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

PRESENT: CAROL EDMEAD J.S.C. PART 35

Index Number : 104990/2006

MURPHY, THOMAS

VS.

40 WEST 53RD ASSOCIATION LP

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this 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

The instant motion is decided in accordance with the annexed memorandum decision. It is hereby

ORDERED that the motion of third-party defendant Forest Electric Corp. for summary judgment is granted, and the third-party complaint is dismissed with costs and disbursements to defendant Forest Electric Corp. as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

FILED
OCT 24 2008
COUNTY CLERK'S OFFICE

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

Dated: 10/23/08

CAROL EDMEAD 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 35

----------X

THOMAS MURPHY and SUSAN MURPHY,

Plaintiffs,

-against-

Index No. 104990/06

40 WEST 53RD ASSOCIATES, LP, a/k/a 49 WEST 53RD PARTNERSHIP, THE 40 WEST 53RD CONDOMINIUM, TONY COPINI, CLIFFORD CHANCE, AMERICAN CRAFT MUSEUM a/k/a MUSEUM OF ARTS & DESIGN, CRAFT COUNCIL UNIT, LEHR CONSTRUCTION,

Defendants.

----------X

LEHR CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 590098/06

FOREST ELECTRIC CORP.,

Third-Party Defendant.

----------X

EDMEAD, J.:

In this action, plaintiffs seek to recover for personal injuries allegedly sustained by plaintiff Thomas Murphy on March 22, 2004 at 31 West 52nd Street, a/k/a 40 West 53rd Street, New York, New York (the site) when he tripped while exiting the men's restroom on the ninth floor on a section of tarp that had not been properly secured. Plaintiffs allege violations of Labor Law §§ 200, 240 (1) and 241 (6), as well as negligence on the part of defendants 40 West 53rd Associates, LP, a/k/a West 53rd Partnership, the 40 West 53rd Condominium (40 West 53rd), Tony Copini (Copini), Clifford Chance, the American Craft Museum a/k/a Museum of Arts & Design,

05

Craft Council Unit (American Craft) and defendant/third-party plaintiff Lehr Construction Corp. (Lehr). Lehr brought a third-party action against Forest Electric Corp. (Forest) for contractual indemnification, breach of contract to procure insurance, and common-law indemnification and contribution.

Third-party defendant Forest now moves, pursuant to CPLR 3212, for summary judgment dismissing and severing each third-party cause of action asserted against it by defendant/third-party plaintiff Lehr.

For the reasons set forth below, the motion for summary judgment is granted.

FACTS

Plaintiff's accident occurred on March 22, 2004 (Bill of Particulars, ¶ 2). Plaintiff was employed by Forest as a journeyman-electrician (Pl Dep., at 9, 488 [Aff. of Marc M. Mahoney, Esq., Exh G]). His duties included voice and data communication work (id. at 18).

On the date of the accident, plaintiff was testing data terminations on the ninth floor of the site (id. at 18). The corridor outside the data center where plaintiff was performing his duties was carpeted (id. at 30). The carpeting in the corridor was covered with a blue tarp, which was secured in certain locations by duct tape (id. at 31-34). At approximately 12:45 p.m., plaintiff left the data center to use the men's room on that floor (id. at 34-35). Plaintiff tripped on the tarp in the corridor as he exited the men's room when his right foot got caught under the tarp (id. at 36-39). Plaintiff did not fall to the ground (id. at 39). The section of tarp that plaintiff's right foot got caught under was not secured properly (id. at 49). This unsecured section of tarp was approximately half the length of the threshold of the men's room doorway (id. at 49). Plaintiff testified that the general contractor on the site on the date of his accident was

Lehr, and that general contractors usually employ laborers who are responsible for laying tarps as a part of their duties (id. at 126-127).

Edward Cini testified that he is employed as a superintendent for Lehr, and that he was a superintendent for four floors of the site, including the ninth floor (the floor of plaintiff's alleged incident), on March 22, 2004 (Cini Dep., at 6-8 [Mahoney Aff., Exh H]). The subject project was a gut renovation of an office building (id. at 11). Cini specifically testified that the tarp which caused plaintiff's accident was put down by laborers employed by Lehr:

> Q. You've seen the photographs that I gave to your lawyer this morning?
>
> A. Yes.
>
> Q. The tarp that is down there, was that placed to protect the rug that had been installed?
>
> A. Yes.
>
> Q. Was that tarp put down by the laborers employed by Lehr?
>
> A. Yes

(id. at 12-13).

Cini further testified that, ultimately, Lehr was responsible "for maintaining the tarp after it had been placed" (id. at 48-49). Cini testified that he supervised the laborers in the laying of the tarp (id. at 22). He also testified that, as the superintendent for the ninth floor, he was obligated to inspect the tarp to make sure it was properly secured (id. at 23). He also had the authority to tell the laborers working at the site to fix the tarp if it was improperly secured or loose (id. at 49-50). Cini testified that it would have been proper procedure at Lehr for an additional piece of tarp to be placed in a doorway leading from the corridor to the bathroom, and

secured to the bathroom tiles by duct tape (id. at 22, 29-30). Cini conceded that, if a tarp edge were not properly secured where people walk in and out of a room off of a hallway, this would create a tripping hazard (id. at 25-25).

Lloyd Lee, Forest's general foreman for the site, testified that Lehr hired Forest as a subcontractor to install data and phone cabling for floors two through fifteen of the job (Lee Dep., at 120 [Mahoney Aff., Exh I]). Lee was the senior Forest employee on the job and was present daily (id. at 16-17). Lee specifically testified that Forest did not lay the tarp, or secure the tarp to the carpet in the corridor at the site. It was also his belief that Lehr laborers laid the tarp (id. at 79-80).

The Purchase Order pursuant to which Lehr retained Forest contains the following indemnification clause:

> Subcontractor [Forest] shall hold harmless, indemnify and defend Contractor [Lehr], its directors, officers, employees, agents and others as requested by contractor from and against any and all claims, damages, liabilities, losses and expenses, including reasonable attorney's fees arising out of or occasioned by, or in any way connected with the work called for by this Purchase Order. This indemnity agreement shall survive the completion of this project

(Purchase Order, at 2 [Mahoney Aff., Exh K]).

The Purchase Order further obligated Forest to obtain and maintain comprehensive general liability insurance pursuant to which Lehr would be covered as an additional insured (id. at 2). As set forth in the affidavit of Donna Lucas (Mahoney Aff., Exh L), Forest honored its contractual obligation to procure additional insured coverage for Lehr, since it had in place a comprehensive general liability insurance policy from Continental Casualty

Company which contained a blanket additional endorsement pursuant to which Lehr would be entitled to coverage as an additional insured subject to the terms, conditions and exclusions in the policy (id., ¶¶ 2-4).

DISCUSSION

In support of its motion for summary judgment dismissing the third-party complaint, Forest argues that Lehr's third-party causes of action should be dismissed because Lehr's contractual indemnification claim is barred by General Obligations Law (GOL) § 5-322.1 as a result of Lehr's own negligence, Forest did not breach its contractual obligation to procure additional insurance coverage for Lehr, and the common-law claims asserted against Forest are barred by the Worker's Compensation Law.

Common-Law Claims

In its first and third causes of action, Lehr asserts claims for common-law indemnification and contribution against Forest. However, in its response to the motion for summary judgment, Lehr asserts that it "agrees to withdraw its common law claims against Forest" (Aff. of Kevin J. Kelly, Esq., ¶ 9). Accordingly, Forest's motion for summary judgment dismissing the first and third causes of action for common-law indemnification and contribution is granted.

Contractual Indemnity

Forest also moves for summary judgment dismissing Lehr's second cause of action for contractual indemnification on the ground that it is barred by GOL § 5-322.1 as a result of Lehr's own negligence. Forest's motion for summary judgment is granted.

