

Hanson v R.C. Dolner, L.L.C.
2010 NY Slip Op 30939(U)
April 9, 2010
Supreme Court, New York County
Docket Number: 102540/05
Judge: Emily Jane Goodman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 102540/2005
HANSON, GARY
 vs.
RC DOLNER
 SEQUENCE NUMBER : 004
 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 *is denied as*
affixed

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

FILED
 APR 20 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 4/8/10

EMILY JANE GOODMAN

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: IAS PART 17

-----X
GARY HANSON and ROSEMARIE HANSON,

Plaintiffs,

-against-

R.C. DOLNER, L.L.C., THE ATHENA GROUP,
L.L.C., and ATHENA-LIBERTY LOFTS, L.P.,

Defendants.
-----X

THE ATHENA GROUP, L.L.C. and ATHENA-
LIBERTY LOFTS, L.P.,

Third-Party Plaintiffs,

-against-

EASTERN EXTERIOR WALL SYSTEMS and EXTERIOR
ERECTORS SERVICES INC.,

Third-Party Defendants.
-----X

R.C. DOLNER, L.L.C.,

Fourth-Party Plaintiff,

-against-

SEASONS CONTRACTING CORP.,

Fourth-Party Defendant.
-----X

Index No. 102540/05

Third-Party Index
No. 590638/06

Fourth-Party Index
No. 590564/07

FILED
APR 20 2010
NEW YORK
COUNTY CLERK'S OFFICE

THE ATHENA GROUP, LLC and ATHENA-LIBERTY
LOFTS, L.P.,

Third Third-Party Plaintiffs,

Third Third-Party
Index No. 590736/07

-against-

SEASONS CONTRACTING CORP.,

Third Third-Party Defendant.

-----X

Emily Jane Goodman, J.S.C.:

Motions with sequence numbers 004 and 005 are
consolidated for disposition.

In this action which arises out of a construction site
accident, third-party defendant Eastern Exterior Wall Systems
(Wall) moves (motion sequence number 004), pursuant to CPLR 3212,
for summary judgment dismissing the third-party complaint and all
cross claims asserted as against it, and for summary judgment on
Wall's cross claims against third-party defendant Exterior
Erectors Services Inc. (Erectors). Third-party defendant
Erectors cross-moves, pursuant to CPLR 3212, for summary judgment
dismissing plaintiffs' complaint and the third-party complaint,
as well as all cross claims and counterclaims asserted as against
it.

In motion sequence number 005, fourth-party and third
third-party defendant Seasons Contracting Corp. (SC) moves,
pursuant to CPLR 3212, for summary judgment dismissing all claims
against it.

BACKGROUND

On February 26, 2003, the date of plaintiff Gary Hanson's (plaintiff) accident, the parties were engaged in the construction/renovation of the Liberty Lofts condominium located at 43 West 64th Street in Manhattan, near Lincoln Center. The property was owned by Athena-Liberty Lofts, L.P. (Lofts).¹ Non-party Athena Construction, LLC (AC), as general contractor, contracted with defendant/third-party plaintiff R.C. Dolner, L.L.C. (RC) to act as construction manager (McConnell 6/19/09 Affirm. in Opp., Ex. B); with Wall, as subcontractor, to provide the pre-fabricated exterior panels for the building (Thymius 4/24/09 Affirm., Ex. E, interior Ex. A, "Scope of Work"); and with SC, as the concrete subcontractor (*id.*, Ex. D, interior Ex. A, "Scope of Work"). Wall subcontracted the installation of the exterior panels to Erectors (McConnell 6/19/09 Affirm., Ex. A; Dunlap Depo., at 8). Plaintiff was an employee of Erectors at the time of his accident.

The purpose of the construction/renovation was to transform an existing eight-story building into a higher one, suitable for condominiums. The additional floors were set back from the original eight, creating a ledge on the ninth floor

¹Although their answer admits that Lofts was the owner of the property, no indication of the status or role of The Athena Group, L.L.C. (Group) with respect to the property, project or this action is given therein.

[*5]
(formerly the roof). It was on the ninth floor that plaintiff suffered his accident.

It is uncontested that on the day of the accident, the ninth floor of the site was littered with construction debris, and had been so cluttered for some time. In fact, on December 6, 2002, Erector's owner, Robert Dunlap (Dunlap), wrote to Peter Grodziak, Wall's project manager, complaining of "the unsafe and deplorable conditions at the Liberty Lofts job site," including "materials and debris everywhere left from other contractors" (McConnell 6/19/09 Affirm. in Opp., Ex. A). The day before, Dunlap had also written to Grodziak, complaining that on "the 9th floor roof, there are many safety hazards (ie material and debris everywhere)" (*ibid.*). At his deposition, Dunlap testified that between December 2002, when the letters were written, and February 26, 2003, the date of the accident, the debris problem on the ninth floor "got worse" (Dunlap Depo., at 77) because "the interior of the building was getting finished, so all the stuff that was laying in there, they kept pushing out into the areas so they could finish the interior of these apartments" (*id.* at 77-78). "Everybody was putting a lot of the debris there because they were trying to finish the apartments" (*id.* at 78). In short, the trades working on the interior portions of the ninth floor were using the terrace "essentially as a dump for debris" (*id.* at 80).

