

**Weber v Baccarat, Inc.**

2011 NY Slip Op 30293(U)

January 18, 2011

Sup Ct, NY County

Docket Number: 120164/02

Judge: Saliann Scarpulla

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

PRESENT: Salvann Scarfella

PART 19

Index Number : 120164/2002

WEBER, ARTHUR

vs

BACCARAT

Sequence Number : 011

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

decided per the memorandum decision dated 1/18/11  
which disposes of motion sequence(s) no.

**FILED**

JAN 19 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/18/11

Salvann Scarfella  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X  
ARTHUR WEBER and MARGARET WEBER,

Plaintiffs,

Index No.: 120164/02  
Submission Date: 10/27/10

- against-

BACCARAT, INC., BACCARAT REAL ESTATE, INC.,  
625 MADISON AVENUE ASSOCIATES,  
IDI CONSTRUCTION COMPANY, INC., RELATED  
MANAGEMENT COMPANY, L.P., and KING FREEZE  
MECHANICAL CORP.,

**DECISION AND ORDER**

Defendants.

-----X

KING FREEZE MECHANICAL CORP.,

Third Party Index No.:  
591098/03

Third-Party Plaintiff,

-against-

**FILED**

COOL WIND VENTILATION CORP.,

**JAN 19 2011**

Third-Party Defendant.

NEW YORK  
COUNTY CLERK'S OFFICE

-----X

KING FREEZE MECHANICAL CORP.,

Second Third Party Index  
No.: 590416/10

Second Third-Party Plaintiff,

-against-

YORK LADDER INC., WERNER LADDER INC. and  
WERNER CO.,

Second Third-Party Defendants.

-----X

BACCARAT, INC.; and BACCARAT REAL ESTATE, INC.,

Third Third Party Index  
No.: 590785/10

Third Third-Party Plaintiffs,  
-against-

YORK LADDER INC., WERNER LADDER INC. and  
WERNER CO.,

Third Third-Party Defendants.

-----X	
For Defendants Baccarat, Inc., 625 Madison Associates, and Related Management Company, L.P.: Wilson, Elser, Moskowitz, Edelman, & Dicker LLP 3 Gannett Drive White Plains, NY 10604	For Defendant/Second Third-Party Plaintiff King Freeze Mechanical Corp.: Goldberg Segalla LLP 11 Martine Avenue, Suite 750 White Plains, NY 10606

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants Baccarat, Inc. (“Baccarat”), 625 Madison Associates (“625 Madison”), and Related Management Company, L.P. (“Related Management”) (together the “Moving Defendants”) move for summary judgment on their cross claims against defendant King Freeze Mechanical Corp. (“King Freeze”) for contractual and common-law indemnification.

**Background**

625 Madison is the owner of a building located at 625 Madison Avenue, New York, New York (“Building”). Related Management is a managing agent. Baccarat is a commercial tenant of portions of the basement, ground and second floors of the Building (“Premises”).

In January 2000, defendant IDI Construction Company, Inc. (“IDI”) entered into a subcontract with King Freeze (“King Freeze Subcontract”), pursuant to which King Freeze agreed to perform work for IDI on various unspecified projects. In June 2000, Baccarat entered into a contract with defendant IDI (“IDI contract”), pursuant to which IDI agreed to act as a construction manager on a renovation project of the Premises (“Project”).

Pursuant to purchase orders issued in November 2000, IDI requested that King Freeze perform HVAC work on the Premises as part of the Project. King Freeze, in turn, sub-subcontracted a portion of the HVAC work to third-party defendant Cool Wind Ventilation Corp. (“Cool Wind”). Plaintiff Arthur Weber (“Mr. Weber”) was employed by Cool Wind. On December 23, 2000, while Mr. Weber was performing HVAC work at the Premises, a ladder on which he was standing broke, causing him to fall to the ground and sustain bodily injuries. The ladder involved in the accident was manufactured by second third-party defendants Werner Ladder Inc. and Werner Co. (collectively “Werner”) and distributed by second third-party defendant York Ladder Inc. (“York”).

In their amended verified complaint, dated February 24, 2009 and filed on February 25, 2009, Mr. Weber and his wife, plaintiff Margaret Weber (“Mrs. Weber”), allege that the accident and Mr. Weber’s injury occurred as a result of first-party defendants’ failure (1) to comply with New York Labor Law §§ 200, 240, and 241, and

(2) to maintain the premises and equipment in a safe condition. Mrs. Weber asserted a cause of action for loss of services as a result of Mr. Weber's injuries.

