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

PRESENT: MARCY S. FRIEDMAN PART 57

Index Number : 112249/2006
W&W GLASS SYSTEMS, INC.
VS.
METAL SALES CO., INC.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 112249/06
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Supplemental Memo of Law Suppl, Suppl 2

Upon the foregoing papers, it is ordered that this motion is

FILED
OCT 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

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

Dated: 10-2-09

MARCY S. FRIEDMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

PRESENT: Hon. Marcy S. Friedman, JSC

W&W GLASS SYSTEMS, INC., THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITAL CORP., DORMITORY AUTHORITY OF THE STATE OF NEW YORK, and GILBANE/TDX, Joint Venture,

Plaintiffs,

- against -

METAL SALES CO. INC.,

Defendant.

Index No.: 112249/06

DECISION/ORDER

This is an action by plaintiffs W&W Glass Systems, Inc. ("W&W"), the City of New York ("City"), the New York City Health and Hospital Corp. ("HHC"), Dormitory Authority of the State of New York ("Dormitory Authority"), and Gilbane/TDX, joint venture ("Gilbane") (collectively referred to without W&W as "co-plaintiffs") against Metal Sales Co., Inc. ("Metal Sales") for contractual and common law indemnification, contribution, and breach of a contract arising from an underlying action entitled Buckley v City of New York, et al., (Supreme Court, New York County, Index No. 117843/05 ["underlying action"].) Metal Sales moves for summary judgment dismissing plaintiffs' complaint.

The relevant facts are largely undisputed. The underlying accident occurred on August 9, 2005 at a construction site at Bellevue Hospital in Manhattan. The plaintiff, James Buckley, claims he was injured when an outrigger fell on top of him while window panels were being

hoisted. At the time of the accident, Buckley worked for Metal Sales which was retained by W&W to install a curtain wall for the construction of a forensic biology lab at the Hospital. The City and HHC own the subject premises. Dormitory Authority was the construction manager for the project and Gilbane was the general contractor which hired W&W.

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 holds that plaintiffs' common law indemnification and contribution claims must be dismissed. Metal Sales contends that, pursuant to Workers' Compensation Law § 11, it can only be held liable for common law indemnification or contribution in cases involving "grave injury" as that term is narrowly defined in the statute. Metal Sales argues that the underlying plaintiff did not sustain a "grave injury" and therefore those claims should be dismissed.

Workers' Compensation Law § 11 provides in pertinent part as follows:

> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple

> fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

It is well settled that "'[t]he grave injuries [in the amended statute] are deliberately both narrowly and completely described. The list is exhaustive, not illustrative.'" (Castro v United Container Mach. Group, Inc., 96 NY2d 398, 402 [2001] [citing Governor's Mem approving L 1996, ch 635, 1996 NY Legis Ann, at 460].)

Metal Sales cites the plaintiff's bill of particulars in the underlying action which does not allege that he sustained a grave injury as defined in the Workman's Compensation Law. In opposition to Metal Sales' prima facie showing, plaintiffs contend, without any support, that Metal Sales has the burden of proving that the underlying plaintiff has been provided with workers' compensation benefits before plaintiffs can be exempt from liability pursuant to the Workman's Compensation Law. This wholly conclusory assertion is insufficient to raise a triable issue of fact. In addition, plaintiffs fail to make any showing that discovery is needed to oppose this branch of Metal Sales' motion.

As to the branch of Metal Sales' motion seeking dismissal of W&W's contractual indemnification claim, it is undisputed that W&W has been providing a defense to co-plaintiffs in the underlying action where co-plaintiffs were named as defendants. It is also undisputed that pursuant to the contract between W&W and the co-plaintiffs, W&W was obligated to provide this defense to co-plaintiffs and may become obligated to indemnify them in the underlying action.

The indemnity provision in the contract between W&W and Metal Sales provides in pertinent part:

> By receipt of the Purchase Order, Subcontractor/Supplier [Metal Sales] agrees to protect, defend, indemnify and hold harmless from and against any and all losses, claims, liens, demands and causes of action of every kind and character including, but not limited to, the amount of judgments, penalties, interest, court costs, legal fees incurred by W&W Glass Systems, Inc., arising in favor of any party, including claims, liens, debts, personal injuries, including employees (including property of W&W) and without limitation enumeration, all other claims or demands of every character occurring or in anyway incident to, in connection with or arising directly or indirectly out of this order. (Metal Sales' Motion, Ex. D.)