At the time of his accident, plaintiff was engaged in affixing Wall's pre-fabricated panels to the façade of the building. This he did in concert with a crane that lifted the panels from the ground level to the ninth floor. Plaintiff attested that "[t]here was so much trash and debris on the floor that it was necessary for us to make a path to get to the area where we were going to perform our work" (Plaintiff's 7/13/09 Aff., ¶ 5). The workers made a path by walking back and forth. "We couldn't use the shovel because there is trash everywhere ... broken up concrete on a slab ... chicken wire ..." (Plaintiff's Depo., at 23). At some point, while plaintiff was traversing the floor to get to a panel, he tripped and fell on his face. When asked if he knew what caused him to trip, he asserted that it was "a piece of wire. It felt like somebody caught my feet and I just went right over" (*id.* at 26; *see also* Plaintiff's 7/13/09 Aff., ¶ 6 ["I was caused to trip over a piece of wire debris that had been left on the job site. This wire caused me to trip and fall and I injured my face"]). Although plaintiff testified that he had not seen the wire before or after he fell (Plaintiff's Depo., at 26-27), he attested that he knew it was a piece of wire that caused his fall because "[s]omething caught my feet" (*id.* at 27; at 69 ["Something grabbed my foot and made me fall"]); at 70 [plaintiff knew he fell because of a wire "(b)ecause it felt like something wrapped my foot. ... All I know (is that) something

[*7]

caught my foot"]), and because of "the way it felt when I tripped" (Plaintiff's 7/13/09 Aff., ¶ 7). In addition, plaintiff identified a photograph, appended as exhibit B to attorney Dupée's July 10, 2009 Affirmation, which plaintiff averred depicted the wire that allegedly caused his fall, surrounded by his blood (Plaintiff's 7/13/09 Aff., ¶ 7).

However, not long after he testified that he fell because of a wire, plaintiff was asked, and responded:

Q Now let me ask you this, is it true or not true that you don't really know what caused you to trip; true or not true?

A I really don't know what caused me to trip -- it felt like something, somebody tied your shoe that made me fall

(Plaintiff's Depo., at 27-28).

THE PLEADINGS

The complaint alleges plaintiff's causes of action sounding in common-law negligence, violations of Labor Law §§ 200 and 241 (6), and plaintiff's wife's claim for loss of consortium. The various answers and third-party actions and cross claims and counterclaims assert causes of action for contribution, common-law and contractual indemnification, and breach of contract to procure insurance.

DISCUSSION

Summary Judgment

It is well settled that "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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers"

(*Johnson v CAC Business Ventures*, 52 AD3d 327, 328 [1st Dept 2008]), quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; see also *Smalls v AJI Industries*, 10 NY3d 733, 735 [2008] [same]; *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson*, 39 AD3d at 306, citing *Alvarez*, 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso*, 50 AD3d 535, 544 [1st Dept 2008]). "On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.*, 64 AD3d 477, 478 [1st Dept 2009]; see also *Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the

merits of any such issues"], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Erector's Cross Motion (Motion Sequence No. 004) For Summary Judgment Dismissing the Complaint, Third-Party Complaint, and All Cross Claims and Counterclaims Asserted as Against It

Labor Law § 200 and Common-Law Negligence

It is well-settled that Labor Law "section 200 is merely a codification of the common-law duty imposed on owners and general contractors to maintain a safe construction site" (*Vargas v New York City Transit Authority*, 60 AD3d 438, 440 [1st Dept 2009], citing *Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343, 352 [1998]). Where an accident is caused by a dangerous condition, here, the debris-strewn ninth floor, a plaintiff must show that a defendant "caused or created the dangerous condition, or had actual or constructive notice of the unsafe condition of which plaintiff complains" (*Arrasti v HRH Construction LLC*, 60 AD3d 582, 583 [1st Dept 2009]; see also *Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 291 n [1st Dept 2008] ["It should be noted that, since the accident was caused by a dangerous condition of the premises, rather than by the work methods used, plaintiff need not establish that the defendant owners exercised supervision and control over his work in order to prevail against those defendants on his claim under Labor Law § 200"]).

Erectors urges that plaintiff's section 200/common-law negligence claims must be dismissed against defendants because

plaintiff cannot establish the cause of his fall, and therefore, also cannot establish that defendants' negligence or violation of Labor Law § 200 caused or contributed to his injuries. In addition, because of a certain lack of clarity in plaintiff's testimony, Erectors concludes that plaintiff cannot offer evidence of proximate cause, i.e., that he cannot point to the particular debris that caused his fall.

