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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 602351/2007
TSAO, CALVIN
vs.
GIOVANNITTI
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 8/20/10

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	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendant Giovannitti Inc. on his first cause of action for contractual indemnification and for attorneys' fees, is denied; and it is further

ORDERED that the cross-motion by Giovannitti Inc. for summary judgment dismissing the plaintiff's complaint and for common law indemnification against Time Mechanicals, Inc., is denied; and it is further

ORDERED that the parties shall complete outstanding discovery, including any outstanding depositions, by November 30, 2010 and plaintiff shall file the note of issue by January 14, 2011; and it is further

ORDERED that plaintiff shall 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: 9/15/10

HON. CAROL EDMEAD 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

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

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CALVIN TSAO,

Plaintiff,

-against-

GIOVANNITTI INC.,

Defendant.

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DAVID GIOVANNITTI INC., a/k/a
GIOVANNITTI INC.,

Third-Party Plaintiff,

-against-

TIME MECHANICALS INC.,

Third-Party Defendant.

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Index No. 102110/10

DECISION/ORDER

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

MEMORANDUM DECISION

Plaintiff Calvin Tsao ("plaintiff") moves for summary judgment against defendant Giovannitti Inc. ("defendant") on his first (and sole) cause of action for contractual indemnification and for attorneys' fees.

Factual Background

On or about July 1, 1994, plaintiff and defendant entered into a Standard Form of Agreement (the "Agreement") with regard to defendant's "complete renovation" of plaintiff's Apartment (the "Project"), located at 7 West 81st Street, New York, New York (the "Building"). The Agreement provided that all materials used on the Project would be "new unless otherwise required or permitted" and that the work would conform to the "Contract Documents" (Agreement ¶3.5).

The Agreement also contained an indemnification clause which requires defendant to indemnify plaintiff for all claims and damages, including attorneys' fees, arising out of or resulting from the performance of "the Work" to the extent caused by defendant's negligent acts or omissions.

Plaintiff and defendant also prepared a construction plan which contained details and specifications for the renovation work to the Apartment (the "Construction Plan"). According to plaintiff, the Demolition section of the Construction Plan specified the demolition and replacement of all branch piping (plumbing) from the new fixture back to the branch risers.

In this connection, defendant hired Time Mechanicals, Inc. ("Time Mechanicals") as the plumbing subcontractor. The work was completed in the same year, 1994.

Plaintiff asserts that 12 years later, in or about September 2006, non-parties Richard and Jill Gallen (collectively "the Gallens") began complaining of water leaking into their apartment, which was located directly below plaintiff's. Non-party Lawless & Mangione, LLP, a Consulting Engineer (the "Building Engineer"), determined after an investigation, that the branch piping failed because defendant did not replace the old branch piping with new branch piping during the renovations to the Apartment as required.[1] Thereafter, plaintiff had the branch piping replaced. The Gallens then demanded that plaintiff reimburse them for the property damage resulting from the water infiltration from plaintiff's Apartment. Under the threat of termination of his lease by the Building manager, in April 2007, plaintiff, through separate counsel, negotiated a financial

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[1] The Building Engineer had, at that time, been hired by the Building's Board of Directors to perform unrelated facade and roof repairs to the Building. After detecting moisture at the base of the Building's waste line riser in plaintiff's kitchen, the Building Engineer performed an experiment by allowing kitchen hot water to run. Hot water was then observed dripping into the Gallens' apartment. Upon increasing the water volume in plaintiff's kitchen, a substantial volume then poured into the Gallens' apartment.

settlement with the Gallens and reimbursed them approximately $80,000 for their property damages. Consequently, plaintiff now seeks indemnification by defendant for the damages he paid to the Gallens. Defendant, in turn, impleaded Time Mechanicals.

In support of summary judgment, plaintiff argues that under the Agreement, defendant agreed to indemnify plaintiff for all damages, including attorneys' fees, arising out of, or relating to, the specified work which were caused by defendant's negligence. The Agreement and "Project Manual" specified that defendant was to demolish all existing branch piping in plaintiff's kitchen and install new ones. Plaintiff also submits the affidavit of Basil Taha ("Taha"), a senior engineer with the Building Engineer. Taha states that the property damage was caused by a section of branch piping in plaintiff's Apartment which failed, and which should have been replaced with new branch piping during defendant's renovations in 1994. The branch piping was not installed new and defendant's failure to perform the work pursuant to the Contract Documents constituted negligence. Plaintiff argues that as a result of defendant's negligence, he was forced to defend, negotiate and settle the Gallens' property damage claim. Further, argues plaintiff, any alleged negligence by Time Mechanicals has no bearing on defendant's duty to indemnify plaintiff, since the Agreement provides that defendant is responsible for defendant's employees and subcontractors. Thus, plaintiff seeks $69,051.13, representing the amount he paid to the Gallens, plus attorneys' fees he incurred in this action and in settling the Gallens' claim, less the partial reimbursement he received from Allstate Insurance under his homeowner's insurance.