In its amended verified answer, dated July 30, 2009 and filed on August 4, 2009, Baccarat asserts cross-claims against 625 Madison, IDI, Related Management, and King Freeze for contribution and/or indemnification, and against IDI and King Freeze for contractual indemnification.

In their amended answer, dated May 16, 2003, 625 Madison and Related Management assert cross-claims against Baccarat, Baccarat Real Estate, IDI, and King Freeze for, among other claims, indemnification for costs incurred in defense of this action, including counsel fees and expenses.

As per stipulation filed on October 26, 2004, the third-party action against Cool Wind was discontinued with prejudice.

Previously, in motion sequence number 005, Mr. and Mrs. Weber moved for, among other forms of relief, summary judgment against all first-party defendants on the issue of liability pursuant to Labor Law § 240 (1). Pursuant to an order, entered on August 1, 2008, the Court (Lehner, J.), inter alia, granted plaintiffs' motion on the issue of liability as against Baccarat and 625 Madison, and denied it as to the other defendants.<sup>1</sup> On appeal, pursuant to an order entered on February 16, 2010, the Appellate Division, First Department, modified the 08/01/08 Order to the extent that summary judgment was

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<sup>1</sup> Pursuant to the 08/01/08 Order, IDI was severed from the proceedings as a result of its filing for bankruptcy.

also granted, on the issue of liability under Labor Law § 240 (1), as against King Freeze.

*See Weber v. Baccarat, Inc.*, 70 A.D.3d 487, 487-488 (1st Dept 2010).

The Note of Issue was filed on May 14, 2010. Moving Defendants now move for summary judgment on their cross claims against King Freeze for common-law and contractual indemnification.

### Discussion

To obtain summary judgment, the movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). "[T]o defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.'" *Zuckerman*, 49 N.Y.2d at 562 (quoting CPLR 3212 (b)).

#### Contractual Indemnification

Moving Defendants seek contractual indemnification from King Freeze.

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002).

When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.

Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise.

*Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491-492 (1989)

(citations omitted). *See also Luby v. Rotterdam Sq., L.P.*, 47 A.D.3d 1053, 1055-1056 (3d Dept 2008).

Here, the King Freeze Subcontract, provides, in relevant part:

The Subcontractor [King Freeze] shall indemnify and hold harmless the Owner, Contractor [IDI], A/E [architect or engineer], A/E's Consultants, agents and employees of any of them *from and against any and all 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, including those claims relating to or by its subcontractors, suppliers or employees, or including such claim, damage, loss or expense which is attributable to bodily injury, sickness, disease or death, or 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 Subcontractor, its subcontractors or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.*

The IDI contract is a contract between IDI and Baccarat, and it provides that Baccarat is "the Owner" and IDI is "the Construction Manager."

It is undisputed that Baccarat's claims, damages, losses and expenses arise out of King Freeze's performance under its subcontract with IDI and are related to work performed by King Freeze's subcontractor, Cool Wind.

King Freeze argues that Baccarat was not a signatory to the King Freeze Subcontract, and hence, may not enforce the indemnification clause. However, the King Freeze Subcontract, which was executed before the IDI contract, provides that:

it is the intention of the parties that this Subcontract Agreement . . . with all of its terms and conditions will be incorporated by reference in each Purchase Order/Change Order issued by the Contractor to Subcontractor for a period of one year from the date [of the Subcontract] and Subcontractor expressly acknowledges and agrees to said incorporation by reference.

IDI issued purchase orders to King Freeze with respect to HVAC work on the Project in November 2000 or within one year of the date of the King Freeze Subcontract. These purchase orders were issued pursuant to the IDI contract which identifies Baccarat as "the Owner." Additionally, King Freeze expressly agreed to indemnify an "Owner" with whom IDI would enter into a prime contract. On this Project, the "Owner" is Baccarat. Accordingly, this clear contractual obligation is enforceable as against King Freeze. *See Hooper Associates, Ltd.*, 74 N.Y.2d at 491-492.

King Freeze further argues that the indemnity provision violates General Obligations Law § 5-322.1, because it lacks a savings clause limiting the indemnity obligation.

“The statute provides that an agreement ‘purporting to indemnify or hold harmless the promisee against liability for damage . . . caused by or resulting from the negligence of the promisee . . . is against public policy and is void and unenforceable.’” *Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, 89 N.Y.2d 786, 795 (1997) (quoting General Obligations Law § 5-322.1(1)). “[T]he statute applies to the indemnification agreements in their entirety where . . . the general contractor/promisee is actually found to have been negligent.” *Itri Brick & