

<b>Kelly v Metropolitan Ins. &amp; Annuity Co.</b>
2007 NY Slip Op 32589(U)
August 16, 2007
Supreme Court, New York County
Docket Number: 0110426/2004
Judge: Milton A. Tingling
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Milton A. Tingling  
*Justice*

PART 44

KELLY, RUAIRI  
- v -  
METLIFE  
**FILED**  
AUG 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

INDEX NO. 110426104  
MOTION DATE 4/9/07  
MOTION SEQ. NO. 005  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 6 were filed on this motion to/for SJ

Notice of Motion/ Order to Show Cause — Affidavits Exhibits \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1</u>
<u>2-4</u>
<u>5-6</u>

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OFFICE

Cross-Motion:  Yes  No

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

Upon the foregoing papers, it is ordered that this motion  
Defendants METROPOLITAN INSURANCE AND ANNUITY COMPANY, MET LIFE INC. AND ROSE ASSOCIATES (hereinafter referred to individually respectively as "MET LIFE", "MIAC" AND "ROSE" AND COLLECTIVELY, AS "METs") move for an Order permitting defendant MIAC to serve an Amended Answer, reflecting the assignment of counsel separate from defendant YATES RESTORATION GROUP, LTD. (hereinafter referred to as "YATES") and permitting MIAC to interpose cross claims against defendant YATES. This portion of the Motion stands unopposed.

Defendants METs move for a Summary Judgment against YATES and SPRING SCAFFOLDING, INC. (hereinafter referred to as "SPRING") in favor of their cross-claims for contractual indemnity. Defendants YATES and SPRING and Plaintiff oppose.

Defendants METs move for a Summary Judgment against SPRING in favor of their cross-claims for common law indemnity. Defendant SPRING and Plaintiff oppose.

Defendants METs move for an order against SPRING granting Summary Judgment on the cross claims for their willful failure to comply with the demands and notices of the defendants, or,  
Dated: \_\_\_\_\_

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE MDAI

alternatively, precluding them from introducing evidence at the Trial, or , alternatively, prohibiting them from introducing evidence at the Trial, or alternatively, directing that they comply with all prior demands and notices of the defendants. Defendant SPRING opposes.

Defendants METs move for a Summary Judgment against Plaintiff dismissing Plaintiff's Complaint on the grounds that the claims against said defendants have no merit as a matter of law and there are no triable issues of fact. Defendant YATES affirms. Plaintiff opposes.

Defendants METs move for a Summary Judgment in favor of defendant MET LIFE, dismissing Plaintiff's Complaint against said defendant. This portion of the Motion stands unopposed. Plaintiff's counsel has agreed to withdraw their claims as against MET LIFE and has signed a Stipulation of Discontinuance regarding MET LIFE. The Court thus grants Summary Judgment dismissing MET LIFE as a party in this case.

This action arises out of the alleged personal injuries sustained by plaintiff Ruairi Kelly, a six-year-old boy injured when he lost control of his bicycle and was thrown off the bicycle and into the air, striking a sidewalk bridge scaffold that had been erected over the sidewalk to protect pedestrians. Plaintiff sustained injuries to his groin area. MIAC is the owner of the property upon which the accident occurred and ROSE is MIAC's property manager. YATES was hired by MIAC to perform facade restoration on MIAC's property. SPRING was a subcontractor of YATES. The sidewalk bridge components which allegedly caused the plaintiff's injuries were erected by SPRING. This Motion is a cross-action claim by METs against YATES and SPRING.

SPRING contends that METs should not be entitled to contractual indemnification against them, as at the time of the accident there was no contract in effect between YATES and SPRING in which SPRING granted contractual indemnification to defendants METs against any claims brought against them in connection with any damages incurred by their work. METs contend that such a contract was in effect and that it provided "the contractor shall indemnify and hold harmless the Owner, Yates Restoration Group..., including but not limited to attorney's fees, arising out of or resulting from the performance of the contractor's Work under this Contract, provided that such claim, damage, loss or expense is attributable to bodily injury...only to the extent caused in whole or party by negligence acts or omissions of the contractor...regardless of whether or not such claim,

damage, loss or expense is caused in part by a party indemnified hereunder”.

Even if the Court were to find that such a contract was in effect at the time of the accident, its provisions regarding contractual indemnification of METs would be void. The courts have ruled that a complete shifting of liability from the general contractor to the subcontractor without limitation in terms of the negligence of the general contractor is violative of General Obligations Law § 5-322.1 and is thus unenforceable (see Barnes v. New York Mercantile Exchange, 776 N.Y.S.2d 559 (1<sup>st</sup> Dept. 2004); Cavanaugh v. 4518 Associates, 776 N.Y.S.2d 260 (1<sup>st</sup> Dept. 2004); Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 680 N.E.2d 1200 (N.Y. Ct. App., 1997). The statute provides: “A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable”. The alleged contract between YATES and SPRING which according to YATES was in effect at the time of the accident essentially indemnifies third parties regardless of any contributory negligence on their part. Thus, pursuant to the above statute, the contractual indemnification provisions concerning the indemnification of a negligent indemnitee contained in said contract are unenforceable. The question of whether or not METs were in fact negligent is a triable issue of fact. Thus, at this time a Summary Judgment on METs’ contractual indemnification claims pursuant to the alleged YATES-SPRING contract is denied.

