹

During the course of construction, Platinum Estates’ principal would stop by to oversee the overall project. It was an additional named insured in Grymes Hill’s liability insurance policy for the project.

The project manager, working directly under Grymes Hill’s oversight, was Defendant/Second Third-Party Plaintiff TGC Construction Corp. TGC recruited the various subcontractors for the project, who were hired and paid by Grymes Hill. Among the subcontractors hired by Grymes Hill was Second Third-Party Defendant JAC Construction, which was hired to do the framing and sheathing of the units. JAC, in turn, entered into a subcontract with plaintiff’s company, Mat-Bro Construction, a sole proprietorship. At the time of the accident, Mat-Bro had a general liability insurance policy, but it did not name JAC, Grymes Hill or Platinum Estates as additional insureds

In moving for summary judgment declaring that it is entitled to contractual indemnification from JAC, Platinum Estates alleges that JAC was required to carry general liability insurance (quoting paragraph 3 of the parties’ subcontract dated January 17, 2002) In addition, it cites the following language from the parties Indemnification Agreement dated January 17, 2002:

To the fullest extent permitted by law the subcontractor shall indemnify and hold harmless the Owner, and the Contractor and all of their agents and employees from and

¹The contract of sale subsequently was assigned by Ricca and Culotta to Grymes Hill Estates, Inc. which ultimately took title to the property in November, 2002.

against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or in any way incidental to, or resulting from the performance of the Subcontractor's Work under this Subcontract provided that any such claim, damage, loss or expense is attributable to . . . a negligent act or omission of the subcontractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable, regardless of whether it is caused in part by a party indemnified hereunder.

On March 2, 2007, plaintiffs and the respective defendants in the "main action" (*i.e. Mathius v Platinum Estates, Inc., et al.*, bearing Index Number 13353/02) reached a settlement. The respective parties entered into a Stipulation of Discontinuance which provided that the "main action" was "discontinued with prejudice as respects the claims brought by ROBERT H. MATTHIUS and LINDA MATTHIUS only." The Stipulation further provided:

this agreement in no way affects the claims or cross claims brought by PLATINUM ESTATES in the first party action or any of the third party actions against GRYMES HILL, ROBERT RICCA, JOHN CULOTTA or JAC, nor does it in any way affect PLATINUM ESTATES' ability to further pursue litigation to be reimbursed for its legal fees paid in the defense of this action.

The Stipulation did not indicate the extent of the settlement, nor did it ascribe fault, vicarious or otherwise to any of the settling parties.

The gravamen of an indemnification claim is that both parties owe a duty to a third party, and that one of them has been held "legally liable and cast in damages to the third party" because of the other's negligence or wrongful conduct (*City of New York v. Lead Indus Assoc*, 222 AD2d 119, 126-27 [1st Dep't 1996])

A party claiming indemnification may recover under contractual indemnification only by showing the existence of a duty between itself and the proposed indemnitor. In establishing its right to recover, the party seeking contractual indemnification must establish "that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v. Professional Data Management*, 259 AD 60, 65 [1st Dept 1999]).

Pursuant to General Obligations Law § 5-322.1, any construction contract purporting to indemnify a party for its own negligence is void and unenforceable, although contracts requiring

parties to procure insurance are not similarly void (*see Kinney v G.W. Lisk Co.*, 76 NY2d 215 [1990]). Consequently, a party to a contract who is a beneficiary of an indemnification provision must prove itself to be free of negligence; and to any extent that the negligence of such a party contributed to the accident, it cannot be indemnified therefor (*see Stein v Yonkers Contr*, 244 AD2d 476 [2nd Dept 1997]; *Dawson v Pavarini Constr Co*, 228 AD2d 466 [2nd Dept 1996]). In the instant case, there exist triable issues of fact on the question of negligence, if any, of the respective parties. Thus, the movants have failed to establish their freedom from fault so as to entitle them to summary judgment on their cross claims for contractual indemnification (*see Daniels v. Bohnfioore, Inc*, 300 AD2d 341 [2nd Dept 2002]; *Reynolds v. County of Westchester*, 270 AD2d 473 [2nd Dept 2000]).

Accordingly, it is

ORDERED that so much of the parties' respective motions as were addressed to the issue of liability in Motions Nos. 2706-006 and 3130-007 are permitted to be withdrawn; and it is further

ORDERED that the balance of these motions, addressed to the issue of contractual and common-law indemnification, together with the motion (No. 739-008) of Platinum Estates for contractual indemnification against Second Third-Party Defendant JAC Construction Corp., are denied.

All parties shall appear in DCM 3 for a status conference on **September 17, 2007** at 9:30 a.m.

ENTER

DATED: August 2, 2007

Joseph J. Maltese
Justice of the Supreme Court