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

PRESENT: HON. CAROL EDMEAD Justice PART 35

Index Number : 109570/2006
TREAT, DR. MICHAEL
VS.
PORT AUTHORITY
SEQUENCE NUMBER : 009
PARTIAL SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 6/30/10
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

FILED
AUG 10 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant Greenman-Pedersen, Inc. s/h/a Greenman-Pederson, Inc. ("GPI") for partial summary judgment pursuant to CPLR 3212 dismissing the contractual indemnification claims by Cal-Tran, Koch and Campbell against it is granted, and such claims are hereby severed and dismissed; and it is further

ORDERED that the branch of GPI's motion for partial summary judgment pursuant to CPLR 3212 dismissing the Port Authority's contractual indemnification claims is granted solely to the extent the Port Authority's first cross-claim against GPI for contractual indemnification claim is based on the 2001 traffic engineering contract between GPI and the Port Authority; and it is further

ORDERED that the branch of GPI's motion for partial summary judgment pursuant to CPLR 3212 dismissing the Port Authority's contractual indemnification claims is denied, without prejudice, to the extent the Port Authority's first cross-claim against GPI for contractual indemnification claim is based on the 2002 and 2004 contracts between the Port Authority and GPI; and it is further

ORDERED that the branch of GPI's motion for partial summary judgment pursuant to CPLR 3212 dismissing the co-defendants' common law indemnifications claims against GPI is denied, without prejudice, at this juncture; and it is further

Dated: J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

ORDERED that the cross-motion by the Port Authority pursuant to CPLR 3025(b), to amend its Answer to include additional cross-claims against GPI is granted and the proposed Answer attached to the cross-motion is deemed served; and it is further

ORDERED that Greenman-Pedersen, Inc. s/h/a Greenman- Pederson, Inc. serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 8/5/10 ENTER: _____, J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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DR. MICHAEL TREAT,

Plaintiff,

-against-

THE PORT AUTHORITY OF NY & NJ, CAL-TRAN ASSOCIATES, INC., GREENMAN-PEDERSON, INC., KOCH SKANSKA USA, GEORGE CAMPBELL PAINTING, CORP., BARRIER ELECTRIC COMPANY, INC., VILLAGE DOCK, INC. and JOHN DOE #3-#4 and JOHNDOE#9-#10,

Defendants.

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Index No.: 109570/06

Sequence 009

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, defendant Greenman-Pedersen, Inc. s/h/a Greenman-Pederson, Inc. ("GPI") moves for partial summary judgment (CPLR 3212) dismissing the common law and contractual cross-claims brought by the Port Authority of New York and New Jersey (the "Port Authority"), Cal-Tran Associates, Inc. ("Cal-Tran"), Koch Skanska, Inc. ("Koch") and George Campbell Painting Corp. ("Campbell") (collectively, the "co-defendants").

Factual Background

Dr. Michael Treat ("plaintiff") alleges that on July 18, 2005, he was injured when his motorcycle was struck by a truck at an intersection leading from the George Washington Bridge/Cross-Bronx Expressway onto Riverside Drive (near an exit ramp at Riverside Drive and the Henry Hudson Parkway), due in part to a negligently designed traffic detour near the George Washington Bridge. Neither the driver nor the owner of the truck were ever identified.

Prior to the accident, the Port Authority entered into three contracts with GPI. The first

contract was for "Expert Professional Services," dated December 10, 2001 (the "2001 traffic engineering contract") for services to be performed during the years of 2001-2004. The second contract was for the Performance of Expert Professional Construction Management Services," dated April 3, 2002 (the "2002 construction management contract"). The third contract was for "Expert Professional Services For Traffic Engineering Services," dated December 29, 2004 (the "2004 traffic engineering contract"), for services to be performed during the years of 2005-2007. Plaintiff claims the Port Authority and GPI negligently designed the detour and that GPI provided negligent construction management services to the Port Authority.

Each of the co-defendants' answers contain a cross-claim against GPI for (1) contractual indemnity, (2) common law indemnity, and (3) contribution.

In support of dismissal of the cross-claims, GPI argues that there is no factual or legal basis for common law indemnification. In order for co-defendants to claim common law indemnification, they must establish that they are not active tortfeasors but rather are being held accountable either (a) due to their vicarious responsibility for the acts of GPI, or (b) based on some statutory authority. According to the Second Amended Complaint, plaintiff asserts that said defendants are directly negligent and responsible for his injuries separate and apart from any act by GPI. Since plaintiff has asserted independent acts of negligence against each defendant for its own alleged conduct, common law indemnification claims must fail. If co-defendants are found not negligent for plaintiff's injuries, then they will not have to pay any judgment for which they would possibly need common law indemnification. If it is ultimately determined that these parties are directly negligent and responsible for a portion of the damages claimed by plaintiff, then they would in turn not be able to seek common law indemnification from GPI. Thus, all

common law indemnification cross-claims against GPI must be dismissed as a matter of law.

GPI further argues that there is no valid factual basis for contractual indemnification cross-claims against GPI.

As to co-defendants Cal-Tran, Koch, and Campbell, GPI's President Steven Greenman ("Greenman") attests that GPI did not enter into any contracts with said co-defendants for work at the George Washington Bridge. Thus, there is no agreement between these parties to support a contractual indemnity claim by them against GPI.

As to the Port Authority, Greenman attests that GPI's 2001 traffic engineering contract encompassed work in the vicinity of the subject detour and included a traffic engineering Maintenance of Traffic Drawing MT17 ("MT 17") in connection with the subject detour. The detour was set up as a result of construction work in the vicinity of plaintiff's alleged accident. While this agreement pertains to the relevant design work performed by GPI at the vicinity of plaintiff's accident, it does not contain any indemnification provision. Thus, the absence of an indemnification clause in this agreement mandates dismissal of the contractual indemnification claim for this work.

As to GPI's 2002 construction management contract, the indemnification provision in Paragraph 21 therein violates General Obligation Law ("GOL") § 5-322.1 and public policy since it seeks to indemnify the Port Authority for its own negligence under the case law and facts. GOL § 5-322.1 has been held to apply to contracts for services performed by design professionals who did not perform any actual construction work. Paragraph 21 only excludes "actual and willful intent to cause the loss." Paragraph 21 fails to provide for an exclusion for the Port Authority's own negligent actions and cannot be enforced. The issue of what degree, if any, the

Port Authority is ultimately found responsible is of no consequence to the analysis. And, any claim by the Port Authority that Paragraph 21 should somehow be salvaged to provide a "partial" indemnification also must fail since it does not contain the appropriate limiting language like, "to the fullest extent permitted by law."

GPI asserts that to the extent the Port Authority is not negligent, then contractual indemnification will be of no consequence since the Port Authority will not have any liability for which it can be indemnified. GPI also points out that plaintiffs' claims against the Port Authority are for Port Authority's own direct negligence, and not for vicarious or statutory liability, such as Labor Law 240, which is not in issue herein. The First Cause of Action, which is against only the Port Authority, alleges that it negligently supervised and permitted the existence of a hazardous condition on the roadway in permitting 18 wheel trucks to come onto the subject detour exit ramp. The Port Authority's liability is not incurred by virtue of the acts of others. That the Port Authority might ultimately be determined "not negligent" does not preclude granting GPI judgment, now.

Furthermore, Greenman asserts that the 2004 traffic engineering contract did not include work performed by GPI in designing the detour that was in place at the time of plaintiff's accident, and is thus irrelevant to the Port Authority's cross-claims. However, even assuming that this agreement applied to the subject detour work done by GPI prior to plaintiff's accident, the indemnification provision found in Paragraph 23 therein, which essentially mirrors Paragraph 21 of the 2002 construction management contract, likewise fails because it violates GOL § 5-322.1 for the reasons above.

Co-defendants oppose dismissal of their cross-claims and the Port Authority cross moves,

pursuant to CPLR 3025(b), to amend its Answer to include additional cross-claims against GPI.

First, argues co-defendants, the motion is premature since no discovery has been conducted and issues of fact exist as GPI's liability. Discovery has been delayed due to the filing of additional Complaints and discovery motions. Depositions have not been held, and testimony concerning defendants' duties to each other, the contracts, and the actions taken or not taken are necessary. Further, it is undisputed that the drawing of the detour at issue, dated October 17, 2004, was prepared pursuant to the 2001 traffic engineering contract. And, the 2004 traffic engineering contract in effect at the time of the accident contains provisions as to the scope and tasks of the work, that could relate to the accident, thereby contradicting Greenman's statements that such agreement does not relate to plaintiff's 2005 accident. Thus, the contract terms raise issues of fact exist as to which contract was in effect at the time of the alleged accident.

Co-defendants argue that the Port Authority's contractual cross-claims against GPI based on the 2002 construction management and 2004 traffic engineering contracts are valid since GOL § 5-322.1 does not bar the indemnification clauses at issue. GOL § 5-322.1 does not apply such contracts since they are not connected to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances; GPI only agreed to provide traffic engineering services, and the GOL does not apply to contracts for such services. Even if the Court held that GOL § 5-322.1 applies to such contracts, and the indemnification clauses therein improperly indemnify the Port Authority for its own negligence, GPI failed to show that the Port Authority was negligent and that the Port Authority's liability was not vicarious, especially in light of plaintiff's claim that the co-defendants are responsible for GPI's assistance in creating the negligent detour. Plaintiff alleges that GPI helped to create an extremely hazardous condition on

a public roadway, and therefore created a "strict liability" offense. Thus, discovery may show that the Port Authority's liability, if any, was vicarious, rendering both indemnification provisions fully enforceable against GPI.[1] As plaintiff is ultimately seeking to hold the co-defendants vicariously liable for the actions or inactions of GPI, a finding of vicarious liability cannot be excluded at this time.

And, since GPI failed to establish that GPI was not negligent, and plaintiff seeks to hold co-defendants liable for the actions or inactions of GPI, it is possible that co-defendants could be held vicariously liable for GPI's negligence. Indeed, plaintiff alleges that the detour was improper and alleges negligence against co-defendants for any relationship they may have had to the detour. Thus, the common law indemnification claims are viable and should not be dismissed.

Finally, the 2001 and 2004 traffic engineering contracts require GPI to obtain commercial liability insurance that names the Port Authority as an additional insured, and GOL § 5-322.1 does not render the insurance procurement provisions in such contracts void or unenforceable. Thus, the Port Authority should be permitted to amend its Answer to assert cross-claims against GPI for breach of GPI's obligation to obtain insurance naming the Port Authority as an additional insured. GPI cannot show any prejudice or surprise by the assertion of such cross-claims and such an amendment will not delay this litigation since no depositions have been held and there has been limited discovery to date.

In reply, GPI argues that its motion is not premature. Testimony as to the respective

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[1] Co-defendants do not challenge GPI's assertion that GPI did not enter into any contracts with indemnification clauses with Cal-Tran, Koch, and Campbell for work at the George Washington Bridge.

responsibilities and duties of the defendants as to their roles in the subject detour and as to the subject contracts, and issues as to which contract was in effect at the time of the alleged accident, do not apply to GPI's motion. While issues as to responsibility and involvement with regard to the subject detour would have to be decided concerning codefendants' contribution claims, these issues have no bearing with regard to contractual or common law indemnity.

All contractual cross-claims against GPI must be dismissed. As to Cal-Tran, Koch and Campbell, it is conceded that there is no written contract of indemnification between those parties and all claims of contractual indemnification by those codefendants must be dismissed.

As to the Port Authority, the argument that GOL §5-322.1 is not applicable to the indemnification provisions at issue should be rejected, since case law and the statute itself indicate that a party does not have to specifically be contracted to perform actual "construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances." Rather, the agreement only has to be in connection with or collateral to a contract or agreement with regard to construction. GPI was retained to do various work in connection with the construction project that was ongoing at the George Washington Bridge.

Further, the Court should not even have to look at the indemnification agreement in the 2004 traffic engineering contract since it was the earlier 2001 traffic engineering contract which covers the design of the subject detour that is the basis of the claims as against GPI. The design drawing for the subject detour was dated October of 2004, and was thus clearly completed under the earlier agreement, which does not contain any written indemnification language. Thus, the Port Authority should not have any contractual indemnity claims as against GPI with regard to this loss.

GPI does not have to prove whether or not there was any negligence on the part of the Port Authority to have the contractual claims of indemnification dismissed. To the extent that the Port Authority may be found not to be negligent, then contractual indemnification would be of no consequence. If the Port Authority is found not to be negligent, then they will receive a defendant's verdict and thus there would be no issues of contractual indemnification. Plaintiff cannot prevail against the Port Authority unless plaintiff establishes some negligence on the part of the Port Authority; this is not a case where the Port Authority can be found statutorily liable in the absence of any negligence on its part, or found vicariously liable. Thus, since the Port Authority will ultimately have to be found negligent at least in part for there to be a finding of liability against them in this case, the GOL would have to apply and this Court would have no choice but to determine that said indemnification clause is void and unenforceable as against public policy since the required language, "to the fullest extent permitted by law" or the like is omitted.

Further, co-defendants cross-claims for common law indemnification must be dismissed. While Courts have recognized a theory of implied indemnity, this theory would only be applicable where a party is found responsible or is being compelled to pay when they were not negligent (*i.e.*, vicarious liability, contractual agreement, products liability) or responsible in part for the happening of the loss. However, as has been maintained, there is no way plaintiff can prevail in his claims as against any of the co-defendants to this matter unless he can establish some negligence on their respective parts. And, co-defendants' argument that their only exposure would be due to any alleged negligence on the part of GPI in its design of the detour, is incorrect. The Second Amended Complaint contains allegations against the Port Authority on

which it could be determined negligent, independent of any action by GPI and unrelated to "design" of the detour. Plaintiff alleges that the maintenance, care, inspection and control over the construction site were reckless and negligent, that the detour was "improperly manned" and/or that the location of the incident was "improperly attended and supervised." Therefore, based on the allegations, at time of trial, there is the potential that the Port Authority and the other co-defendants could be found liable with respect to some action or inaction wholly unrelated to the "design" of the detour should plaintiff ultimately prevail at time of trial.

GPI further contends that the mere fact that plaintiff alleges strict liability in no way creates a purely vicarious liability situation as there is no statutory obligation or contractual agreement alleged that could create strict liability as against any of the defendants to this action.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New York County 2008]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show

facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Contractual Indemnification Claims

Cal-Tran, Koch and Campbell

As to Cal-Tran, Koch and Campbell, it is uncontested that there is no written contract of indemnification between such parties and GPI. Therefore, all claims of contractual indemnification by these co-defendants are dismissed.

Port Authority

It is undisputed that there is no written indemnification clause contained within the 2001 traffic engineering contract between GPI and the Port Authority for the subject traffic detour. Therefore, to the extent the Port Authority's first cross-claim against GPI for contractual indemnification claim is based on such agreement, such claim is dismissed.

It is also undisputed that the 2002 and 2004 contracts contain indemnification provisions.

And, contrary to GPI's contention, the record does not establish, at this juncture, that the 2004 traffic engineering contract was wholly irrelevant to the detour work performed by GPI. Although the design drawing for the subject detour was dated October of 2004, it cannot be said, based solely on the affidavit of GPI's President and in the absence of any deposition testimony on this subject, that the detour was (1) completed solely under the 2001 traffic engineering contract, which did not contain any indemnification clause (as espoused by GPI), or (2) that the work GPI performed under the 2004 traffic engineering contract bore no relation at all to the implementation or maintenance of the subject detour. Both the 2001 *and* the 2004 traffic engineering contracts contain language that GPI is to provide engineering services which include "preparing traffic engineering analyses, conceptual plans, functional plans, reports and/or contract drawings, specifications and estimates for a wide variety of new capital construction projects and rehabilitation projects..." The 2004 traffic engineering contract specifically states that the Port Authority:

> "hereby offers to retain Greenman-Pedersen, Inc. to provide expert professional services in connection with the performance of preliminary design and/or preparation of contract drawings, specifications and construction estimates as requested on a 'call-in' basis during 2005, 2006 and 2007 as more fully set forth in Attachment A. . ."
> (Paragraph 1).

Indeed, both the 2001 and 2004 traffic engineering contracts include an "Attachment A" thereto, which lists the scope of work and description of tasks to be performed by GPI. Such tasks include, under each contract, for example, "Traffic sign and sign system design," "Maintenance and protection of traffic plans, specifications, and estimates," "Pavement marking design," "Accident analysis and countermeasure development for high-frequency locations," to name a few. The 2004 traffic engineering contract, which was in effect at the time of the

accident, included work that was contracted for in the 2001 traffic engineering contract. Thus, in the absence of depositions, it cannot be said, as a matter of law, that the subject detour was unrelated in any manner to the 2004 traffic engineering contract.

Turning to whether such indemnification clauses in the 2002 and 2004 traffic engineering contracts relied upon by co-defendants are subject to GOL §5-322.1, GOL §5-322.1 states as follows:

> A[n] . . . agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, operation, 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, for indemnity, whether such negligence be in whole or in part, is against public policy and is void and unenforceable.

This section of the GOL clearly applies to an agreement in "connection with or collateral to a contract or agreement relative to the construction, operation, repair or maintenance of a building, structure or pertinences, and appliances." Thus, contrary to the co-defendants' contention, GPI need not have contracted to perform the actual construction work in order for this section of the GOL to apply. GPI's contracts were for various services that were to be "for a wide variety of new capital construction projects and rehabilitation projects" (*see Bennett v Bank of Montreal*, 161 AD2d 158, 554 NYS2d 869 [1st Dept 1990] (holding that "[a]greements made between design professionals . . . are at the very least 'collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building'"); *DeFilippis Crane Service, Inc. v Joannco Contracting Corp.*, 132 AD2d 517, 518, 517 NYS2d 259 [2d Dept 1987] (finding that since the crane was leased as an incident of defendant's subcontract, which required

it to perform certain types of excavation work, the indemnification clause the leasing contract should be viewed as "collateral to a contract or agreement relative to . . . construction" under GOL §5-322.1)). GPI's contracts were for work in connection with the capital construction project ongoing at the George Washington Bridge. Having failed to establish that GOL §5-322.1 does not apply to the indemnification provisions contained in the 2002 and 2004 contracts, such provisions must comport with GOL §5-322.1 in order to sustain the co-defendants' cross-claims for contractual indemnification against GPI.

It bears noting that GOL § 5-322.1 provides that an agreement, which purports to indemnify the indemnitee against liability for damages caused or resulting in whole or part from indemnities negligence, "is against public policy and is void and unenforceable" (*Robinson v City of New York*, 8 Misc 3d 1012, 801 NYS2d 781 [Sup Ct, Bronx County 2005]).

An overbroad indemnification clause is thus void to the extent it requires indemnification in the presence of negligence on the indemnitee's part (*Brown v Two Exchange Plaza Partners*, 146 AD2d 129, 539 NYS2d 889 [1st Dept 1989]). However, to the extent an indemnification provision purports to indemnify a party "for its own negligence, it has been held that such an agreement does not violate General Obligations Law if it authorizes indemnification 'to the fullest extent permitted by law" (*Quick v City of New York*, 24 Misc 3d 1210, 890 NYS2d 370 [Sup Ct, Kings County 2009] citing *Lesisz v Salvation Army*, 40 AD3d 1050 [2d Dept 2007]; *Gdoviak v Southbridge Towers, Inc.*, 20 Misc 3d 1129, 872 NYS2d 690 [Sup Ct, New York County 2008] (Indemnification provisions that contain limiting language, such as "to the fullest extent permitted by law," do not run afoul of GOL § 5-322.1)). An overbroad indemnification clause is valid to the extent it requires indemnification in the absence of negligence on

indemnitee's part (*Brown v Two Exchange Plaza Partners*, 146 AD2d 129, 539 NYS2d 889 [1st Dept 1989]).

"Furthermore, an indemnification clause that purports to indemnify a party for its own negligence may be enforced where the party to be indemnified is found to be free of any negligence and its liability is merely imputed or vicarious" (*Lesisz*, 40 AD3d at 1051]).

The question for purposes of this statute is whether the indemnitee, *i.e.*, a general contractor was negligent, not whether the indemnitor, *i.e.*, a subcontractor was not negligent; the "bar of the statute applies only if the indemnitee was in some degree negligent irrespective of negligence, or the lack of it, by the indemnitor" (*Brown v Two Exchange Plaza Partners*, 146 AD2d 129, 137, 539 NYS2d 889 [1st Dept 1989]). Thus, "a contractor [or owner] who is 1% responsible for an accident is, by reason of the statute, barred from enforcing an indemnification agreement and is limited instead to 99% contribution from his co-tortfeasors; a general contractor free of negligence, on the other hand, may enforce his subcontractor's agreement to indemnify, the latter's freedom from negligence notwithstanding" (*id.*).

Here, Paragraph 21 of the 2002 construction management contract between the Port Authority and GPI contains an indemnification provision, which reads as follows:

> The Consultant [GPI] assumes the following distinct and several risks, whether they arise from the acts or omissions (*whether negligent or not*) of the Consultant, *of the Authority* or of third persons or from any other causes, and whether such risks are within or beyond the control of the Consultant *excepting only risks which arise solely from affirmative acts done by the Authority subsequent to the execution of this Agreement with actual and willful intent to cause the loss, damage and injuries described in subparagraph A through D below*:
>
> * * *
>
> The Consultant shall indemnify the Authority against all claims described in subparagraphs A through D above and for all expense incurred by it in the defense,

> settlement or satisfaction thereof, including expenses of attorneys. If so directed, the Consultant shall defend against any claim described in subparagraphs B, C and D above, in which event he shall not without obtaining express advance permission from the General Counsel of the Authority raise any defense involving in any way jurisdiction of the tribunal, immunity of the Authority, governmental nature of the Authority or the provisions of any statutes respecting suits against the Authority, such defense to be at the Consultant's cost.[2]
> (emphasis added)

It is undisputed that there is no limiting language "to the fullest extent permitted by law" in the agreements at issue. Further, the indemnification provision is not triggered by the negligence of GPI; thus, the negligence of GPI is immaterial. And, the clause seeks to indemnify the Port Authority from the Port Authority's acts or omissions "whether negligent or not."

However, it cannot be said that Paragraph 21 is void *at this juncture*, simply due to the fact that the indemnification clauses fail to contain the appropriate limiting language like, "to the fullest extent permitted by law." Though "the statute declares such agreements are against public policy and hence "void" and unenforceable, the Court of Appeals, consistent with a prior holding in *Brown v Two Exchange Plaza* . . . . ruled implicitly that such unlimited indemnification agreements are actually 'voidable.'" That is, to render the agreement void, the offensive language purportedly seeking full indemnification must be coupled with "active" negligence by the owner or general contractor (the indemnitee) . . . ." (*Bush v City of New York*, 195 Misc 2d 882, 885, 762 NYS2d 775 [Sup Ct, Bronx County 2003]; *Gdoviak v Southbridge Towers, Inc.*, 20 Misc 3d 1129, 872 NYS2d 690 [Sup Ct, New York County 2008] (stating, in a Labor Law action where the indemnification clause provided full indemnification, "whether or not the Owner is found to be negligent or just vicariously liable," [s]uch paragraph is void and

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[2] Paragraph 23 of the 2004 traffic engineering contract is essentially identical in this regard.

unenforceable under GOL § 5-322.1, when an "indemnitee is found to be at least partially negligent." . . . If, however, [the owner] is later found to be only vicariously liable, then the indemnification clause is enforceable")).

The plaintiff alleges that the Port Authority was negligent in permitting the "extremely hazardous detour to exist on a public thoroughfare." The possibility exists that plaintiff (or co-defendants) may maintain a claim that the activities of the Port Authority were ultra-hazardous activities for which common-law strict liability may be imposed, in which case, the Port Authority could be found liable for the acts of GPI in the absence of any finding of negligence on the part of the Port Authority. Discovery may reveal that the Port Authority's liability was vicarious, in which case, both indemnification provisions would be enforceable. Until there is a determination that the activities undertaken by the Port Authority did not rise to the level of hazard so as to impose strict liability, and in the absence of discovery eliminating the possibility of such strict liability, it cannot be said that the indemnification clauses herein are void as a matter of law, at this juncture (*Doundoulakis v Town of Hempstead*, 42 NY2d 440 [1977] (Determining whether an activity is abnormally dangerous involves multiple factors)).

Therefore, the motion to dismiss the Port Authority's contractual indemnification claims against GPI is denied, without prejudice, to the extent such claims are based on the 2002 and 2004 contracts noted above.

Common Law Indemnification

In order for the co-defendants to establish a claim for common-law indemnification against GPI, they must prove not only that they were "not guilty of any negligence" but must also prove that the "proposed indemnitor was guilty of some negligence that contributed to the

causation of the accident'" (*Matz v Laboratory Inst. of Merchandising (LIT)*, 27 Misc 3d 1220 Sup Ct, New York County 2010] citing *Correia v Professional Data Mgmt.*, 259 AD2d 60, 65 [1st Dept 1999] and *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). Since the record fails to establish GPI's freedom from negligence for plaintiff's injuries, and for the reasons stated above, dismissal of the common law indemnification claims against GPI are also unwarranted, at this juncture (*Hanley v McClier Corp.*, 63 AD3d 453, 881 NYS2d 400 [1st Dept 2009] (stating that dismissal of common-law indemnification claim against Allsafe improper where "factual issue exists whether any negligence on the part of Allsafe contributed to the accident")). Therefore, dismissal of co-defendants' common law indemnifications claims against GPI is unwarranted, at this juncture.

Cross-Motion to Amend

As to the cross-motion to amend, the 2001 and 2004 traffic engineering contracts contain language which supports the Port Authority's claim that GPI was required to obtain insurance naming the Port Authority as an additional insured.

The 2004 traffic engineering contract specifically states:

> 1) The Consultant shall take out and maintain at his own expense Commercial General Liability Insurance including but not limited to Premises-Operations, Completed Operations and Independent Contractor coverages in limits of not less than $2,000,000 combined single limit per occurrence for Bodily Injury Liability and Property Damage Liability.... In addition, the policy shall include the Authority as an additional insured and shall contain a provision that the policy may not be canceled, terminated or modified without thirty days written advance notice to the Project Manager as noted below. Moreover, the Commercial General Liability policy shall not contain any provisions (other than a Professional Liability exclusion, if any) for exclusions from liability other than provisions or exclusions from liability forming part of the most up to date ISO form or its equivalent unendorsed Commercial General Liability Policy. The liability policy(ies) and certificate of insurance shall contain cross-liability language providing severability of interests so that coverage will respond as if separate policies were in force

for each insured."
(See 24 of Exhibit "J" [emphasis added].)

Therefore, the Port Authority's request to amend its Answer to include a cross-claim that the Port Authority is entitled to insurance coverage, as an additional insured, from GPI has merit, and the cross-motion is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Greenman-Pedersen, Inc. s/h/a Greenman-Pederson, Inc. ("GPI") for partial summary judgment pursuant to CPLR 3212 dismissing the contractual indemnification claims by Cal-Tran, Koch and Campbell against it is granted, and such claims are hereby severed and dismissed; and it is further

ORDERED that the branch of GPI's motion for partial summary judgment pursuant to CPLR 3212 dismissing the Port Authority's contractual indemnification claims is granted solely to the extent the Port Authority's first cross-claim against GPI for contractual indemnification claim is based on the 2001 traffic engineering contract between GPI and the Port Authority; and it is further

ORDERED that the branch of GPI's motion for partial summary judgment pursuant to CPLR 3212 dismissing the Port Authority's contractual indemnification claims is denied, without prejudice, to the extent the Port Authority's first cross-claim against GPI for contractual indemnification claim is based on the 2002 and 2004 contracts between the Port Authority and GPI; and it is further

ORDERED that the branch of GPI's motion for partial summary judgment pursuant to

CPLR 3212 dismissing the co-defendants' common law indemnifications claims against GPI is denied, without prejudice, at this juncture; and it is further

ORDERED that the cross-motion by the Port Authority pursuant to CPLR 3025(b), to amend its Answer to include additional cross-claims against GPI is granted and the proposed Answer attached to the cross-motion is deemed served; and it is further

ORDERED that Greenman-Pedersen, Inc. s/h/a Greenman- Pederson, Inc. serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: August 5, 2010

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
AUG 10 2010
NEW YORK
COUNTY CLERK'S OFFICE