

<b>Villegas v 408 Broadway, LLC</b>
2007 NY Slip Op 33067(U)
September 19, 2007
Supreme Court, New York County
Docket Number: 0105229/2006
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.

PART \_\_\_\_\_

Justice

Index Number : 105229/2006

VILLEGRAS, DANIEL

vs

408 BROADWAY

Sequence Number : 001

DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

is motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

*motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.*

**FILED**

OCT - 1 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 9/19/07

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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

-----X  
DANIEL VILLEGAS and GLADIS S. SILVAVA,

Plaintiff,

-against-

408 BROADWAY, LLC and AP BID MANAGEMENT  
CORP.,

Defendants.

-----X  
AP BID MANAGEMENT CORP.,

Third-Party Plaintiff,

-against-

COMPLETE CONCRETE & MASONRY CORP. and  
SUPERIOR CONCRETE & MASONRY CORP.,

Third-Party Defendant.

-----X  
AP BID MANAGEMENT CORP.,

Second Third-Party Plaintiff,

-against-

SUPERIOR CONTRACTING & RESTORATION,  
INC.,

Second Third-Party Defendant.

-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this  
(these) motion(s):

**Papers**

**Numbered**

Second Third-Party Pltf's motion [d j/mt] w/TEM affirm in support, Al aff..... 1

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*Upon the foregoing papers, the decision and order of the court is as follows:*

Second Third-Party Plaintiff AP Bid Management Corp. ("AP") seeks a default judgment, pursuant to CPLR § 3215, against Second Third-Party Defendant Superior Contracting & Restoration, Inc. ("Superior Contracting"). Notwithstanding that the request is submitted to the court without opposition, it must be denied, without prejudice.

Plaintiffs commenced this action against defendant 408 Broadway, LLC and defendant/third-party plaintiff AP seeking to recover monetary damages for personal injuries sustained arising from an incident that occurred on March 29, 2006. Plaintiff Daniel Villegas fell when a scaffold upon which he was working collapsed. He alleges he sustained serious and permanent injuries. The premises where the incident occurred is owned by the defendant, 408 Broadway, LLC, and was undergoing renovation to be converted into commercial space. 408 Broadway, LLC retained the services of the defendant, AP, to perform certain aspects of the demolition and construction. AP, in turn, has commenced an action against Superior Contracting, with which it subcontracted to perform construction services on the premises. AP now seeks a default judgment, pursuant to CPLR § 3215, against Superior Contracting because it has not answered the complaint or otherwise appeared in this action and its time to do so has expired.

While a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom, AP is not entitled to default judgment in its favor, given its failure to demonstrate on this

motion that it has a *prima facie* cause of action [Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 (1984), Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3<sup>rd</sup> dept. 2001)]. AP sets forth three causes of action in the complaint against Superior for breach of contract, common law indemnification, and contractual indemnification. They are addressed below.

#### Breach of Contract (Third Cause of Action)

AP alleges that pursuant to an agreement, Superior Contracting was to maintain general liability insurance prior to commencement of the work at its own expense and name AP as an additional named insured under the policy. The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2<sup>nd</sup> Dept. 1990). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." Express Industries and Termianl Corp. V. New York State Dept. Of Transportation, 93 N.Y.2d 584 (1999).

AP fails to demonstrate a *prima facie* cause of action for breach of contract because AP has failed to provide a copy of the contract it relies upon. Only the sworn affidavit of Andrew Imperatore is submitted in support of entry of judgment. Thus, AP has not established the actual existence of an agreement. A determination on the parties' obligations and performance cannot be made without details as to the formation and terms of the contract.

#### Common-Law Indemnification (First Cause of Action)

AP claims that it is entitled to common law indemnification by Superior Contracting. "In the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party." Correia v. Professional Data Management, Inc., 259 A.D.2d 60, 65 (1<sup>st</sup> Dep't. 1999). No evidence whatsoever of anyone's negligence is provided on this motion. There is an unresolved question of fact as to whether AP itself was negligent and further, AP has failed to establish that Superior Contracting was actively negligent. See: Sheridan v. Beaver Tower Inc., 229 AD2d 302 (1<sup>st</sup> dept. 1996) *lv den* 89 NY2d 860 (1996); O'Sullivan v. IDI Construction Co., Inc., 7 NY3d 805 (2006); Rizzuto v. L.A. Wenger Contracting Co., *supra* at 352; Gonzalez v. United Parcel Serv., 249 AD2d 210 (1<sup>st</sup> dept. 1998). Consequently, the motion by AP must be denied because there are unresolved factual issues about whether any one of these defendants was negligent.

#### Contractual Indemnification (Second Cause of Action)

AP claims that it is entitled to contractual indemnity from Superior Contracting, however, it has failed to provide any details as to the contract, whether written or oral, which would form the basis of the indemnification. Only the sworn affidavit of Andrew Imperatore is submitted in support of entry of judgment, although AP factually claims it had a subcontract with Superior Contracting to provide labor and services in connection

with a project. Failure to provide a copy of the Subcontract which provides the basis for AP's claims against Superior Contracting, precludes the inference that the Subcontract exists.

AP has also failed to show that its own negligence did not contribute to the injuries plaintiff alleges to have sustained in the personal injury action. Any such negligence on AP's part would prevent it from enforcing the alleged indemnification clause, and would result in dismissing the claim for indemnification pursuant to General Obligations Law 5-320.1 [Cavanaugh v. 7518 Assocs., 9 AD3d 14 (1<sup>st</sup> dept. 2004)].

Accordingly, the motion is denied, without prejudice to renew upon proper papers.

Any relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
September 19, 2007

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
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NEW YORK  
COUNTY CLERK'S OFFICE