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

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Generoso, Nicky

-v-

Housing Authority

INDEX NO. 102719-08

MOTION DATE

MOTION SEQ. NO. 3

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

FEB 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/9/11

LOUIS B. YORK 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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NICKY GENEROSO,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY, BRI-DEN CONSTRUCTION CO., INC., PRO SAFETY SERVICES LLC, AND POWERS BRIDGING AND SCAFFOLDING CO., INC.

Defendants.

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Index No. 102719/08

DECISION/ORDER

NEW YORK CITY HOUSING AUTHORITY, BRI-DEN CONSTRUCTION CO., INC.,

Third-Party Plaintiffs,

-against-

COOPER PLASTING CORP.,

Third-Party Defendant.

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Louis B. York, J.S.C.:

This is a negligence action arising from injuries suffered by plaintiff in a construction site accident, third-party defendant moves, pursuant to CPLR 3212, for summary judgment dismissing the indemnification claims against it by third-party plaintiffs. The court denies the motion for the reasons set forth below.

Defendant, New York City Housing Authority (Housing Authority), is the owner of a housing complex located at 177 Amsterdam Avenue, New York, NY. On January 2007, the Housing Authority contracted with Defendant, Bri-Den Construction Company,

Inc. (Bri-Den), to renovate and rehabilitate said housing complex. Four of the buildings in the housing complex required facade work. In turn, Bri-Den as the general contractor, hired Cooper Plasting Corporation (Cooper) as a subcontractor to replace the old facades. Plaintiff, Nicky Generoso (Generoso) was one of the workers assigned to this project by Cooper.

As part of Generoso's duties, he had to chip away the buildings' decaying structures, and protect the windows by placing wooden templates with plastic coverings over them. Generoso performed his duties by moving across the building's exterior through the pole scaffolding erected across the buildings exterior. Generoso also routinely moved vertically through the buildings' fire escapes. On September 27, 2007, as Generoso was descending a flight of fire escape steps, one gave way causing him to fall. He immediately reached for the adjacent handrail as he fell on the staircase. Generoso sustained physical injuries, particularly to his back and shoulders.

Subsequent to Generoso receiving workers compensation through Cooper, he filed suit against the Housing Authority, Bri-Den and two other defendants who were later dismissed from this action. Third-party plaintiffs Housing Authority and Bri-Den impleaded Cooper, making it a third-party defendant. On December 2009, the court granted plaintiff's partial summary judgment against defendants on the issue of liability under Labor Law §§ 240(1) and 241(6).

Cooper now moves for summary judgment asserting that the indemnification agreement relied on by Bri-Den and the Housing Authority is void as against public policy. Cooper also alleges that Bri-Den suffered no damages as a result of Cooper's failure to procure insurance. Further, Cooper argues that the workers compensation law

insulates them from liability, since Generoso received workers compensation benefits and did not suffer a grave injury. However, Generoso, Housing Authority and Bri-Den oppose Cooper's motion asserting the validity of the indemnification agreement. Additionally, the Housing Authority and Br-Den argue that Cooper failed to procure insurance, and is therefore liable.

Pursuant to CPLR § 3212, upon submission of proof in admissible form, summary judgment is appropriate when "there is no defense to the cause of action or that the cause of action or defense has no merit." CPLR § 3212(B); Andre v. Pomeroy, 35 N.Y.2d 361 (1974).

The Workers Compensation Law §11. bars an employee-plaintiff from filing suit against an employer absent a grave injury. Section 11 also bars a third-party from seeking indemnification or contribution from an employer, if the employee-plaintiff fails to show grave injury. Id. Yet, if the employer and third-party enter a "written indemnification agreement prior to the date of [employee-] plaintiff's accident, [then] the indemnification claims against plaintiffs' employer are not precluded by Workers' Compensation Law § 11." Portelli v. Trump Empire State Partners, 12 A.D.3d 280, 281, 786 N.Y.S.2d 5, 6 (1st Dep't. 2004).

Generoso did not suffer grave injury. He was also covered under Cooper's workers compensation coverage, in which he received benefits. This is the reason Cooper was not a named defendant. Furthermore, Cooper signed an indemnification agreement with Bri-Den, nine months prior to Generoso's accident on the fire escape. Thus, Workers Compensation Law § 11 would not preclude Bri-Den from seeking indemnification for Generoso's injuries.

An indemnification agreement is void against public policy if it indemnifies a general contractor for harm caused by its own negligence, in whole or in part. General Obligations Law § 5-322.1. This statute was enacted to "prevent a practice prevalent in the construction industry of requiring contractors and subcontractors to assume liability by contract for the negligence of others." Brown v. Two Exchange Plaza Partners, 76 N.Y.2d 172, 556 N.E.2d 430 (1990). However, an indemnification agreement "contain[ing] the language '[t]o the fullest extent permitted by law,' does not violate GOL § 5-322." Millstein v. Atlas Park, L.L.C., 2010 WL 1004539; 2010 N.Y. Slip Op. 30527(U) (Sup. Ct., New York County 2010); see Linarello v. City University of New York, 6 A.D.3d 192, 774 N.Y.S.2d 517 (1st Dep't. 2004).

