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SCANNED ON 1/24/2008

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

PRESENT: Hon Joan A. Madden PART 11

Justice

Index Number : 110630/2005

ARTALE, PAUL J.

VS.

AMBASSADOR CONSTRUCTION

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE ~~7-21-08~~ 7-21-08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on 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 is decided in accordance with the annexed Memorandum Decision + Order.

FILED
NOV 24 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: November 20, 2008

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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PAUL J. ARTALE, Index No.: 110630/05

Plaintiffs,

-against-

AMBASSADOR CONSTRUCTION COMPANY, and SL GREEN REALTY CORP.,

Defendants.

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AMBASSADOR CONSTRUCTION CO, INC., Third-Party Index No.: 590083/06

Third-Party Plaintiffs,

-against-

LEVEST ELECTRIC CORP.,

Third-Party Defendant.

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SL GREEN REALTY CORP., Third-Party Index No.: 590083/06

Second Third-Party Plaintiff,

-against-

EQUANT, INC., LEVEST ELECTRIC CORP. AND MINTZ & GOLD, LLP,

Second Third-Party Defendants.

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JOAN A. MADDEN, J.

In this personal injury action asserting claims under Labor Law §§ 200 and 241(6) and for common law negligence, defendant-third-party plaintiff Ambassador Construction Company, Inc. ("Ambassador") moves for an order granting it conditional summary judgment on its third party claims for contractual and common law indemnification against defendant/third party defendant, Levest Electric Corp. ("Levest") (motion seq. 004). Defendant/second third-party plaintiff SL

Green Realty Corp. ("SL Green") separately moves for an order granting it conditional summary judgment on its claim for contractual indemnification against Levest (motion seq. 005). Second-third party defendant Equant, Inc.("Equant") moves for summary judgment on its cross-claims for indemnification against Ambassador and Levest (motion seq. no.006).[1] Levest opposes all three motions, and Ambassador opposes the motion by Equant.

Background

Plaintiff alleges that he was injured on December 1, 2004 at about 11:00 am, while he was working at a project involving the renovation of office space on the 10th floor of 470 Park Avenue, New York, NY ("the Building"). SL Green owns the Building, and leased the 10th floor space to Equant, which decided to renovate the space and to sublet it to Mintz & Gold, LLP.[2] Equant hired Ambassador as the general contractor for the project, pursuant to a contract dated May 6, 2004 (hereinafter the "Ambassador Contract").

Section 3.18.1 of the Ambassador Contract contains the following indemnification language:

> To the fullest extent permitted by law... Contractor [i.e. Ambassador] shall indemnify and hold harmless the Owner [i.e. Equant], Architect....and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work[3], provided that such claim, damage, loss or expenses is attributable to bodily injury...but only to the

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[1]Motion seq. nos. 004, 005 and 006 are consolidated for disposition.

[2]The claims against Mintz & Gold have been discontinued.

[3]Section 1.1.3 defines the term "Work" to mean "the construction and services required of the Contract Documents, whether completed or partially completed, and includes all labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or part of the project."

> extent caused by the negligent acts or omissions of the Contractor, or a Subcontractor, 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. Such obligations shall not be construed to negate, abridge or reduce other rights or obligations of indemnity which would otherwise exist as to a party described in Section 3.18.

(emphasis supplied).

Ambassador hired the subcontractors for the project, including Levest, as the electrical subcontractor. The purchase order for Levest's work on the project contains an indemnification clause, which provides that:

> To the fullest extent permitted by law, the Subcontractor [i.e. Levest] shall indemnify and hold harmless the Owner [S.L. Green and Equant],[4] and Contractor [Ambassador]...and their agents and employees from and against all claims, damages, losses, and expenses, including, but not limited to attorney's fees, arising out of or resulting from the performance of the Work, provided that any such claims, damages, losses or expenses are (1) attributable to bodily injury, ...and (2) caused in whole or in part by any negligent act or omission of the Subcontractor, any sub-subcontractor, or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder....
>
> (emphasis supplied).

