

**Solow Mgt. Corp. v Rick's Painting &
Decorating Corp.**

2009 NY Slip Op 30957(U)

April 21, 2009

Supreme Court, New York County

Docket Number: 401543/08

Judge: Marcy S. Friedman

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

PRESENT: FRIEDMAN
MARCY S. FRIEDMAN, J.S.C. Justice

PART 57

SOLOW MANAGEMENT CORP,
ET AL.

INDEX NO. 401543/08

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

RICK'S PAINTING + DECORATING CORP.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 1A, B, 2</u>
Answering Affidavits — Exhibits	<u>3, 4</u>
Replying Affidavits	<u>5</u>

Replying Affidavits _____

Cross-Motion: Yes

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT
 This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To please entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

Dated: 4-21-09

Marcy Friedman
MARCY S. FRIEDMAN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

UNFILED JUDGMENT
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PRESENT: Hon. Marcy S. Friedman, JSC

SOLOW MANAGEMENT CORP. and TAG 380
LLC,

Index No.: 401543/08

Plaintiffs,

- against -

DECISION/ORDER

RICK'S PAINTING & DECORATING CORP.,

Defendant.

x

In this declaratory judgment action, plaintiffs Solow Management Corp. (“Solow”) and TAG 380 LLC (“Tag”) move for summary judgment on their claim against defendant Rick’s Painting & Decorating Corp. (“Rick’s Painting”) for contractual indemnification in an underlying action entitled Mennis v Commet 380, Inc. (2008 NY Slip Op 30553|U) [2008] [“underlying action”].¹ Rick’s Painting cross-moves for summary judgment dismissing plaintiffs’ claims against it.²

The relevant facts are largely undisputed. The underlying accident occurred on May 18, 2005 at 380 Madison Avenue in Manhattan. The plaintiff, Marcos Mennis, was injured when he fell from a ladder leading from the 23rd floor of the building to its roof. Mennis claimed that he

¹Plaintiffs also moved for a stay of the underlying action pending the outcome of the instant action. Pursuant to a stipulation filed on March 5, 2005, Mennis discontinued the underlying action against plaintiffs. The branch of plaintiffs’ motion for the stay is therefore moot.

²In opposition to defendant’s cross-motion, plaintiffs withdrew their common law indemnification claims. (See Ps.’ Opp. to Rick’s Painting’s Cross-Motion, ¶16.)

slipped off of the ladder because it was wet from water leaking from cooler pumps located on the roof. At the time of the accident, Mennis worked for defendant as a painter. Defendant was hired by the building's property manager Cushman & Wakefield, Inc. ("Cushman & Wakefield") to remove rust from and paint roof structural supports. Solow was the janitorial service company for the building, Tag was the net lessee, and Commet 380, Inc. ("Commet") was the owner.

Plaintiffs contend that defendant is obligated to indemnify plaintiffs pursuant to a hold harmless provision contained on the back of the purchase order for the work that Cushman & Wakefield faxed to defendant and that defendant signed. Defendant argues that the purchase order that it received did not contain a back page with a hold harmless clause. Defendant further claims that the hold harmless provision violates General Obligations Law ("GOL") 5-322.1 in that it provides for indemnification for plaintiffs' own negligence.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

As a threshold matter, the court finds that defendant is bound by the terms of the indemnification clause contained in the purchase order. It is well settled that "[a] party that signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it."

(Guerra v Astoria Generating Co., L.P., 8 AD3d 617, 618 [2d Dept 2004].) In Guerra, the court held that defendant's excuse "that it never received the General Conditions" section of the contract that contained the indemnification clause, even though it signed other documents which referred to the General Conditions, was insufficient to defeat plaintiff's motion for summary judgment. (Id. See also Roger's Fence, Inc. v Abele Tractor and Equipment Co., Inc., 26 AD3d 788, 789 [4th Dept 2006] [holding plaintiff bound to the terms on the reverse side of a faxed contract it claimed not to have received where "[t]he record establishe[d] that plaintiff's vice-president signed [the] agreement that stated . . . directly above the signature line that the conditions of sale and the warranty terms were on the reverse side of the agreement"].)

On this record, plaintiffs make a prima facie showing that the hold harmless clause in the purchase order is binding on defendant. The faxed purchase order states on the first page that it is "[s]ubject to terms and conditions below and on reverse side" and that the "[c]onditions above and on reverse side constitute a part of this order." As defendant concedes, this page was signed by its owner and president Joseph Ricci directly below the above language. (See Defendant's Cross-Motion, Ex. B-1.) The purchase order on its face thus conclusively shows that defendant agreed to be bound by the terms of the hold harmless clause. On the above authority, the statements of Mr. Ricci and defendant's office manager that they never received the additional page fail to raise a triable issue of fact as to the inclusion of the hold harmless clause in the parties' contract.

The court accordingly turns to the branch of the parties' motions concerning the validity of the hold harmless clause. GOL 5-322.1(1) states in pertinent part:

A covenant, promise, agreement or understanding in, or in connection with or

collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, 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. . . . This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

It is settled that GOL 5-322.1(1) “permit[s] a partially negligent [party] to seek contractual indemnification from [a] subcontractor so long as the indemnification provision does not purport to indemnify the [party] for its own negligence.” (Brooks v Judlau Contr., Inc., 11 NY3d 204, 207 [2008].) An indemnification provision that would otherwise “run [sic] afoul of General Obligations Law § 5-322.1(1)” may be valid if it contains language that limits liability to the extent permitted by law. (Compare Linarello v City of New York, 6 AD3d 192, 193 [1st Dept 2004], with Dutton v Pankow Bldrs., Ltd., 296 AD2d 321, 322 [1st Dept 2002] lv denied 99 NY2d 511 [2003].) Moreover, even where an indemnification provision is found to violate GOL 5-322.1(1), it is enforceable if the party seeking indemnity is found to be free from negligence. (Brown v Two Exch. Plaza Partners, 76 NY2d 172, 179 [1990]; Itri Brick & Concrete Corp. v Actna Cas. & Sur. Co., 89 NY2d 786 [1997].) The party seeking to enforce the indemnity clause “as the proponent of the summary judgment motion . . . [must] meet its prima facie burden of demonstrating that no questions of fact exist with respect to its negligence.” (Potter v M.A. Bongiovanni, Inc., 271 AD2d 918, 919 [3rd Dept 2000].)

Here, the hold harmless provision in the purchase order provides for indemnification of plaintiffs for any claims arising out of the work performed except claims resulting from

plaintiffs' sole negligence.³ By its terms the provision requires defendant to indemnify plaintiffs even for their own negligence. As the provision fails to include language limiting such indemnity to the extent permitted by law, it violates GOL 5-322.1(1).

Plaintiffs also fail to make a prima facie showing that they were not negligent. First, contrary to plaintiffs' contention and, as held above, plaintiffs have the burden of proving *freedom from negligence in order to recover under the contractual indemnification provision at issue*. However, plaintiffs do not submit any evidence to satisfy this burden. Their bare assertions that they did not supervise or direct Mennis' work are insufficient to raise an issue of fact as to their negligence. Therefore, plaintiffs' motion for summary judgment must be denied.

In contrast, defendant makes a prima facie showing in support of its cross-motion that plaintiff Solow was negligent. On Mennis' motion in the underlying action for summary judgment on his Labor Law §240(1) claim, this court determined, as affirmed by the Appellate Division First Department, that Mennis slipped off of the ladder because it was wet from water that had leaked onto it from the cooler pumps on the roof. (Mennis v Commet 380, Inc., 2008 NY Slip Op 30553[U] [2008] affd as mod 54 AD3d 641 [1st Dept 2008].) In support of the instant motion, defendant cites Mennis' deposition testimony that the ladder was wet all the time, and that he repeatedly complained to the building engineer about the ladder being wet. (Mennis Dep. at 88-89.) Defendant also relies on the testimony of Santos Rodriguez, a cleaning

³ The hold-harmless provision states in pertinent part that "[Rick's Painting] agrees to perform work in a safe and proper manner and save Purchaser [Cushman & Wakefield], its agents..., as well as the Owner . . . of the building where the work is to be performed or materials used, harmless against any and all (1) claims and liability for injury to or death of any person . . . by reason of the work hereunder (except that resulting from the sole negligence of [Cushman & Wakefield]. . . ." (Aff. of Raymond Cuddy [Building Manager] in Support of P.'s Motion, Ex. B, ¶ 15.)

supervisor for Solow at the building, that it was the responsibility of the engineers to clean water leakage on the roof near the cooling system. (Rodriguez Dep. at 56.) Rodriguez also testified without contradiction that the engineers were employed by Solow. (*Id.* at 10.) On this record, defendant makes a prima facie showing that Solow was in control of the area of the work site where Mennis' accident occurred, and that it had notice of the water condition but did not correct it. In opposition, Solow fails to raise a triable issue of fact as to its claim that it was not negligent. The contractual indemnification provision as it pertains to Solow is therefore unenforceable.

The court reaches a different conclusion with respect to defendant's motion against Tag. In claiming that Tag was negligent, defendant cites the Appellate Division opinion in the underlying action, stating that Mennis "repeatedly notified defendants [plaintiffs here] of this [water] condition prior to his fall." (*Mennis*, 54 AD3d at 642.) However, this finding is dictum as notice is not required for a finding of liability under Labor Law §240(1). (See *Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 340 [2008].) Moreover, defendant does not submit any evidence that it gave notice to Tag, as opposed to Solow, of the water leaks, or that Tag, as opposed to Solow, employed the engineers. Defendant also fails to produce evidence that Tag otherwise had the requisite control over the work area where the defective condition existed to support a finding of negligence on Tag's part. (Compare *Zaher v Shopwell, Inc.*, 18 AD3d 339 [1st Dept 2005].) Therefore, defendant fails to make a prima facie showing of entitlement to judgment dismissing the contractual indemnification provision as unenforceable as against Tag.

Plaintiffs also, for the first time on the reply, appear to seek summary judgment on a claim for indemnification under an insurance policy that was procured by defendant on plaintiffs'

behalf. New legal arguments are not properly entertained on a reply. (See Ritt by Ritt v Lenox Hill Hosp., 182 AD2d 560 [1st Dept 1992].) In addition, plaintiffs have not pleaded a cause of action in the complaint based on an insurance policy. Nor have plaintiffs joined the insurer as a party.

Accordingly, it is hereby ORDERED that the motion of plaintiffs Solow Management Corp. and TAG 380 LLC for summary judgment is denied in its entirety; and it is further

ORDERED that the cross-motion of defendant Rick's Painting & Decorating Corp. is granted to the extent of dismissing the complaint of plaintiff Solow Management Corp. as against said defendant; and the Clerk shall enter judgment accordingly; and it is further

ORDERED and ADJUDGED that Rick's Painting & Decorating Corp. has no obligation indemnify plaintiff Solow Management Corp. in the underlying action entitled Mennis v Commet 380, Inc. (2008 NY Slip Op 30553[U] [2008]); and it is further

ORDERED that the remaining claims of plaintiff TAG 380 LLC are severed and shall continue; and it is further

ORDERED that the parties shall appear in Part 57 of this Court on May 7, 2009 at 2:30 p.m. for a status conference.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York
April 21, 2009



MARCY FRIEDMAN, J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).