

<b>Gomez v F&amp;T Int'l (Flushing, New York) LLC</b>
2008 NY Slip Op 31396(U)
May 12, 2008
Supreme Court, New York County
Docket Number: 0101817/2005
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: **MARTIN SHULMAN**

PART 1

Index Number: 101817/2005 **J.S.C.**

GOMEZ, JOSE FRANCISCO

INDEX NO. 101817/05

vs  
F&T INTERNATIONAL

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

Sequence Number: ~~008~~ 008

MOTION SEQ. NO. 008

DEFAULT JUDGMENT

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 ...

	PAPERS NUMBERED
A-M	1
	2
	3
	4

Answering Affidavits -- Exhibits A-D

Replying Affidavits -- ~~Exhs.~~ A-G

Cross-Motion - Affidavit - Exhibits A+B

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion and cross-motion are decided in accordance with the attached decision and order.

**FILED**

MAY 16 2008

COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: May 12, 2008

**MARTIN SHULMAN** 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: PART 1

-----X  
Jose Francisco Gomez and Amado Polivio Livicura,  
Plaintiffs,

Index No: 101817/05

**Decision and Order**

-against-

F&T Int'l (Flushing, New York) LLC, Top 8 Construction  
Corp., Diamond Point Excavating Corp., All-Safe Height,  
Scaffold & Equipment Corp. and 3805 and 3729 Main  
Street, LLC,  
Defendants.

-----X  
Diamond Point Excavating Corp.,  
Third-Party Plaintiff,

Index No: 590751/05

-against-

Prestige Carting Corporation,  
Third-Party Defendant.

-----X  
F&T Int'l (Flushing, New York) LLC and Top 8  
Construction Corp.,  
Second Third-Party Plaintiffs,

Index No: 590987/05

-against-

Prestige Carting Corporation,  
Second Third-Party Defendant.

-----X  
3805 and 3729 Main Street, LLC,  
Third Third-Party Plaintiff,

Index No: 590858/05

-against-

Prestige Carting Corporation,  
Third Third-Party Defendant.

-----X  
HON. MARTIN SHULMAN, J.S.C.

In this personal injury action, defendants/second third-party plaintiffs, F&T Int'l  
(Flushing, New York) LLC and Top 8 Construction Corp. (collectively "Top 8"), move for

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COUNTY CLERK'S OFFICE  
NEW YORK

summary judgment pursuant to CPLR 3212 on: 1) their cross-claims for contractual indemnification against co-defendant Diamond Point Excavating Corp. ("Diamond"); and 2) their third-party claims against Prestige Carting Corp. ("Prestige")<sup>1</sup> for common law indemnification relative to plaintiff Jose Francisco Gomez's ("Gomez") claims in the main action. Diamond opposes Top 8's motion and cross-moves for summary judgment on its third-party claims against Prestige for: 1) contractual indemnification; and 2) common law indemnification relative to Gomez's claims. The motion and cross-motion are consolidated here for disposition.<sup>2</sup>

### **Background**

On February 4, 2005, Gomez and co-plaintiff Amado Polivio Livicura (collectively "plaintiffs"),<sup>3</sup> both employees of Prestige, were injured<sup>4</sup> while working at a construction site located at 38-11/38-19 Main Street, Flushing, New York (the "premises" or "site"). It is undisputed that F&T Int'l (Flushing, New York) LLC was the owner of the premises

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<sup>1</sup> Prestige appeared in this action by counsel, who was permitted to withdraw by order dated December 14, 2006 (Acosta, J.). Prestige failed to obtain new counsel and is now in default. The branch of Top 8's motion pertaining to Prestige and Diamond's entire cross-motion are thus unopposed.

<sup>2</sup> Having been advised that the action settled after mediation, by prior short form order dated March 27, 2008 and entered on March 31, 2008, this court denied the motion and cross-motion as moot. On or about April 22, 2008, Mediator Shelley Rossoff Olsen advised this court that the third-party actions were not resolved. Accordingly, the within decision and order supercedes the March 27, 2008 short form order, which is hereby vacated in its entirety.