Although there is some ambiguity in plaintiff's deposition testimony, he was quite clear that the ninth floor was so strewn with debris that he and his co-workers had to make a path through it just to get to the panels they needed, and that some debris caught his feet and caused him to fall. He also attested that a photograph showed what he believed was the wire that caused his fall, surrounded by his blood.

Erectors has not established that defendants' negligence and/or violation of Labor Law § 200 did not cause plaintiff's injuries. Erectors has produced no evidence demonstrating that defendants did not cause or create the "unsafe and deplorable conditions" of "material and debris everywhere" on the ninth floor (Dunlap's 12/5/02 & 12/6/02 Letters to Wall), or that they had no actual or constructive notice of the condition. Thus, Erectors has not met its burden of establishing its prima facie entitlement to summary judgment dismissing these claims.

On the other hand, plaintiff has submitted evidence

that indicates that the debris-strewn condition was long-standing, and the photograph he has identified as showing the scene of the accident, with a wire surrounded by his blood, suggests that a piece of wire debris caused his accident and injuries. This evidence is sufficient to raise triable issues of fact which preclude summary judgment.

Therefore, the part of Erectors' cross motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is denied.

Labor Law § 241 (6)

Labor Law § 241 (6) imposes a nondelegable duty . . . upon owners and contractors to provide reasonable and adequate protection and safety to [construction workers]. To recover on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards. The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case [internal quotation marks and citations omitted]

(*Forschner v Jucca Co.*, 63 AD3d 996, 998 [2d Dept 2009]; see also *Hricus v Aurora Contractors*, 63 AD3d 1004, 1005 [2d Dept 2009]; *Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2d Dept 2009] [injury must be "in connection with construction, demolition or excavation work" (citation omitted)]). The duty is imposed "regardless of the absence of control, supervision, or direction of the work" (*Romero v J & S Simcha, Inc.*, 39 AD3d 838,

839 [2d Dept 2007]) because "the 'apparent intent [of the 1969 amendment to section 241 (6)] was to compel owners and general contractors to become more concerned with the safety practices of subcontractors, because *they would be exposed to liability without regard to control over the work*' [citation omitted]" (*Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d at 352). However, as is well-settled, "[a]n owner or general contractor may ... raise any valid defense to the imposition of vicarious liability under section 241 (6), including contributory and comparative negligence" (*id.* at 350).

In his complaint, plaintiff alleges that Industrial Code (12 NYCRR Part 23) §§ 23-1.7 (d), (e) (1), (e) (2), and 23-1.5 (a) serve as the bases for his section 241 (6) claim, but in his papers opposing Erectors' cross motion, he only mentions section 23-1.7 (e) (2) (Dupée 7/10/09 Affirm. in Opp., ¶ 4).

However, Erectors has made no argument and has submitted no evidence in support of this portion of its cross motion. Thus, it has failed to demonstrate its entitlement to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim. This part of the cross motion is denied.

The Third-Party Complaint

In its third-party complaint, Athena² alleges only the

²In the papers submitted on these motions, Lofts and Group together are denominated "Athena."

first two causes of action as against Erectors, for contractual indemnification and for breach of contract to procure insurance. Erectors contends that, as it was plaintiff's employer, and as plaintiff did not sustain a "grave injury," Erectors is entitled to the protections set forth in Workers' Compensation Law § 11.

Workers' Compensation Law § 11 bars a third-party action for contribution or indemnification against an employer whose employee is injured in a work-related accident, except for, inter alia, the existence of "a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered" [citations omitted]. A contractual indemnification provision must be strictly construed to avoid imposing a duty which the parties did not intend (see *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989] ["The promise (to indemnify) 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"])

(*Baginski v Queen Grand Realty, LLC*, 68 AD3d 905, 907 [2d Dept 2009]; see also *Great Northern Insurance Co. v Interior Construction Corp.*, 7 NY3d 412, 417 [2006]; *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]; see also *Murphy v Longview Owners*, 13 AD3d 346, 347 [2d Dept 2004] ["causes of action for contractual indemnification and to recover damages for breach of contract to procure insurance are not barred by Workers' Compensation Law § 11"])).

The Wall/Erectors subcontract is dated November 21, 2002, and plaintiff's accident occurred on February 26, 2003. Thus, the subcontract is a written contract that was entered into prior to the accident.

Section 4.6.1 of the Wall/Erectors subcontract provides, in relevant part:

To the fullest extent permitted by law, the Subcontractor [Erectors] shall indemnify and hold harmless the Owner [designated as RC on the first page of the subcontract], Contractor [Wall] ... from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury ..., but only to the extent caused by the negligent acts or omissions of the Subcontractor ... anyone directly or indirectly employed by them ... regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder

(Wall/Erectors Subcontract, § 4.6.1).

Erectors contends that there is no proof that it was responsible for the wire that allegedly caused plaintiff to fall, and that Wall has provided no basis for its claim that Erectors was negligent. Erectors claims that Wall maintains that Erectors is responsible for plaintiff's negligence because plaintiff was Erectors' employee, but there is no evidence of plaintiff's negligence.

In its opposition to Erectors' cross motion, RC

suggests that Erectors "may have been negligent in allowing [plaintiff] to work in what plaintiff claims to have been a defective workplace. It is beyond argument that an employer has a duty to provide its employee with a safe place to work" (McConnell 6/19/09 Affirm. in Opp., ¶ 2).

However, the letters sent by Erectors to Wall in December 2002 indicate that Erectors was aware of the debris on the ninth floor, and was unwilling to allow its employees to work in such conditions (see December 5, 2002 Letter from Erectors to Wall ["Also, on inspecting the 9th floor roof, there are many safety hazards (i.e. material and debris everywhere) Also, there are no laydown areas on the 9th floor roof. Please advise if we need to layoff operators next week"]). In particular, the letter of December 6, 2002 from Erectors to Wall specifically states, in pertinent part:

Please allow this letter to serve as notification of the unsafe and deplorable conditions at the Liberty Lofts job site. I was on site yesterday 12/05/06 [sic] and observed many safety hazards on site. There are materials and debris everywhere left from other contractors. ... On the 9th floor there are no lay down areas on the roof. The existing unsafe conditions MUST be brought to the attention of R.C. Dolner work forces immediately. This site MUST be cleaned up to ensure safety for our work forces. I can not stress enough the importance of a safe work site for everyone. Since our contract is with [Wall] and [Wall] has a contract with Dolner it is your responsibility to notify them immediately of their responsibility to clean up the site. We can not and will not

jeopardize or compromise the safety of our workers. Should these deplorable conditions not be corrected, we will be forced to pull off our work forces from the Liberty Lofts job site

(Both December 2002 Letters, Ex. D to McConnell 6/18/09 Affirm. in Opp.).

Athena argues that, although Erectors seeks to dismiss the third-party action because there are no allegations that Erectors created the condition or violated any duty that caused or contributed to the accident, plaintiff testified that he and his co-workers created a path through the debris by walking back and forth, and that he was walking in that created path when he fell. According to Athena, plaintiff's failure to identify the cause of his accident also raises questions of fact as to whether Erectors was negligent in the means and methods it employed in preparing the area for its employees.

There are numerous references in the various depositions concerning the blue and white styrofoam that littered the ninth floor. The only debris that Erectors was responsible for removing was its own white styrofoam (see Plaintiff's Depo., at 24, 63). However, there is no indication, evidence or allegation that plaintiff slipped on styrofoam, rather than tripped on a piece of debris that felt like a wire. The other debris on the ninth floor was left by "other contractors" (December 6, 2002 Letter from Erectors to Wall), and should have

been stockpiled by the various trades and then removed by RC's laborers (see Bonetti Depo., at 32-34). Although both RC and Athena posit that Erectors was negligent in that it failed to ensure that plaintiff had a clean and safe worksite, they provide no law to that effect. Erectors was a sub-subcontractor at the site, and had no authority to supervise other trades' or subcontractors' work. Therefore, it could not have been responsible or liable for the failure of other trades or subcontractors to properly stockpile their debris, which failure resulted in the "unsafe and deplorable conditions" which contributed to plaintiff's injuries.

Erectors has established that no negligent act or omission on its part caused or contributed to plaintiff's injuries. Therefore, it has no obligation to indemnify Athena under the Wall/Erectors subcontract, and summary judgment dismissing Athena's first cause of action, for contractual indemnification, is granted.

Page 2 of the Insurance & Indemnification Requirements Addendum to the Wall/Erectors subcontract, paragraph 7, requires Erectors to add the "Contractor, General Contractor ... and Owner shall be added as ADDITIONAL INSUREDS on all liability policies, even for claims regarding their Sole Negligence" (Ex 13). Erectors has provided no evidence that it either obtained the insurance required by the subcontract, or that it included Athena

as additional insureds under such policy, nor have any of the parties specifically addressed this issue. Therefore, summary judgment dismissing Athena's third-party claim for breach of contract to procure insurance is denied.

The Cross Claims and Counterclaims Against Erectors

In its third-party answer, Wall asserts cross claims against Erectors sounding in common-law and contractual indemnification, contribution, and breach of contract to procure insurance. In its answers, SC alleges cross claims for contractual or common-law indemnification or contribution. RC, in its supplemental cross claims against Erectors, brings causes of action for common-law and contractual indemnification, contribution, and breach of contract to procure insurance.

Common-Law Indemnification

"The principles of common-law indemnification allow the party held vicariously liable to shift the entire burden of the loss to the actual wrongdoer" (*Frank v Meadowlakes Development Corp.*, 6 NY3d 687, 691 [2006]). Common-law indemnification is obtained from the "actively negligent" party (*see Tapia v 126 First Avenue, LLC*, 282 AD2d 220, 220 [1st Dept 2001]). "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that

contributed to the causation of the accident' [citations omitted]" (*Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005]).