METs further contend that they are entitled to contractual indemnification from YATES as at the time of the accident there was a contract in effect between MIAC and YATES providing indemnification to METs for “any claim, liability, loss, damage, expense, including reasonable attorneys’ fees at both trial and the appellate levels, award, fine, or judgment arising by reason of the death or bodily injury to a person, injury to property, or any other loss, damage, expense or liability resulting from or arising out of the performance of the work”. This contract contains no provision indemnifying METs for any of METs’ own negligence. Pursuant to said contract YATES is not

obligated to indemnify METs for METs' own negligence and pursuant to General Obligations Law § 5-322.1 YATES is not allowed to indemnify METs for METs' own negligence. The Court finds that the question of the existence of any negligence on METs' part is a triable issue of fact. Summary Judgment on METs' contractual indemnification claim against YATES is denied at this time without prejudice to renew after a determination of METs' liability or non-liability.

METs' Motion for a Summary Judgment granting them common law indemnity against SPRING is denied. As a general rule, common law indemnity will only be granted so long as the indemnitor's negligence was the precipitant of the injuries sustained (see Leon v. J & M Peppe Realty Corp., 596 N.Y.S.2d 380 (1<sup>st</sup> Dept. 1993); Greco v. Archdiocese of New York, 702 N.Y.S.2d 29 (1<sup>st</sup> Dept. 2000)). In the case at hand there exist triable issues of fact regarding SPRING's alleged negligence in causing or contributing to the subject accident. Further, the Courts have held that where a party's liability in an action is not vicarious but is premised upon its own acts or omissions there can be no claim for common law indemnity (see Consolidated Rail Corp. v. Hunts Point Terminal Produce Cooperative Association, 783 N.Y.S.2d 30 (1<sup>st</sup> Dep't 2004); Trump Village Section 3, Inc. v. New York State Housing Finance Agency, 764 N.Y.S.2d 17 (1<sup>st</sup> Dept. 2003); Walker v. Trustees of University of Pennsylvania, 712 N.Y.S.2d 117 (1<sup>st</sup> Department, 2000); Guzman v. Haven Plaza Housing Dev. Fund Co., 509 N.E.2d 51 (N.Y. Ct. App. 1987)). There exist triable issues of fact as to whether the scaffolding in question was defective and as to whether METs exercised supervision or control over the scaffolding which would have enabled them to take steps to prevent the accident from occurring, thus rendering their failure to act negligent. METs' Motion for a Summary Judgment granting them common law indemnity against SPRING is accordingly denied.

Regarding SPRING's alleged failure to provide Court-ordered materials, the Courts have held that granting Summary Judgment on cross-claims for failure to comply with discovery orders is a drastic remedy to be used only where the Court finds evidence that the failure to disclose was willful, contumacious or in bad faith (see Mateo v. City of New York, 711 N.Y.S.2d 396 (1<sup>st</sup> Dept. 2000); Christian v. City of New York, 703 N.Y.S.2d 5 (1<sup>st</sup> Dept. 2000); Adzhiashvilli v. Joy-Lud Distributors, Int'l, Inc., 725 N.Y.S.2d 39 (1<sup>st</sup> Dept. 2001)). No such evidence has been presented to this Court regarding SPRING's alleged failure to comply with the demands and notices of METs. METs' Motion against SPRING pursuant to their failure to comply with the demands and notices

of METs is consequently denied without prejudice to renew.

Regarding METs' move to dismiss Plaintiff's Complaint, this Court finds that there exist triable issues of fact as to whether the sidewalk bridge scaffold was defective and as to whether the Defendants acted negligently in failing to cover the bolts on the sidewalk bridge. Further, the question of whether Plaintiff was injured as a result of an assumed risk and whether the accident was unforeseeable are triable issues of fact which preclude a Summary Judgment dismissing Plaintiff's Complaint. This branch of METs' Motion for Summary Judgment is denied.

Accordingly, the Court rules that METs' unopposed Motion for an Order permitting defendant MIAC to serve an Amended Answer permitting MIAC to interpose cross claims against defendant YATES is granted; METs' motion for a Summary Judgment against SPRING and YATES in favor of their cross-claims for contractual indemnity is denied at this time; METs' motion against SPRING in favor of their cross-claims for common law indemnity is denied; METs' motion for Summary Judgment against SPRING for SPRING's failure to comply with discovery orders is denied; METs' motion for Summary Judgment dismissing Plaintiff's Complaint is denied; METs' motion for Summary Judgment in favor of defendant MET LIFE dismissing Plaintiff's Complaint against said defendant is granted.

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JSC

**FRON. MILTON A. TINGLING**  
**J.S.C.**

**FILED**  
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