By its plain terms, the indemnification provision at issue is triggered only in the

event that plaintiff's injuries arose out of, were occasioned by, or were "in any way connected with the work called for by this Purchase Order" (Purchase Order, at 2). Forest has established, as a matter of law, through the submission of the deposition testimony of Lehr's representative, that Lehr was solely responsible for the tarp that plaintiff tripped upon. Indeed, Lehr admits it was solely responsible for laying and maintaining the tarp, and that it created the condition that caused the accident by failing to properly do so. Thus, Cini testified that Lehr was responsible for laying the tarp which caused plaintiff to trip (Cini Dep., at 12-13). He also testified that Lehr was responsible for maintaining the tarp once it had been laid (id. at 48-49). Cini admitted that the tarp in the corridor should have been properly secured, and specifically stated that an additional piece of tarp should have been duct taped down in between the men's room and the corridor, creating a bridge-like walkway (id. at 22, 29-30). In opposition to the motion, Lehr presents no evidence that plaintiff's accident occurred in any way other than by tripping on the tarp, or that Forest was responsible for the tarp in any manner.

Accordingly, plaintiff's injuries, which arose as a result of plaintiff tripping on the tarp, could not have arisen out of, or resulted from, Forest's work under the subcontract. Thus, the indemnification provision was never even triggered, and Lehr is not entitled to contractual indemnification (see e.g. Brown v Two Exchange Plaza Partners, 76 NY2d 172 [1990] [in absence of evidence of actual negligence on the part of sub-subcontractor with respect to injury to its employee, as required under the indemnification agreement between the parties, indemnification clause in subcontract did not entitle contractor to indemnity from sub-subcontractor for its liability to the employee]; Agricola v City of New York, 52 AD3d 627 [2d Dept 2008] [record showed that, as a matter of law, plaintiff's injuries were not caused by

lessee's use of leased crane, and thus the indemnification clause in rental agreement between lessee and lessor of equipment was never triggered, and lessee was not required to defend or indemnify lessor]; Loiek v 1133 Fifth Ave. Corp., 46 AD3d 766 [2d Dept 2007] [subcontractor could not be held liable to premises general contractor under contractual indemnification theory for injuries sustained by its worker, given evidence that worker's injuries did not arise out of and result from performance of subcontractor's work under subcontract]).

Moreover, pursuant to GOL § 5-322.1 (1), any construction contract purporting to indemnify a party for its own negligence is void and unenforceable:

> A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, [or] repair ... of a building ... purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons ... 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

(see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786 [1997]; see e.g. Cavanaugh v 4518 Assocs., 9 AD3d 14 [1st Dept 2004] [general contractor's negligence renders the indemnification provision of its contract with the subcontractor void]). Consequently, a party to a contract who is a beneficiary of an indemnification provision must prove itself to be free of negligence (see Cuevas v City of New York, 32 AD3d 372, 374 [1st Dept 2006] [cable company "cannot enforce the contractual indemnification provision against [installer] unless it demonstrates its own freedom from negligence"]). Thus, the contractual indemnification provision at issue here is unenforceable if Lehr itself was negligent.

Here, the evidence submitted by Forest conclusively establishes that Lehr, which

was the sole party responsible for maintaining the tarp which caused plaintiff's accident, was not free from negligence. In opposition to the motion, Lehr has failed to establish that it was not negligent. Accordingly, "[s]ince the sole potential basis for liability on [Lehr's] part is its own negligence," the contractual indemnification clause "is unenforceable" pursuant to GOL § 5-322.1 (Williams v 7-31 Limited Partnership, ___ AD3d ___, 2008 WL 4133380, *1 [1st Dept 2008]; see e.g. Loiek v 1133 Fifth Ave. Corp., 46 AD3d 766, supra [subcontractor could not be held liable to premises general contractor under contractual indemnification theory for injuries sustained by its worker, given evidence which conclusively established that general contractor, which affirmatively undertook responsibility for safeguarding opening in floor through which worker fell, was not free from negligence]; Niagara Frontier Transp. Auth. v City of Buffalo Sewer Auth., 1 AD3d 893 [4th Dept 2003] [city sewer authority failed to establish as a matter of law that it was not negligent with respect to sewer system work, and authority was thus not entitled to contractual indemnification by company that excavated and relocated sewer lines on light rail transit system developer's claim for damages to transit system]).

In opposition to the motion, Lehr asserts that its contractual indemnification claim against Forest should survive, because there are issues of fact concerning whether it was negligent and/or actively violated the Labor Law. Lehr's opposition, however, fails to raise any triable issues of fact.