The court has determined that no negligence on the part of Erectors caused plaintiff's injuries. Therefore, summary judgment dismissing Wall's, SC's, and RC's cross claims for common-law indemnification is granted.

Contribution

"Contribution is available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person' [citation omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]; see also *Mas v Two Bridges Associates*, 75 NY2d 680, 689-690 [1990] ["in contribution, the tort-feasors responsible for plaintiff's loss share liability for it. Since they are in pari delicto, their common liability to plaintiff is apportioned and each tort-feasor pays his ratable part of the loss"]).

Since no fault has been found against Erectors, the cross claims for contribution against Erectors, asserted by Wall, SC, and RC, are dismissed.

Contractual Indemnification

As set forth above, the Wall/Erectors subcontract required Erectors to indemnify the "Owner, Contractor, ... and

agents and employees of any of them" for damages arising out of Erectors' work which were caused by Erectors' negligent acts or omissions (Wall/Erectors Subcontract, § 4.6.1). Since no negligence has been found against Erectors, the cross claims against Erectors for contractual indemnification must fail.

Breach of Contract to Procure Insurance

The Insurance & Indemnification Requirements Addendum of the Wall/Erectors subcontract required Erectors to procure liability insurance, and in paragraph 7, required Erectors to name the "Contractor, General Contractor ... and Owner shall be added as ADDITIONAL INSUREDS on all liability policies, even for claims regarding their Sole Negligence." According to the papers submitted on these motions and the Wall/Erectors subcontract itself, Wall was the Contractor, non-party AC was the General Contractor, and Lofts was the Owner, although the subcontract itself names RC as the Owner. As Erectors has provided no evidence that it procured the required insurance and named the listed entities as additional insureds on its policy, summary judgment dismissing Wall's and RC's cross claims for breach of contract to procure insurance is denied.

Wall's Motion (Motion Sequence Number 004) For Summary Judgment Dismissing the Third-Party Complaint and All Cross Claims Asserted as Against It, and For Summary Judgment on Wall's Cross Claims Against Erectors

In the third-party complaint, Athena alleges four causes of action as against Wall: for common-law and contractual

indemnification, contribution, and breach of contract to procure insurance.

Dismissal of the Third-Party Complaint

In its first argument in support of its motion for summary judgment, Wall maintains that the third-party action must be dismissed because there is no basis for Athena's liability to plaintiff. Wall correctly identifies Lofts as the owner of the property, but, possibly incorrectly, claims that Group, rather than non-party AC, was the general contractor for the project (see Kozoriz 3/30/09 Affirm., ¶¶ 12-13). RC was the construction manager pursuant to its contract with AC, and was "responsible for all safety conditions of the site" (Smith Depo., at 20; see also *id.* at 26 [complaints about debris on the site would be taken to RC]). Employees of Group visited the site two or three times a week to monitor progress (*id.* at 9, 26), walking the site with RC's project manager or site superintendent (*id.* at 9-10).³

Because questions of fact exist concerning what role, if any, Group had in the project, and what responsibility and authority either or both Athena defendants exercised at the site, summary judgment dismissing the third-party complaint because there is allegedly no basis for Athena's liability to plaintiff

³The witness for Group testified that he had no knowledge of AC, averring that "I don't believe they had a role" in the project, "[t]hey don't have any employees" (Smith Depo., at 22-23), and that "I don't know anything about this particular contractor" (*id.* at 23).

must be denied.

Contractual Indemnification

In its reply to Athena's opposition to its motion, Wall asserts that it has no contractual obligations to Athena because its contract was with non-party AC. Besides being improperly raised for the first time in its reply papers (see *Alexander v Spanierman Gallery, LLC*, 64 AD3d 487, 487 [1st Dept 2009]), this argument, at most, merely raises an issue of fact concerning the roles Athena and AC exercised as part of the project.⁴

Paragraph 22.2 of the AC/Wall contract provides as follows:

To the fullest extent permitted by law, the Subcontractor [Wall] shall indemnify and hold harmless Owner [Lofts], General Contractor [AC], Manager [RC] ... (collectively, "Indemnitees" and individually, "Indemnitee") from and against all claims, damages, losses and expenses (including but not limited to attorney's fees and disbursements and the deductible amounts of any insurance) arising out of or resulting from the performance of the Subcontractor's Work, provided that any such claim, damage, loss or expense (i) is attributable to bodily injury ... or (iii) is caused in whole or in part by any act or omission of the Subcontractor, its sub-subcontractors ... except and to the extent it is caused by an Indemnitee

(Kozoriz 3/30/09 Affirm., Ex. 12, AC/Wall Contract, at 13).

⁴The court notes that the AC/Wall contract identifies AC as "a New York limited liability company, located at c/o The Athena Group, 712 Fifth Avenue, New York, New York 10019 ("General Contractor")."