According to plaintiff, who was employed by Levest, he was injured when he slipped and fell on a wet staircase in the basement of the Building while carrying an eight-foot light fixture. Plaintiff testified that he was instructed by a Levest journeyman named "Hanah" to remove light fixtures from the basement. In the basement, plaintiff observed water on the floor varying from

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[4]The purchase order provides that "all references to 'Owner' or 'Customer' of the Contractor shall mean the owner of the realty, a lessee, tenant or sub-tenant thereof, individually, jointly, or jointly and severally."

one to three inches deep, and described the steps as "covered with water." Plaintiff further testified that he was told by Hanah that Ambassador had instructed him to have the fixtures removed, and that to the best of his recollection the person from Ambassador told Hanah to remove the materials so that they would not be ruined as a result of the leaking pipe.

Levest's supervisor on the project was Kenneth Garafalo ("Garafalo"). Garafalo, who was at the job site on the date of the accident, testified that Levest's employees were bringing up light fixtures from the basement, and that he believed the fixtures were purchased by Ambassador. According to Garafalo, he sent workers down to the basement and they told him about the water. He then went down the stairs and saw the water on one side of the basement steps but not on the other side, and he instructed the workers to use the dry side of the basement. When asked about his assessment of the water condition of the basement, Garafalo testified that "I didn't see it as much of a problem," and that "it's like walking in the rain." (Garafalo Dep., at 84).

Ambassador's project manager Richard Palladino ("Palladino") testified that, as the general contractor on the project, Ambassador was responsible for work site safety and that Ambassador would respond to a leak on the job site by having it cleaned up. He also testified that before the accident, he had been in the basement one time, that he did not know that materials for the project were stored there, and that he had never seen water on the basement floor. Palladino also testified that he was not on the job site when the accident occurred, and the only Ambassador employee at the site at the time of the accident was a laborer without any authority to supervise the work. In his affidavit, Palladino states that no one from Ambassador instructed plaintiff and/or his co-workers to remove light fixtures from the basement.

The day after the accident Palladino completed an incident report based on information he

received from Levest. It stated that plaintiff was injured "[w]hile removing light fixtures that were stored in the basement of the building, there was a huge water leak from the building drain lines causing water to pour onto the floor. [Plaintiff] slipped and fell causing pain around the side of his chest. I was not present to witness this incident...."

SL Green's property manager, Paul Palgian ("Palgian"), testified that his employer owned and managed the Building, and that its project manager was responsible for approving construction performed by the tenant. Palgian also testified that the Building's superintendent was responsible for limiting the effect of a water leak in the Building

Equant's real estate and facilities manager, Kathleen Lynch, testified that Equant did not direct, supervise or control the work performed by Ambassador or its subcontractors, and that Equant did not make any arrangements to obtain materials from the Buidling's basement.

Ambassador, SL Green and Equant each seek summary judgment on their claims for contractual indemnity against Levest based on the indemnification provision in the purchase order, and Ambassador also seeks summary judgment on its claim for common law indemnification against Levest.

In opposition, Levest asserts that the indemnification provision in the purchase order is void under General Obligations Law section 5-322.1. since it permits indemnification "regardless of whether or not [such claim, damage, loss, or expense] is caused in part by a party indemnified." Moreover, Levest asserts that the motions are premature as there are triable issues of fact regarding whether the negligence of Ambassador and/or SL Green caused or contributed to plaintiff's injuries. Levest also argues that Ambassador is precluded from seeking common law indemnification as plaintiff did not suffer a "grave injury" as defined by Workers' Compensation Law § 11.

Equant also moves for summary judgment on its claim for contractual indemnification against Ambassador based on the indemnification clause in the Ambassador Contract. In opposition, Ambassador argues that Equant is not entitled to contractual indemnification as there is no evidence that it was actively negligent, and that all indemnification should be paid by Levest, as the culpable party. In reply, Equant points out that the indemnification provision at issue requires Ambassador to indemnify Equant not only for its own negligent acts but for those of its subcontractors, which would include Levest.

Discussion

General Obligations Law §5-322.1 provides, in part, that:

> A covenant, promise, agreement or understanding in or in connection with or collateral to a contract or agreement relative to the . . . repair or maintenance of a building, structure, appurtenances and appliances . . . 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 . ...

Under this section of the General Obligations Law, an agreement to indemnify in connection with a construction contract is void and unenforceable to the extent such agreement contemplates full indemnification of a party for its own negligence. Itri Brick & Concrete v Aetna Cas. & Sur. Co., 89 NY2d 786, 795 (1997) (invalidating indemnification provisions which provided for full indemnification of the general contractors for their own negligence and contained no language limiting the subcontractors' obligations to that permitted by law or to the subcontractor's negligence). At the same time, however, an indemnification provision which contemplates partial indemnification of a loss to the extent that the party to be indemnified was

not negligent, does not violate the General Obligations Law. See Dutton v Charles Pankow Builders, Ltd., 296 AD2d 321 (1st Dept 2002), appeal denied 99 NY2d 511 (2003); Murphy v. Columbia University, 4 AD3d 200 (1st Dept. 2004).

In support of its position that the indemnification provision in the purchase order provides for full and not partial indemnification and is therefore void under the General Obligations law, Levest relies primarily on the holding in Cavanaugh v. 4518 Associates, 9 AD3d 14 (1st Dept 2004). The indemnification agreement in Cavanaugh provided for indemnification of the general contractor "to the fullest extent permitted by law" for claims arising out of the subcontractor's work and caused "in whole or in part, by any negligent act or omission of the subcontractor... regardless of whether or not [such claim] is caused in part by a party indemnified hereunder." At trial, the jury found the general contractor 70% at fault and plaintiff's employer 30% at fault. Following the verdict, the trial court granted the general contractor's motion for contractual indemnification for the full amount of the jury award, based on an indemnification provision in the contract between the general contractor and the subcontractor, and the subcontractor's agreement to procure insurance.

The First Department held that the grant of full indemnification to the general contractor violated § 5-322.1 of the General Obligations Law which prohibits "'indemnity agreements in which owners or contractors [seek] to pass along the risks for their *own negligent actions* to other contractors or subcontractors, even if the accident was caused only in part by the owner's or contractor's negligence'." Cavanaugh v. 4518 Associates, 9 AD3d at 20, quoting, Brown v. Two Exchange Partners, 76 NY2d 172, 180 (1990). It also held that the jury's finding of negligence by the general contractor "rendered the indemnification provision of its contract with [the subcontractor] void." Id. at 19.

Contrary to Levest's position, Cavanaugh supra, is not dispositive here. Significantly, in Cavanaugh supra, there was a jury finding that the party to be indemnified was negligent and despite this finding the court directed that the negligent party obtain full indemnification. In this case, the record raises a triable issue of fact as to whether Ambassador or SL Green were negligent. Specifically, with respect to Ambassador, there is evidence from which it could be inferred that Ambassador knew about the leak and directed Levest to have its employees, including plaintiff, remove the light fixtures from the basement. As for SL Green, in light of the evidence suggesting that the water condition was severe, and that its superintendent was responsible for remedying leaks, a jury could find that SL Green was negligent in failing to prevent or alleviate the water condition in the basement.

Under these circumstances, it cannot be said at this juncture that the indemnification provision in the purchase agreement is void under General Obligations Law § 5-322.1. See e.g., Itri Brick & Concrete v Aetna Cas. & Sur. Co., 89 NY2d at 795, n.5 (noting that without a finding of negligence on the part of a general contractor an indemnification agreement "would not run afoul of the proscriptions of the General Obligations Law § 5-322.1"); Brown v. Two Exchange Partners, 76 NY2d at 180-181 (where there is no finding of fault on the part of an indemnitee "neither the wording nor the intent of [General Obligations Law § 5-322.1] is violated by allocating responsibility ...through an indemnification provision"). Instead, whether the indemnification provision is void must be determined after trial.

