

**McGhee v HRH Constr. LLC**

2008 NY Slip Op 32615(U)

September 24, 2008

Supreme Court, New York County

Docket Number: 0116314/2004

Judge: Doris Ling-Cohan

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PRESENT: Hon. Doris Ling-Cohan  
Justice

PART 36

Index Number : 116314/2004  
**MCGHEE, VIVIAN M.**  
vs.  
**HRH CONSTRUCTION LLC**  
SEQUENCE NUMBER : 007  
SUMMARY JUDGEMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ... 1, 2  
Answering Affidavits - Exhibits \_\_\_\_\_ 3  
Replying Affidavits \_\_\_\_\_ 4

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion *by defendant/second third-party plaintiff for summary judgment is granted in accordance with the attached memorandum decision.*

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

**FILED**  
SEP 26 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**DORIS LING-COHAN**

Dated: 9/26/08

*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 36

-----x  
VIVIAN M. McGHEE,  
Plaintiff

-against-

HRH CONSTRUCTION LLC,  
CARLTON CONCRETE CONSTRUCTION CORP.,  
CARLTON CONCRETE CORPORATION,  
SENTRALE CONTRACTING CORPORATION,  
SENTRALE CONSTRUCTION CORPORATION,  
PERSICO CONTRACTING & TRUCKING, INC.,  
PERSICO INDUSTRIES, INC.,  
JOHN PUFF & SONS, INC., and  
VERGONA CRANE CO., INC.,  
JEFFERSON AT WHITE PLAINS, L.P.,  
JEFFERSON AT WHITE PLAINS LLC,  
WESTCHESTER COUNTY INDUSTRIAL  
DEVELOPMENT AGENCY,  
JPI APARTMENT DEVELOPMENT, L.P., and  
JPI APARTMENT CONSTRUCTION L.P.

Defendants.

-----x  
HRH CONSTRUCTION LLC,

Third-Party Plaintiffs,

-against-

CARLTON CONCRETE CORPORATION,  
Third-Party Defendants.

-----x  
VERGONA CRANE CO., INC.  
Second Third-Party  
Plaintiff,

-against-

CARLTON CONCRETE CORPORATION  
Second Third-Party  
Defendant.

-----x  
LING-COHAN, J.:

Index No.: 116314/04

Motion Seq. No.: 007

**FILED**  
SEP 26 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Third-Party Index  
No. 590676/06

Second Third-Party  
Index No. 590618/07

DECISION AND ORDER

Second Third-Party Plaintiff, Vergona Crane Co., Inc. (Vergona), moves for summary judgment pursuant to CPLR 3212 against Second Third-Party Defendant, Carlton Concrete Corporation (Carlton), based on contractual indemnification.

#### **BACKGROUND**

Plaintiff, an employee of Carlton, was injured when she slipped on some grease on the tracks of a crane leased from Vergona to Carlton. The crane was leased to Carlton three months prior to the accident in question. On January 22, 2008, pursuant to an earlier motion by Vergona against plaintiff, this court granted summary judgment in favor of Vergona, dismissing plaintiff's case against Vergona in its entirety. In that decision, this court found that Vergona was not liable to plaintiff either under Labor Law § 200 or under a common-law claim of negligence. Specifically, the court held that there was "no evidence that Vergona created or had actual or constructive notice of the unsafe condition that caused plaintiff's injuries." (Decision page 8). This decision is now the law of the case.

Vergona, in this motion, originally sought summary judgment against Carlton for indemnification under the lease agreement between the parties. In addition to the indemnification claim, Vergona sought to be granted summary judgment for breach of contract for Carlton's failure to provide insurance to cover any injury to Vergona arising out of the lease and operation of the

crane. Further, Vergona sought to have its attorneys' fees indemnified by Carlton, as provided in the lease agreement. The January 22, 2008 decision of this Court rendered all of Vergona's claims moot except for the motion for summary judgment with respect to the attorneys' fees.

In its opposition, filed prior to when the above-referenced decision was rendered and filed, Carlton stated that Vergona's summary judgment motion against plaintiff, if successful, would render the instant motion moot with respect to Vergona's indemnification and breach of contract arguments. However, Carlton does not discuss Vergona's motion with respect to attorneys' fees.

#### DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment

must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Vergona has submitted a copy of the lease agreement in which Carlton specifically agrees to indemnify Vergona, among other things, "to the fullest extent permitted by law and include all costs or expenses arising out of all claims specified herein, including all Court and/or arbitration costs, filing fees, attorneys' fees and costs of settlement." [Exh. I, Notice of Motion]. Carlton has argued against the validity of the indemnification clause, citing for support *Itri Brick & Concrete Corp. v Aetna Casualty & Surety Company* (89 NY2d 786 [1997]).

In *Itri*, the court found that an indemnification clause that purported to have a subcontractor indemnify the general contractor for all claims arising out of the contract, including those claims caused by the general contractor's own negligence, violated New York's General Obligations Law § S-322.1. However, this is not the case in the instant action for two reasons: first, the subject indemnification clause does not encompass Vergona's own negligence; and second, this court has already determined that Vergona was not negligent. As a consequence, the *Itri* decision is distinguishable from the case at bar.

Carlton, by contract, has agreed to indemnify Vergona for all court cost and attorneys' fees resulting from any claims arising out of the lease agreement. Therefore, Vergona's motion

for summary judgment against Carlton for attorneys' fees and court costs is granted. See *Newman v Regent Contracting Corp.*, 31 AD3d 1133, 1135 (4<sup>th</sup> Dept 2006).

#### CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Second Third-Party Plaintiff Vergona Crane Co., Inc.'s motion for summary judgment against Second Third-Party Defendant Carlton Concrete Corporation is granted to the extent of granting summary judgment in favor of Vergona Crane Co., Inc. with respect to indemnification for attorneys' fees and court costs, all other issues being deemed moot; and it is further

ORDERED that with respect to the issue of legal fees/costs, within 45 days of entry of this decision, order and judgment, Vergona Crane Co., Inc. is directed to submit an accounting of the fees/costs incurred, and Carlton Concrete Corp. is directed to review and, should Carlton Concrete Corp agree with such fees/costs, satisfy such fees/costs incurred by Vergona Crane Co., Inc, within 45 days from receipt of the accounting<sup>1</sup>, or provide specific reasons for its disagreement within such time (such objections shall be specifically directed to each item billed, with detailed reasons for the objection). If the parties are unable to agree on the amount of the fees/costs owed to


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<sup>1</sup> Settlement of such costs shall be filed with the Clerk of this court and a Copy provided to the Part Clerk (with a copy of this decision, order and judgment).

Vergona Crane Co., Inc., then within 90 days from entry of this order, either side may file the within order with the Clerk of the Judicial Support Office to arrange a calendar date for a reference to a Special Referee, and such issue is referred to a Special Referee, or another person designated by the parties to serve as referee, to hear and report with recommendation, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine this issue; failure to comply shall be deemed a waiver or default on this claim, as appropriate; and it is further

ORDERED that within 30 days of entry of this order, Vergona Crane Co., Inc. shall serve a copy upon all parties with notice of entry.

Dated: September 24, 2008

  
Hon. Doris Ling-Cohan, J.S.C.

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