The indemnification agreement between Cooper and Bri-Den contains such language, thus, it does not facially violate GOL § 5-322.1. The agreement states in part

> "[t]o the fullest extent permitted by law, the Subcontractor agrees to indemnify, defend and hold harmless the Contractor...from any and all claims, suits, damages, liabilities...arising out of or in connection with or as a consequence of the performance of the Work of the Subcontractor under this agreement...whether caused in whole or part by the Subcontractor. [Further the] parties expressly agree that this indemnification agreement contemplates: 1) full indemnity to the event liability is imposed against the Indemnitees without negligence and solely by reason of statute, operation of law or otherwise; and 2) partial indemnity in the event of any actual negligence on the part of the indemnities either causing or contributing to the underlying claim."

It is apparent that the parties clearly contemplated the agreement covering both full and partial indemnification. Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d 786, 789 -790 (1997); see Isnardi v. Genovese Drug Stores, Inc., 242 A.D.2d 672, 674, 662 N.Y.S.2d 790, 792 (2nd Dep't. 1997). Although the clauses of the indemnification agreement appear valid, their applicability cannot be determined at this juncture.

The Court of Appeals provides excellent guidance in Brown v. Two Exchange Plaza Partners on matters similar to what is currently before the court. Brown, at 180, 433 - 434. In Brown, a general contractor was liable for violating Labor Law § 240(1). Nonetheless, the Court of Appeals stated that "[w]ithout a finding of negligence on the part of [the general contractor], General Obligations Law § 5-322.1's prohibition against indemnifying a contractor for its own negligence is inapplicable." Id. This court granted Generoso partial summary judgment because the Housing Authority and Bri-Den were liable for violating Labor Law § 240(1). Moreover, the court held that questions of fact existed on whether Housing Authority and Bri-Den were negligent for causing Generoso's injuries.

Cooper argues that it is without fault for Generoso's injuries. This alone is not sufficient to obtain a judgment as a matter of law. The law is clear that the negligence of the owner or general contractor is necessary in determining whether an indemnification agreement violates GOL § 5-322.1. Carr v. Jacob Perl Associates, 201 A.D.2d 296, 297, 607 N.Y.S.2d 301, 302 (1st Dept. 1994) ("[w]hen an owner [or general contractor] is held liable for injuries solely by virtue of the provisions of Labor Law § 240(1) despite its lack of supervision or control over the work or proof of actual negligence, the owner [or general contractor] is entitled to indemnity"). Simply put, GOL § 5-322.1 does not apply to statutory liability. Thus, "there must be a showing that the indemnitee was actually negligent." Gomez v. National Center for Disability Services, Inc. 306 A.D.2d 103, 762 N.Y.S.2d 51 (1st Dep't. 2003) (internal citations omitted).

Absent a showing of negligence, an indemnitee is entitled to contractual indemnification. Pardo v. Bialystoker Center & Bikur Cholim, Inc., 10 A.D.3d 298, 301-302, 781 N.Y.S.2d 339, 342 (1st Dept. 2004) ("where the indemnitee's negligence remains unresolved, summary judgment in favor of the indemnitee on a claim for contractual indemnification is inappropriate"); Iurato v. City of New York, 18 A.D.3d 247, 793 N.Y.S.2d 915 (1st Dep't. 2005) (third-party defendant's motion for summary judgment is "premature with respect to contractual indemnification, since there has been no determination as to the proximate cause of injury or who was liable for the accident"); see McGuinness v. Hertz Corp., 15 A.D.3d 160, 789 N.Y.S.2d 121 (1st Dep't. 2005). Cooper will have ample opportunity to prove the third-party plaintiffs' negligence at trial. However, the summary judgment motion is premature on the applicability of the indemnification agreement.

Finally, Bri-Den argues that Cooper failed to procure the required insurance as written in their contract. Cooper contends that this failure is immaterial because Bri-Den did not show actual damages as a result of this failure. Nonetheless, Cooper is mistaken. The language of the contract is clear. Further, pursuant to CPLR § 3212, the court may grant such judgment as a matter of law without a non-moving party's cross-motion. Cooper breached the contract by failing to procure insurance and is liable to Bri-Den as a matter of law. Therefore, a separate hearing is necessary to determine the money damages entitled to Bri-Den.

For the reasons given above, it is therefore

ORDERED that Third-Party Defendant's motion is denied; and it is further

ORDERED that partial summary judgment is granted in favor of Third-Party Plaintiff's for breach of contact and the third-party action is severed and the issue of damages up to the point of trial is referred to a Special Referee to Hear and Decide and enter a judgment thereon.

Dated: 2/9/11

ENTER:

Louis B. York, J.S.C.