Wall contends that the contractual indemnification claim must be dismissed because Athena seeks indemnity from Wall as a result of the negligence of Athena's agent, RC, citing General Obligations Law (GOL) § 5-322.1. GOL § 5-322.1 "prohibits the enforcement of indemnification agreements which seek to exempt the indemnitee ... from liability for negligence" (*Gomez v National Center for Disability Services*, 306 AD2d 103, 103 [1st Dept 2003]). However, provisions that contain limiting language, such as "to the fullest extent permitted by law," do not run afoul of GOL § 5-322.1 (see e.g. *Jackson v City of New York*, 38 AD3d 324, 324-325 [1st Dept 2007] [indemnification "provision contains the requisite language limiting the subcontractor's obligation to that permitted by law"], citing *Dutton v Charles Pankow Builders*, 296 AD2d 321, 322 [1st Dept 2002] [no violation of GOL § 5-322.1 because clause provides indemnification only "to the fullest extent permitted by applicable law"])). As the contractual language quoted above limits Wall's indemnification obligations to "the fullest extent permitted by law," no violation of GOL § 5-322.1 as a basis to dismiss Athena's contractual indemnification cause of action will be found.

Wall contends that plaintiff's accident did not arise out of Wall's work, but that, instead, Erectors, plaintiff's employer, was responsible for unloading the panels and installing

them on the façade of the building (see Reinert Depo., at 36 [Erectors was responsible for unloading the truck]; Dunlap Depo., at 9 [Wall delivered panels, and Erectors took them off the truck]; *id.* at 15-16 [it was Erectors' responsibility to take panels from the truck and to take them up to where they would be used]). According to Wall, it had no presence at the job site once the panels were delivered (see Reinert Depo., at 41). Thus, it argues, since the panels were unloaded and installed by Erectors, not Wall, Wall cannot be held liable to Athena or to any cross claimant for contractual indemnification.

In its opposition to Wall's motion, Athena insists that plaintiff's injuries arose out of work which Wall contracted with AC to do, and thus, that Wall owes Athena contractual indemnification. According to Exhibit A ("Scope of Work") of the AC/Wall contract, Wall agreed to provide the "necessary labor, material, ... equipment, ... supervision, hoisting, ... delivery ... and all other services required for the complete performance of the **PRE-FABRICATED EXTERIOR PANEL WORK** and all related work for this project ... (Kozoriz 3/30/09 Affirm., Ex. 12, AC/Wall Contract, Ex. A, at 1). In addition, the Scope of Work section provides that "[a]s 'scope' documents, the Drawings and Specifications do not necessarily indicate or describe all items required for proper completion of Work, but it is to be understood that the intent is a complete job in every respect"

(*ibid.*).

In the event that it is found that the AC/Wall contract also covers Athena, Wall will be contractually obligated to indemnify Athena and other indemnitees for, among other things, damages for injuries "arising out of or resulting from the performance of the Subcontractor's Work" that are not caused by an indemnitee itself. It has been held that, when such a "broadly worded" indemnification clause is used, recovery may be had under a contract between an owner and contractor when an employee of a subcontractor is injured while performing work required under the owner/contractor agreement (see e.g. *Urbina v 26 Court Street Associates, LLC*, 46 AD3d 268 [1st Dept 2007]; *Torres v Morse Diesel International*, 14 AD3d 401 [1st Dept 2005]).

Accordingly, summary judgment dismissing Athena's contractual indemnification claim is denied.

Breach of Contract to Procure Insurance

Paragraph 23.2 of the AC/Wall contract requires that the "General Contractor and Indemnitees shall be named as additional insured[s]" on Wall's liability policies (Kozoriz 3/30/09 Affirm., Ex. 12, AC/Wall Contract, at 13). As Wall has produced no evidence that it procured the policies required by the contract, summary judgment dismissing this cause of action must be denied.

Common-Law Indemnification and Contribution

No finding has yet been made concerning the possible fault or negligence, or lack thereof, of Athena, and the issue of the roles, if any, that each Athena entity, including AC, played at the project remains. Therefore, summary judgment dismissing these claims is denied.

The Cross Claims Against Wall

Erectors alleges cross claims for contribution, common-law and contractual indemnification. In both of SC's answers, it asserts claims for contractual or common-law indemnification or contribution. RC's cross claims against Wall sound in common-law indemnification or contribution.

Contractual Indemnification

As set forth above, the AC/Wall contract obliges Wall, in certain circumstances, to indemnify indemnitees Lofts, AC, and RC. Since Erectors and SC are not among the enumerated indemnitees, summary judgment dismissing their cross claims for contractual indemnification against Wall is granted.