It is well settled that "[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." (Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491-492 [1989] [internal citations omitted].) However, this does not mean that "specificity requirements" which are not in the statute should be imposed. "So long as a written indemnification provision encompasses an agreement to indemnify the person asserting the indemnification claim for the type of loss suffered, it meets the requirements of the [Workers' Compensation Law]." (Rodrigues v N & S Bldg. Contrs., Inc., 5 NY3d 427, 433 [2005] [internal citations omitted].)

Here, in seeking dismissal of the contractual indemnification claim, Metal Sales contends that the indemnification provision may only be invoked if W&W is named as a defendant in the underlying action. Metal Sales thus notes that the underlying plaintiff has not brought a negligence claim against W&W and cannot now bring one because it would be time-barred. It further claims that co-plaintiffs also cannot commence an action for indemnification or contribution against W&W due to the anti-subrogation rule. Metal Sales therefore argues that W&W is not subject to any "claim" as a result of the underlying accident, and that W&W's right

to indemnification from Metal Sales cannot be triggered.

The indemnification provision clearly states that Metal Sales is required to indemnify W&W not just for claims but "from and against any and all losses" incurred by W&W "in connection with or arising directly or indirectly out of" the contract. Metal Sales submits no authority that a claim within the meaning of the indemnification provision is limited to a claim asserted in a lawsuit. Moreover, Metal Sales does not cite any authority that the defense W&W is providing to co-plaintiffs in the underlying action is not reimbursable under the indemnity provision as a loss. On the contrary, it is well settled that an insurer may recover from a third-party for the defense and indemnification that the insurer provides to its insured's indemnitees, where the insurer does not also insure the third-party and where the third-party agreed to indemnify the insured for any loss arising out of the contract. (See Fitch v Turner Constr. Co., 241 AD2d 166 [1st Dept 1998].) Such recovery does not violate the anti-subrogation rule. (See id. at 171.)

The court rejects Metal Sales' further assertion that the contractual indemnification provision is unenforceable under the General Obligations Law. An indemnification provision violates General Obligation Law § 5-322.1 where it purports to indemnify a contractor for its own negligence. However, even where an indemnification provision is found to violate this statute, 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 Aetna Cas. & Sur. Co., 89 NY2d 786, 795 n 5 [1997].) On this record, Metal Sales makes no showing that W&W was negligent in any respect. The branch of Metal Sales' motion for dismissal of W&W's contractual indemnification claim must therefore be denied.

Metal Sales also fails to show that W&W may not maintain its claim against Metal Sales for failure to procure insurance. This branch of Metal Sales' motion must therefore also be denied.

Metal Sales does, however, make a prima facie showing that the contractual indemnification and failure to procure insurance claims asserted by co-plaintiffs must be dismissed. Ordinarily, a third-party may not enforce a contract unless the contract expressly states that it is the intention of the contracting parties to benefit the third-party. (See generally Port Chester Elec. Constr. Corp. v Atlas, 40 NY2d 652, 656 [1976]. See also Baskewicz v Rochester Gas & Elect. Corp., 217 AD2d 922 [4th Dept 1995] [applying above to indemnification provision].) As the contract between W&W and Metal Sales contains no indication that the contracting parties intended to benefit third parties, the contract is not enforceable by the co-plaintiffs.

It is accordingly hereby ORDERED that the motion of Metal Sales Co., Inc. for summary judgment is granted to the extent that:

It is hereby ORDERED that the claims of plaintiffs the City of New York, the New York City Health and Hospital Corp., Dormitory Authority of the State of New York, and Gilbane/TDX, joint venture are dismissed in their entirety; and it is further

ORDERED that the claims of plaintiff W&W Glass Systems, Inc. for common law indemnification and contribution are dismissed.

This constitutes the decision and order of the court.

Dated: New York, New York
October 2, 2009

MARCY FRIEDMAN, J.S.C.