Likewise, as there are issues of fact as to whether Ambassador and/or SL Green were negligent it would be premature to grant either of them conditional summary judgment on their claims for contractual indemnification. See e.g., Cuevas v. City of New York, 32 AD3d 372, 374 (1st Dept 2006)(holding that conditional grant of summary judgment on claims for contractual indemnification was premature where there were triable issues of fact regarding whether parties

to be indemnified either improperly maintained or installed the vault on which plaintiff fell); Gomez v National Center for Disability Services, Inc., 306 AD2d 103 (1st Dept 2003)(holding that the resolution of the contractual indemnification claim was premature where there were issues of fact as to negligence of the party to be indemnified under the relevant indemnification provision).

In contrast, as there is no evidence that Equant's negligence resulted in plaintiff's injuries, Equant is entitled to a conditional grant of summary judgment on its claim for contractual indemnification against Levest, since any liability on its part would be purely statutory based on a violation of Labor Law § 241(6). See Brown v. Two Exchange Partners, 76 NY2d at 180-181; see also, Colozzo v. National Center Foundation, Inc., 30 AD3d 251 (1st Dept 2006)(granting conditional summary judgment to indemnitee where there is no evidence of negligent on the part of the indemnitee).

Next, unlike claims arising out of a written agreement for contribution or indemnification (See Worker's Compensation Law § 11(2)), an employer, like Levest, cannot be held liable on claims for common law indemnification (or contribution) unless it is shown that the plaintiff suffered "a grave injury." See Worker's Compensation Law § 11. As Ambassador does not claim the injuries suffered by plaintiff constitute a "grave injury" as defined under Workers' Compensation Law section 11, Ambassador's motion for summary judgment on its claim for common law indemnification must be denied, and the claim is dismissed.

The remaining issue concerns Equant's motion for summary judgment on its claim against Ambassador based on the indemnification provision in the Ambassador Contract. As there is no evidence that Equant is liable to plaintiff for any negligence, the indemnification provision in the Ambassador Contract cannot be said to be void under General Obligations Law § 5-322.1. See Mahoney v. Turner Construction Co., 37 AD3d 377, 380 (1st Dept 2007). Furthermore, as the indemnification provision provides for indemnification predicated not only on Ambassador's negligence but that of its subcontractor, Levest, Ambassador's argument that only Levest was

actively negligent is unavailing.

Accordingly, that Equant is entitled to conditional grant of summary judgment on its cross claim against Ambassador for contractual indemnification.[5]

Conclusion

In view of the above, it is

ORDERED that the Ambassador Construction Company, Inc's motion for an order granting it conditional summary judgment on its third party claims for contractual and common law indemnification against defendant/third party defendant, Levest Electric Corp. (motion seq. 004) is denied, and the claim for common law indemnification is dismissed; and it is further

ORDERED that the motion by SL Green Realty Corp. for an order granting it conditional summary judgment on its second third party claim for contractual indemnification against Levest Electric Corp. (motion seq. 005) is denied; and it is further

ORDERED that the motion by Equant, Inc. for an order of summary judgment on its cross claims for indemnification against Levest Electric Corp. (motion seq. no.006) is granted on condition that Levest Electric Corp. is found negligent; and it is further

ORDERED that the motion by Equant, Inc. for an order of summary judgment on its cross claims for indemnification against Ambassador Construction Company, Inc.(motion seq. no.006) is granted on condition that Ambassador Construction Company, Inc and/or Levest Electric Corp. are found negligent.

DATED: November 20,2008

FILED
NOV 24 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. JOAN A. MADDEN
J.S.C.

[5]The court notes that the pleadings submitted on these motions do not include Equant's claims against Ambassador.