Common-Law Indemnification and Contribution

Wall contends that it had nothing to do with plaintiff's accident because it merely manufactured the panels, and delivered them to the site to be unloaded and hoisted to the roof by Erectors. According to Wall, once it delivered the panels to the site, it no longer had any presence there, except

that its project manager would go about once a week to "check on the progress of the installation" (Reinert Depo., at 41-42). Moreover, Wall asserts that RC's negligence, as construction manager and the party responsible for safety at the site (see Smith Depo., at 20), was the cause of plaintiff's accident.

RC counters that Wall was negligent in failing to notify RC of the two December 2002 letters which Erectors sent to Wall, demanding that Wall notify RC of the "deplorable conditions" at the site (Both December 2002 Letters, Ex. D to McConnell 6/18/09 Affirm. in Opp.). Erectors demanded that Wall notify RC of the conditions "[s]ince our contract is with [Wall] and [Wall] has a contract with Dolner [so] it is your responsibility to notify them immediately of their responsibility to clean up the site" (December 6, 2002 Letter). However, neither Erectors nor RC has demonstrated that Wall had any obligation to inform RC of dangerous conditions at the site. Rather, as the party responsible for site safety, RC had a site safety inspector on site daily to "call out any unsafe conditions" (Bonetti Depo., at 36).

As no evidence contradicting Wall's demonstration that it was not negligent in the causation of plaintiff's accident has been produced, summary judgment dismissing Erectors', SC's and RC's cross claims against Wall for common-law indemnification and contribution is granted.

Summary Judgment on Wall's Cross Claims Against Erectors

In its third-party answer, Wall alleges three cross claims against Erectors, for common-law and contractual indemnification, contribution, and breach of contract to procure insurance.

As set forth above, in the discussion concerning Erectors' cross motion, summary judgment dismissing Wall's cross claims against Erectors was granted, except with respect to Wall's cross claim for breach of contract. Thus, summary judgment in Wall's favor on its cross claims for common-law and contractual indemnification and contribution is denied.

As previously noted, Paragraph 7 of the Insurance & Indemnification Requirements Addendum to the Wall/Erectors subcontract required Erectors to add Wall, among others, as an additional insured on Erectors' liability policies. Because no policy has been submitted that demonstrates Erectors' compliance or noncompliance with this provision, summary judgment in Wall's favor on its claim for breach of contract for failure to procure insurance must be denied.

SC's Motion for Summary Judgment Dismissing All Claims Against It (Motion Sequence Number 005)

RC and Athena have brought third-party actions against SC, alleging claims for common-law and contractual indemnification, contribution, and breach of contract to procure insurance. In addition, Wall asserts two cross claims against

SC, for common-law indemnification and contribution.

Common-Law Indemnification and Contribution

SC was the concrete subcontractor at the site. It attests that, while other parties have established that there was blue styrofoam debris on the ninth floor, at least some of which might have been debris left by SC, no one has demonstrated that SC used or might have been responsible for the wire that allegedly tripped plaintiff, causing his fall. Nor has anyone provided any evidence that the blue styrofoam was at all instrumental in causing plaintiff's accident. However, RC suggests that because the wire was in close proximity to the styrofoam, SC may have been negligent in not properly disposing of its debris.

RC asserts that there is substantial evidence that SC had the "ultimate cleanup responsibility for the area where the plaintiff's accident happened" (McConnell 6/18/09 Affirm. in Opp., ¶ 2), citing to its Daily Reports for the project. Those reports reflect various duties which SC performed, e.g. (taking two random examples), on December 4, 2002, SC Concrete had 15 workers on site to "Place concrete at 65th street façade 5th floor columns, form and install rebar at 6th floor beam." The report for January 2, 2003 is identical. However, on January 20, 2003, the report shows that SC Concrete had three workers on site to "Clean up throughout building," while SC demolition had four

workers to "Continue removing deteriorated slabs at 9th floor and clean 8th floor." From that date on, through and including February 26, 2003, the date of plaintiff's accident, the entries for SC Concrete show three workers to "Clean up throughout building" (*id.*, Ex. C).

SC counters that it had no contractual obligation to clean up any other subcontractor's mess, that each subcontractor was responsible for its own debris. Arthur Bonetti, who was RC's assistant project manager at the site, confirmed that each subcontractor was obligated to clean up after itself (Q. "Whoever made the mess cleaned it up, right?" A. "Yes" [Bonetti Depo., at 27]). RC employed laborers who worked at the site each day, but their job was to "clean up -- the subcontractors would stockpile their debris, and [the laborers] would come and they would clean up their debris" (*id.* at 33). A random sampling of RC's Daily Reports indicates that RC had at least three laborers on site each day (see McConnell 6/18/09 Affirm. in Opp., Ex. C).