<sup>3</sup> Plaintiffs commenced separate actions which were consolidated by order entered on March 28, 2006 (Acosta, J.).

<sup>4</sup> Plaintiffs fell when a cement slab they were demolishing on the third floor of an existing building at the premises collapsed.

and retained Top 8 Construction Corp. to serve as general contractor on the construction project. Top 8 retained Diamond to perform excavation and concrete installation work at the site. Diamond in turn retained Prestige to perform demolition work.

The consolidated complaints seek damages under theories of common law negligence and the New York State Labor Law. As previously stated, Prestige, against whom the movants and cross-movant seek summary judgment, is now in default, having previously appeared by counsel. Further, as a result of Prestige's prior failures to comply with discovery, an order of preclusion was entered on December 14, 2006, precluding Prestige "from introducing any evidence for the remainder of the proceedings, up to and including the time of trial."

#### **The Parties' Respective Positions**

In support of their cross-claims for contractual indemnification against Diamond, Top 8 argues: 1) the indemnity provision of its contract with Diamond (Exh. G to motion) is enforceable; 2) there is no evidence that plaintiffs' injuries were caused by any negligence on Top 8's part; 3) plaintiffs' injuries arose from the negligence of Diamond or its sub-contractor, Prestige; 4) unrefuted deposition testimony establishes that Prestige was solely responsible for plaintiffs' supervision, control and/or direction and was negligent in training and supervising plaintiffs and in providing them with adequate protection to prevent their fall; 5) Top 8 did not direct, supervise and/or control plaintiffs' work; and 6) Prestige has been precluded from offering evidence to refute the foregoing.

In opposition to Top 8's motion for summary judgment, Diamond contends: 1) the motion is untimely and should not be considered on the merits; and 2) issues of fact exist as to whether Top 8's negligence caused or contributed to plaintiffs' accident. Diamond's cross-motion for summary judgment on its third-party claim for contractual indemnification against Prestige is based upon article 6 of its sub-contract with Prestige, and is predicated upon substantially similar arguments as those Top 8 asserts, viz., Diamond's lack of negligence and Prestige's sole negligence.

As to their third-party claims against Prestige, Top 8 argues they are entitled to common law indemnification with respect to Gomez's claims because: 1) Gomez was gravely injured as defined in Workers' Compensation Law §11 and as such, Prestige can be liable to third parties such as Top 8 for indemnity and contribution; 2) Top 8 did not control or supervise the work site and their own negligence did not contribute to plaintiffs' injuries; 3) Prestige was negligent and supervised and controlled plaintiffs' work that caused their injuries; and 4) Top 8's liability to plaintiffs is vicarious only under the Labor Law. Diamond's cross-motion for summary judgment on its third-party claim for common law indemnification against Prestige with respect to Gomez's claims is predicated upon substantially the same arguments.

### **Discussion**

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943, 473 N.Y.S.2d 397 (1<sup>st</sup> Dept., 1984), *aff'd* 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). In order to prevail on a motion for summary

judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). Indeed, the moving party has the burden to set forth evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979).

While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v. N.Y. Univ. Med. Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985)), once such proof has been offered, in order to defeat the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597 (1980); *Freedman v. Chemical Const. Corp.*, 43 N.Y.2d 260, 401 N.Y.S.2d 176 (1977); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). As set forth in *Spearmon v. Times Square Stores Corp.*, 96 A.D.2d 552, 553, 465 N.Y.S.2d 230, 232 (2<sup>nd</sup> Dept., 1983):

"It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial." Bare conclusory allegations are insufficient to defeat a motion for summary judgment [citations omitted]. *Id.*, 96 A.D.2d at 553.