Lehr has not submitted any evidence suggesting that Forest, or any entity other than Lehr, was in any way responsible for the tarp, or caused plaintiff's accident. Therefore, there are only two possible outcomes. Either plaintiff will establish that Lehr's laying and maintaining of the tarp was negligent, and that its negligence in that regard violated Labor Law §§ 200 and 241

(6), or Lehr will avoid liability because it was not negligent in laying and maintaining the tarp. In the first scenario, Lehr is not entitled to contractual indemnification from Forest because the accident was caused by Lehr's affirmative negligence (see GOL § 5-322.1). In the second, there is nothing for which to indemnify Lehr, and its contractual indemnification claim against Forest is moot.[1] Either way, there can be no contractual indemnification from Forest to Lehr.

Lehr also argues that its contractual indemnification claim should survive because, as the general contractor, it is possible that it can be held vicariously liable pursuant to Labor Law § 241 (6). This argument equally lacks merit. Although Lehr does not indicate under which section of the Industrial Code its potential Labor Law § 241 (6) liability is predicated, the only valid Labor Law § 241 (6) claim would be that the condition of the tarp which Lehr laid and maintained was in violation of Industrial Code § 23-1.7 (e) (1), which provides that "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping." Obviously, any violation of that provision could only have resulted from Lehr's affirmative negligence in laying and maintaining the tarp that allegedly tripped plaintiff. Thus, if a jury finds that the condition of the tarp violated Industrial Code § 23-1.7 (e) (1), Lehr's indemnification claim would be barred by its own negligence, pursuant to GOL § 5-322.1. Conversely, if Lehr's laying and maintaining of the tarp did not violate Industrial Code § 23-1.7 (e) (1), Lehr would not be liable under Labor Law § 241 (6), and there would be no need to indemnify it.

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[1] There is no valid claim for reimbursement of Lehr's defense costs because Forest's insurer has agreed, subject to a reservation of rights, to cover Lehr's defense and indemnification as an additional insured under Forest's insurance policy (see Mahoney Aff., Exh N).

Finally, Lehr argues that its contractual indemnification claims against Forest should survive because Forest may have violated Labor Law § 200, which is simply a codification of an employer's common-law duty to maintain a safe place to work at a construction project (Comes v New York State Elec. & Gas Corp., 82 NY2d 876 [1993]). However, since Lehr has conceded that there are no valid common-law claims against Forest, Lehr cannot now claim that Forest violated its common-law duty as contained in Labor Law § 200.

Accordingly, Lehr's claims for contractual indemnification are dismissed.

Breach of Contract to Procure Insurance

In its fourth cause of action, Lehr alleges that Forest failed to procure and maintain insurance naming Lehr as an additional named insured. However, in support of the motion for summary judgment, Forest presents evidence that it honored its contractual obligation to procure additional insurance coverage for Lehr since it had in place a comprehensive general liability insurance policy from Continental Casualty Company which contained a blanket additional insured endorsement pursuant to which Lehr would be entitled to coverage as an additional insured, subject to the terms, conditions and exclusions of the policy (see Lucas Aff., ¶¶ 2-3; Exh A and B). Since Forest procured primary comprehensive liability insurance in satisfaction of its obligation to Lehr, Lehr's claim for breach of contract to procure insurance against Forest must be dismissed (see Martinez v Tishman Constr. Corp., 227 AD2d 298 [1st Dept 1996], lv denied 92 NY2d 807 [1998] [subcontractor not liable to general contractor for breach of insurance procurement provision where insurance procured]; Garcia v Great Atlantic and Pacific Tea Co., Inc., 231 AD2d 401 [1st Dept 1996] [contractor's duty to procure insurance met by insurance policy with automatic additional insured endorsement]).

Lehr has not offered any evidence to contradict the Lucas affidavit which establishes that Forest procured the required additional insurance coverage. Therefore, Lehr is not entitled to recover against Forest for breach of contract to procure insurance, and the fourth cause of action must be dismissed.

The court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED that the motion of third-party defendant Forest Electric Corp. for summary judgment is granted, and the third-party complaint is dismissed with costs and disbursements to defendant Forest Electric Corp. as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 10/23/08

ENTER:

J.S.C.

CAROL EDMEAD
J.S.C.