In opposition, defendant argues that plaintiff's motion is procedurally defective, in that plaintiff failed to appear for a deposition in violation of the compliance conference order and

CPLR 3126.

In response, defendant cross moves for summary judgment dismissing plaintiff's Complaint, and for common law indemnification against Time Mechanicals for any judgment defendant may be liable to plaintiff, including attorneys' fees. It is argued that plaintiff's complaint should be dismissed because the subject indemnification clause is unenforceable. Plaintiff breached paragraphs 12.2.2 and 4.3.9 of the Agreement in failing to give defendant prompt written notice of the alleged defective condition or alleged damage. At no time prior to the instant action, was defendant given any notice by defendant of any problems with their work or any opportunity to inspect the subject pipe and cure any defect. And, plaintiff breached paragraph 4.5.1 which provides that any controversy or claim related to the Agreement be "settled by arbitration."

Defendant further argues that since plaintiff observed the pipe leakage in 2006, plaintiff's delay in notifying defendant of such leakage prevented defendant from assessing and mitigating the alleged damages. Therefore, plaintiff's claim is barred by laches.

And, plaintiff's acceptance of defendant's work and payment in full upon completion of the project without any reduction of payment reflects plaintiff's satisfaction of defendant's work pursuant to paragraph 12.3 of the Agreement.

Also, argues defendant, the indemnification clause is void and unenforceable as violative of General Obligations Law ("GOL") § 5-322.1. Said clause seeks to impose indemnification even in instances where some negligence is attributable to the contractor and plaintiff is held less than 100% at fault. Since the indemnification clause contemplates a complete rather than a partial shifting of liability, it is void against public policy.

Defendant argues that in the event the indemnification clause is enforceable, there is no negligence on the part of defendant so as to trigger the indemnification clause. Plaintiff submits no evidence of defendant's involvement of the pipe, or expert testimony as to the workmanship of the branch piping or whether the branch piping should have been removed. Defendant contends that the alleged defect of the pipe would have been caused by normal wear and tear, rather than any deficient workmanship of defendant. Defendant contends that the branch piping was installed in compliance with the Agreement, and that the specifications did not provide specific information as to how to remove or install branch piping. In order not to jeopardize the integrity of the "building stack" which was not part of the Agreement or scope of work, Time Mechanicals decided to attach the new branch piping to the last fitting at the stack rather to "get involved with the subject pipe" and because the subject pipe was covered with friable asbestos. Defendant claims that it did not direct or control the means and methods of Time Mechanicals's work. The installation, replacement, and connection of the branch piping were within the discretion and sole control of Time Mechanicals.

Nor is plaintiff entitled to expenses and costs incurred. Defendant was deprived from knowing what factors plaintiff considered and whether his assessment of his liability in Gallens' claim was made in good faith.

Finally, defendant argues that any alleged defect would have been the result of Time Mechanicals's improper judgment at the worksite, and defendant is entitled to common law indemnification from Time Mechanicals.

Time Mechanicals opposes defendant's motion for common law indemnification against it, contending that since 1994, it has not been called back or performed any work at the

Apartment. Although an inspection was conducted at the Apartment on October 28, 2009, Time Mechanicals was not present and depositions have not yet been held. Plaintiff's deposition is necessary because he drafted the diagrams upon which he relies in stating that the branch piping was of the drawing and was to be replaced. Plaintiff must also be questioned to determine if the payments he made were necessary. As an architect, plaintiff himself was aware of pipes covered in asbestos and failed to make appropriate provisions for dealing with same. Also, defendant's deposition is necessary to flesh out the scope of the Agreement.

Defendant also failed to establish its freedom from negligence in order to receive common law indemnification. Defendant does not specifically state that he did not supervise Time Mechanicals's work.

Plaintiff also failed to establish the proximate cause of his damages. It is likely that the Building's own plumber punched through the pipe when servicing the same or another apartment.