Mere conclusory allegations, expressions of hope, speculation or conjecture are insufficient to resist summary judgment. *Zuckerman, supra*. If the opposing party fails to submit evidentiary facts to controvert the allegations set forth in the movant's papers,

the movant's allegations may be deemed admitted. *Kuehne & Nagel, Inc. v. F.W. Baiden*, 36 N.Y.2d 539, 544, 369 N.Y.S.2d 667, 671 (1975). Summary judgment may then be granted, as no triable issue of fact exists. *Id.*

### **Timeliness of Top 8's Motion for Summary Judgment**

At the outset, the court rejects Diamond's argument that Top 8's motion is untimely. Diamond cites paragraph 9 of the preliminary conference order dated October 3, 2005 (Exh. B to Eccher Aff. in Opp.), which required dispositive motions to be brought within 60 days of filing the note of issue. Plaintiffs filed the note of issue on May 14, 2007 and Top 8 served its motion on September 10, 2007.

In reply, Top 8 argues that the final status conference order dated April 26, 2007 (Exh. A to Murphy Aff. in Reply) extended the note of issue filing date to May 15, 2007, without mentioning a deadline for filing dispositive motions. Top 8 contends that its motion is timely because it was served within 120 days of filing the note of issue in accordance with CPLR 3212(a). Top 8 correctly cites *Anzalone v. Pan-Am Equities*, 271 A.D.2d 307, 308, 706 N.Y.S.2d 409 (1<sup>st</sup> Dept., 2000), for the proposition that the deadline for dispositive motions in the preliminary conference order was rendered irrelevant by subsequent conference orders extending the note of issue filing date without setting a deadline for dispositive motions.

### **Contractual Indemnification**

Top 8's contractual indemnity cross-claim against Diamond is based upon section 4.6.1 of the Top 8/Diamond contract (Exh. G to motion), which provides in relevant part:

To the fullest extent permitted by law, **the Subcontractor [Diamond] shall indemnify and hold harmless the Owner, Contractor . . . and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's [Diamond's] Work under this Subcontract**, provided that any such claim, damage, loss or expense is attributable to bodily injury . . . , but only **to the extent caused by the negligent acts or omissions of the Subcontractor [Diamond], the Subcontractor's Sub-subcontractors [Prestige]**, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder . . . (Bracketed matter and emphasis added).

Diamond's third-party claim against Prestige is predicated upon Article 6 of its contract with Prestige, which provides:

To the fullest extent permitted by law, the Contractor [Prestige] shall indemnify, defend and hold harmless Diamond Point Excavation Corp. and its agents and employees, from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the work or providing of materials to the extent caused in whole or in part by negligent or wrongful acts or omissions of, or a breach of this agreement by, the contractor, a subcontractor, anyone directly or indirectly employed by them or anyone whose acts they are legally responsible. (Bracketed matter added).

It is clear that both Top 8 and Diamond are entitled to contractual indemnification under their respective contracts, Top 8 from Diamond for Diamonds' and/or Prestige's negligence, and Diamond from Prestige for Prestige's negligence. It is equally clear from the deposition testimony of the plaintiffs, Top 8 and Diamond that plaintiffs' injuries arose from the work contemplated in each contract and that Prestige was solely responsible for supervising, directing and controlling plaintiffs' work at the site. It is undisputed that Prestige failed to train plaintiffs or to provide them with safety devices and equipment. Given all of the foregoing coupled with Prestige's preclusion from

offering contradictory evidence, the court concludes there was no active negligence on the part of either Top 8 or Diamond.