The AC/SC contract is Exhibit D to the April 29, 2009 Affirmation of SC's counsel. Paragraph 13.1 of the contract provides, in relevant part:

The Subcontractor [SC] shall, at its own cost and expense: (1) keep the Site free at all times from all waste, packaging materials and rubbish, and shall collect and deposit these materials and rubbish in the locations or containers designated by General Contractor; (2) clean and remove from the Site and the Project affected by the Subcontractor's Work

and contiguous work any soiling, staining, mortar, plaster, concrete or dirt and make good all defects resulting therefrom;

Exhibit A ("Scope of Work") to the contract, at paragraph 34, provides, in relevant part:

This Subcontractor is responsible for handling and managing rubbish generated by his trade. This Subcontractor is responsible to place all rubbish in the center of all work areas. This Subcontractor must keep his work place exceptionally clean on a daily basis.

Although the AC/SC contract is not a model of clarity as it states that SC shall "keep the Site free at all times from all waste, packaging materials and rubbish, and shall collect and deposit these materials and rubbish in the locations or containers designated by General Contractor" while the Scope of Work limits the clean up responsibility to SC's work, it is not a reasonable interpretation of the contract, as a whole, to hold that SC was responsible to clean up debris caused by other trades. Further, SC has met its burden to demonstrate that it was not negligent, and defendants have not submitted any evidence to demonstrate that SC was negligent. RC's argument, that the blue styrofoam likely used by AC may have caused Plaintiff to trip and fall, because even though Plaintiff "claims he tripped over a wire, the wire was located in the vicinity of the debris associated with Seasons" is not persuasive. Accordingly, summary judgment dismissing the claims for common-law

indemnification and contribution asserted against SC is granted.

Contractual Indemnification

Paragraph 22.2 of the AC/SC contract ("Indemnity"), provides, in relevant part:

To the fullest extent permitted by law, the Subcontractor [SC] shall indemnify and hold harmless Owner [Lofts], General Contractor [AC], Manager [RC] ... (collectively, "Indemnitees" and individually, "Indemnitee") from and against all claims, damages, losses and expenses (including but not limited to attorney's fees and disbursements and the deductible amounts of any insurance) arising out of or resulting from the performance of the Subcontractor's Work, provided that any such claim, damage, loss or expense (i) is attributable to bodily injury ... or (iii) is caused in whole or in part by any act or omission of the Subcontractor ... except and to the extent it is caused by an Indemnitee.

Because there is no evidence that the damages were caused "in whole or in part by any act or omission of the Subcontractor" summary judgment dismissing this claim is granted.

Breach of Contract to Procure Insurance

Exhibit D ("Insurance Requirements") of the AC/SC contract requires SC to procure, among other things, general liability insurance prior to commencing its work. Paragraph 23.2 of the contract requires SC to name AC and Indemnitees as additional insureds on these policies. Although SC denies that it failed to purchase the required insurance, it does not append any policy to its papers. Thus, the court cannot determine whether SC met its contractual obligations.

SC's argument that the issue of whether SC obtained the required insurance need not be reached is unpersuasive. SC has provided no evidence which would enable this court to determine whether RC and Athena have suffered recoverable damages because of the alleged breach. Nor has it provided any evidence that "all of the prime defendants have disclosed that they have coverage in place for the plaintiff's action against them" (Thymius 4/24/09 Affirm., ¶ 21), referring only to RC's Response to Seasons Contracting's Combined Demands, paragraph 6, wherein RC divulged that it had a commercial general liability policy (*id.*, Ex. G). Nor has SC provided any evidence with respect to premium costs or losses associated with RC's and Athena's purchase of their own insurance.

Accordingly, summary judgment dismissing this claim must be denied.

CONCLUSION

Accordingly, it is

ORDERED that the part of Eastern Exterior Wall Systems' motion (motion sequence number 004) which seeks summary judgment dismissing the third-party complaint is denied; and it is further

ORDERED that the part of Eastern Exterior Wall Systems' motion which seeks summary judgment dismissing the cross claims asserted against it is granted; and it is further

ORDERED that the part of Eastern Exterior Wall Systems'

motion which seeks summary judgment on its cross claims against Exterior Erectors Services Inc. is denied; and it is further

ORDERED that the part of Exterior Erectors Services Inc.'s cross motion (motion sequence number 004) which seeks summary judgment dismissing the complaint is denied; and it is further

ORDERED that the part of Exterior Erectors Services Inc.'s cross motion which seeks summary judgment dismissing the third-party complaint is granted only with respect to the cause of action for contractual indemnification, and is otherwise denied; and it is further

ORDERED that the part of Exterior Erectors Services Inc.'s cross motion which seeks summary judgment dismissing the counterclaims and cross claims against it is granted with the exception that Eastern Exterior Wall Systems, Inc. and R.C. Dolner, L.L.C.'s cross claims for breach of contract to procure insurance are not dismissed; and it is further

ORDERED that Seasons Contracting Corp.'s motion (motion sequence number 005) is granted, except as to dismissal of the claim for breach of contract for failure to provide insurance; and it is further

ORDERED that the parties appear for trial on June 21, 2010.

Dated: April 9, 2010

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED
APR 20 2010
NEW YORK
COUNTY CLERK'S OFFICE