In reply, plaintiff argues that his motion is not procedurally defective, as it was made after issue was joined in accordance with CPLR 3212, and not prohibited by the compliance conference order; motions for summary judgment stay discovery pursuant to CPLR 3214 in any event.

Also, depositions are irrelevant to his motion, since the motion rests on documentary evidence, *i.e.*, the Agreement, Project Manual, and Project Drawings, and the affidavits of plaintiff and his engineering expert. All discovery has been exchanged in the main action, and defendant does not describe a single category information it wishes to obtain through depositions.

Further, argues plaintiff, paragraph 12.2.2 of the Agreement is irrelevant to his claim for indemnification for property damage sustained by a third party. Paragraph 12.2.6 relates only to the specific obligation of the defendant to correct the work, and has no relationship to the time within which the Contract Documents may be sought to be enforced. As to paragraph 4.3.9, plaintiff promptly notified defendant of the defective work once he was informed of the cause of the Gallens' property damage and required to pay for same. After paying the Gallens in April 2007, plaintiff commenced this action in July 2007. Paragraph 4.3.9 seems to apply to personal injuries and damages sustained during the performance of work under the Agreement, and thus, plaintiff has no reasonable expectation that defendant will return to the Project to investigate a particular condition.

Further, argues plaintiff, defendant waived its right to arbitration by answering the Complaint in February 2008 and participating in multiple court conferences, document discovery, a site inspection, and impleading Time Mechanicals. Nor did defendant assert the arbitration provision as an affirmative defense.

Plaintiff also argues that laches is inapplicable, because plaintiff did not delay in asserting his indemnification claim, which did not even accrue until April 16, 2007 when plaintiff paid the Gallens. Plaintiff commenced this action within eight months of his payment. Defendant has not been prejudiced since the plaintiff was not using the kitchen fixtures during the period the Building Engineer visited the Gallens' apartment. The defective branch piping is also preserved, and photographs of same have been exchanged.

Also, plaintiff maintains, paragraph 4.3.5 does not provide a basis to find that there was a satisfaction of the work, because this section does not waive claims arising from the failure of the

work to comply with the Agreement, as herein. Defendant's defective work was not discoverable until portions of the cabinetry were removed. And, defendant was contracted and paid for asbestos removal.

Plaintiff maintains that he established defendant's negligence, and the indemnification clause is enforceable and triggered. The indemnification clause does not run afoul of the GOL because it has limiting language such as "to the fullest extent permitted by law."

In reply, defendant argues that the depositions sought are necessary. Also, the inspection of the pipe was not performed at the Apartment and plaintiff refuses to permit an inspection of his Apartment.

Defendant maintains that the indemnification clause cannot be construed to require defendant to indemnify plaintiff for damages arising 12 years after the work was completed.

Defendant also argues that even if it supervised Time Mechanicals, general supervisory authority is insufficient to impose common law indemnification. And, there is no affidavit from Time Mechanicals indicating that defendant supervised, directed, or controlled Time Mechanicals's work.

Discussion

At the outset, the Court finds that plaintiff's motion is not procedurally defective. Pursuant to CPLR 3212, any "party may move for summary judgment in any action, after issue has been joined" and it is undisputed that issue has been joined in this action. Nothing in the discovery conference order precludes plaintiff from making the instant motion. Further, that discovery has not been completed in accordance with the discovery order does not render plaintiff's application procedurally improper (*see Eller v Tater*, 20 Misc 3d 1110, 867 NYS2d

374 [Sup Ct, Bronx County 2008] (stating, "incomplete discovery does not bar a grant of summary judgment, unless the opposing party can show a reasonable attempt at discovery was made and that triable issues of fact may be uncovered through further discovery)). Therefore, plaintiff's motion is procedurally proper.

Turning to the merits of the instant motion, as the proponent of the motion for summary judgment, plaintiff must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR §3212 [b]). This standard requires that the proponent of a motion for summary judgment 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 (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman* at 563; *Prudential Securities Inc. v Rovello*, 262 AD2d 172, 172 [1st Dept 1999]).

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; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]).

A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005], *quoting Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987] [internal quotation marks omitted]).

It must be noted that General Obligation Law § 5-322.1 provides that an agreement, which purports to indemnify the indemnitee [Owner] against liability for damages caused or resulting in whole or part from the indemnitee's negligence, "is against public policy and is void and unenforceable." [2]

Paragraph 3.1 8.1 which stated in relevant part:

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[2]General Obligations Law § 5-322.1 provides in relevant part:

"A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building * * * purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable " (emphasis added)

> *To the fullest extent permitted by law*, the Contractor [defendant] shall indemnify and hold harmless the Owner [plaintiff] . . . from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to . . . injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor [defendant]. . . ., *regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder*. . . .

Although the indemnification provision in issue requires defendant to indemnify plaintiff where the damage is "caused in part" by defendant regardless of whether plaintiff caused such damage, it also restricts indemnification "to the fullest extent permitted by law," thereby rendering the provision enforceable (*Damashek v City of New York*, 27 Misc 3d 1214 [Sup Ct New York County 2010] *citing Giangarra v Pav-Lak Contracting, Inc.*, 55 AD3d 869 [2d Dept 2008] [agreement not void as it also authorized indemnification "to the fullest extent permitted by law"]). Therefore, the branch of defendant's cross-motion to dismiss the complaint on the ground that the indemnification clause is unenforceable as violative of the GOL, is denied.

Under the indemnification paragraph, defendant is obligated to indemnify plaintiff for the damages plaintiff sustained where (1) the claims, damages, losses and expenses, including but not limited to attorneys' fees, arose out of or resulted from defendant's performance of the Work and (2) such claims, damages, losses and expenses were caused by defendant's negligence or omissions. Plaintiff failed to establish that the damage caused by the leak from plaintiff's Apartment were caused by defendant's negligent performance of it work at the Project.

Plaintiff's claim that defendant failed to install new branch piping is arguably supported by the Agreement and construction drawing. The Agreement specifies that the Work included "2. Demolition of plumbing back to the branch risers." (See Plaintiff's memorandum of law,

Exh. 5, Section 02050, Part 1.00-General §1.02A.2). The construction drawing, which is part of the Agreement, entitled "Sixth and Seventh Floor Plan Symbol List" states, in relevant part, "Family/Kitchen: chase exist[ing] floor fill and r/w [replace with] new piping within floor fill." Defendant warranted, under section 3.5.1 of the Agreement, that the "materials and equipment furnished . . . will be new unless otherwise required or permitted by the Contract Documents." Plaintiff claims that the branch piping in plaintiff's kitchen could not have been installed as new in 1994 because it was covered in "friable asbestos." Further, plaintiff established that the failure of defendant to replace the branch piping with new piping caused the leak which resulted in damage to the Gallens' apartment. The affidavit of the Taha indicates that in October 2006, after HAG Plumbing exposed the branch piping, "it was determined that the cause of the leak in Gallen's apartment was due to a very old section of branch piping (waste line) which was reused and reinstalled during [plaintiff's] gut renovation in 1994 . . . ."[3]

However, the affidavit of Giovannitti raises an issue of fact as to whether the Agreement called for the removal and replacement of the subject branch piping. Giovannitti attests that it, along with Time Mechanicals, provided the proper equipment materials and complied with the Agreement. According to Giovannitti, new branch piping was installed to join "the existing stack" and that said "stack is part of the building plumbing system." (¶5). The subject branch piping is integral to the building stack. Time Mechanicals attached the new branch piping to the last fitting at the stack because the subject pipe was covered by friable asbestos and Time

[3] It is noted that while Taha's affidavit explains the testing he performed in order to reach his conclusion that the leak into the Gallens' apartment was from one of the pipes in plaintiff's kitchen, Taha does not expressly explain the basis for the determination that that such leak was caused by the branch piping that defendant failed to replace. It is unclear whether Taha or HAG Plumbing reached this conclusion, and how such conclusion was reached.

Mechanicals did not want to jeopardize the integrity of the building stack, which was not part of the Agreement. (¶6-7). While plaintiff allegedly paid defendant for asbestos removal, it is unclear whether defendant's obligation to remove asbestos included the duty to replace the asbestos-covered branch piping which was integral to the Building stack, where the Building stack was not part of the Agreement. Giovannitti also attests that the defect in the pipe would have been caused by normal wear and tear, rather than the negligent workmanship of defendant. The Court notes that the "Warranty" (Section 3.5.1) "excludes remedy for damage or defect caused by . . . normal wear and tear under normal usage. Depositions of the parties are necessary to flesh out issues, such as whether defendant was required under the Agreement to replace the subject pipe with a new one, and if so, whether defendant's failure to replace the subject pipe, in 1994, constituted negligence that was a proximate cause of the subject property damage.

In light of Giovannitti's affidavit, it cannot be determined, at this juncture, whether the damage to the Gallens' apartment resulted from the negligence of defendant in the performance of its work under the Agreement. Thus, plaintiff's motion for summary judgment granting contractual indemnification against defendant is denied. Accordingly, the branch of defendant's cross-motion for common law indemnification against Time Mechanicals is denied.

As to the balance of defendant's cross-motion to dismiss, plaintiff's purported breach of paragraphs 12.2.2, 4.3.9, and 4.5.1, does not affect plaintiff's indemnification claim.

Paragraph 12.2.2 provides that if, within one year after the Work is completed, "any of the Work is found to be not in accordance with the" Agreement, defendant "shall correct it promptly after receipt of written notice. . . ." Paragraph 4.3.9 requires plaintiff to provide "written notice of [] injury or damage" to defendant "within a reasonable time not exceeding 21

days after first observance . . . ." While defendant was not given any notice of any damage or problems with the Work until 2007, paragraphs 12.2.2 and 4.3.9 only address defendant's obligation to correct any of its Work that did not conform to the Agreement and plaintiff's obligation to provide defendant with notice within 21 days of such damage. Neither paragraph addresses, nor limits in any manner, the obligation of defendant to indemnify plaintiff for claims against plaintiff for property damage caused by defendant's negligent work.

Further, as to paragraph 4.5.1, it is undisputed that this paragraph provides that any controversy or claim related to the Agreement be "settled by arbitration." Where defendant has taken advantage of the judicial forum to an extent that exceeds the limits of the arbitral forum, they have deemed to waive their rights to arbitration (*see e.g., Nishio v E.F. Hutton & Co., Inc.*, 168 AD2d 224, 562 NYS2d 112 [1st Dept 1990]; *De Sapio v Kohlmeyer*, 35 NY2d 402, 362 NYS2d 843 [1974]; *Sherrill v Grayco Builders, Inc.*, 64 NY2d 261, 486 NYS2d 159 [1985]). Defendant does not dispute that it waived its right to arbitrate plaintiff's claim by participating in this litigation through discovery conferences, exchange of discovery, and filing an impleader action. Therefore, the arbitration clause does not bar this action.

Nor does plaintiff's acceptance, full payment, and satisfaction of defendant's work pursuant to paragraph 12.3 (entitled "Acceptance of Nonconforming Work") affect the defendant's purported duty to indemnify plaintiff. Whether plaintiff was satisfied with defendant's work in 1994 does not constitute a finding that defendant was not negligent or that defendant's alleged negligence did not cause the property damage at issue.

The well-established rationale for the doctrine of laches is to prevent a party from injustice that would arise from the assertion of stale claims (*Continental Cas. Co. v Employers*

Ins. Co. of Wausau, 60 AD3d 128, 871 NYS2d 48 [1st Dept 2008] *citing Marcus v Village of Mamaroneck*, 283 NY 325, 332 [1940] (defense of laches is based upon the principle that plaintiffs have delayed to the prejudice of defendants)). There is no indication that the delay in enforcing the indemnification clause herein was due to any fault of the plaintiff. Although plaintiff observed the pipe leakage in 2006, plaintiff's indemnification claim did not accrue until plaintiff paid the Gallens in April 2007 *(Commissioners of State Ins. Fund ex rel. A.J. McNulty & Co., Inc. v Sherry*, 2002 WL 31107888 [Sup Ct, New York County 2002] *citing McDermott v City of New York*, 50 NY2d 211, 428 NYS2d 643 [1980] (indemnification claims have a six-year Statute of Limitations and accrue when the party seeking indemnification has made a payment to an injured person)). Plaintiff then commenced this action timely in December 2007, eight months later. Furthermore, the subject branch piping has been preserved, defendant was provided with photographs of same, and defendant conducted an inspection of a piece of the subject pipe was performed. Except for a deposition of the plaintiff and an on-site inspection which can be conducted, defendant has received meaningful discovery to aid it in defense of this action. It cannot be said that defendant has been prejudiced in its defense of this action due to the passage of time. Thus, plaintiff's claim is not barred by the doctrine of laches.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendant Giovannitti Inc. on his first cause of action for contractual indemnification and for attorneys' fees, is denied; and it is further

ORDERED that the cross-motion by Giovannitti Inc. for summary judgment dismissing

the plaintiff's complaint and for common law indemnification against Time Mechanicals, Inc., is denied; and it is further

ORDERED that the parties shall complete outstanding discovery, including any outstanding depositions, by November 30, 2010 and plaintiff shall file the note of issue by January 14, 2011; and it is further

ORDERED that plaintiff shall 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: September 15, 2010

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