The court rejects Diamond's contention that an issue of fact exists as to whether Top 8 was free of negligence in initiating safety measures and in supervising work at the site as required by the applicable contracts. In support of its claim that Top 8 was negligent, Diamond points to the contract between F&T Int'l (Flushing, New York) LLC and Top 8 Construction Corp., which requires Top 8 to supervise work at the site and provide that Top 8 is responsible for controlling all construction means, methods and techniques, as well as for providing safety measures. Diamond further cites its own contract with Top 8, which contemplates safety measures being initiated by Top 8 and does not require Diamond to assume Top 8's responsibilities under the prime contract. However, the methods of plaintiffs' work were determined exclusively by a Prestige employee and it cannot be inferred from Top 8's contractual duties alone that it had the requisite supervision and control. See *Reilly v. Newireen Associates*, 303 A.D.2d 214, 221, 756 N.Y.S.2d 192 (1<sup>st</sup> Dept.), *lv. den.* 100 N.Y.2d 508, 764 N.Y.S.2d 235 (2003); *Loiacono v. Lehrer McGovern Bovis, Inc.*, 270 A.D.2d 464, 465, 704 N.Y.S.2d 658 (2<sup>nd</sup> Dept., 2000).

Finally, Diamond relies upon the fact that only Top 8 had authority to stop the work being performed. However, the retention of the right to generally supervise and stop work, or to ensure compliance with safety regulations is insufficient to impose liability on an owner or general contractor. *Id.* Accordingly, Diamond fails to establish the existence of an issue of fact with respect to Top 8's negligence. For all of the

foregoing reasons, Top 8 and Diamond are entitled to summary judgment on their respective contractual indemnification claims.

### **Common Law Indemnification**

Both Top 8 and Diamond seek common law indemnification from Prestige *vis a vis* Gomez's claims. Workers' Compensation Law ("WCL") §11 provides that an employer, such as Prestige, cannot be held liable for contribution or indemnity to third persons based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such employee sustains a "grave injury". It is undisputed that the accident herein rendered Gomez a paraplegic, which WCL §11 expressly characterizes as a grave injury. Thus, WCL §11 does not bar Top 8's and Diamond's claims for common law indemnity as to Gomez.

A party seeking common law indemnification must prove that it neither controlled nor supervised the work site and that its own negligence did not contribute to the accident which caused the plaintiff's injuries. *Mangano v. American Stock Exchange, Inc.*, 234 A.D.2d 198, 651 N.Y.S.2d 494 1<sup>st</sup> Dept., 1996). It must also be shown that the party from whom indemnification is sought was either negligent or that such party supervised or controlled the work that gave rise to the injury. *Rodriguez v. Metropolitan Life Ins. Co.*, 234 A.D.2d 156, 651 N.Y.S.2d 475 (1<sup>st</sup> Dept., 1996). Further, a party whose liability is only vicarious based upon its standing as an owner or general contractor under the Labor Law<sup>5</sup> may recover under common law indemnification from

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<sup>5</sup> By decision and order dated June 25, 2007 (Acosta, J.), plaintiffs were granted partial summary judgment on liability pursuant to Labor Law §240(1) against Top 8.

the party whose negligence caused the plaintiff's injuries. *Buccini v. 1568 Broadway Associates*, 250 A.D.2d 466, 673 N.Y.S.2d 398 (1<sup>st</sup> Dept., 1998).

Here, as more fully set forth in the analysis of Top 8's and Diamond's contractual indemnity claims, neither Top 8 nor Diamond controlled or supervised the work site and their own negligence did not contribute to plaintiffs' accident. Rather, Prestige is the sole party who negligently controlled and supervised plaintiffs' work. Accordingly, Top 8's motion and Diamond's cross-motion for summary judgment on their claims for common law indemnity from Prestige with respect to Gomez's claims must be granted. Accordingly, it is hereby

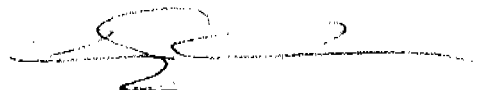
ORDERED that this court's short form order dated March 27, 2008 denying the motion and cross-motion herein as moot is vacated in its entirety; and it is further

ORDERED that Top 8's motion for summary judgment is granted in its entirety; and it is further

ORDERED that Diamond's cross-motion is granted in its entirety.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for movant and cross-movant.

Dated: New York, New York  
May 12, 2008

  
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Hon. Martin Shulman, J.S.C.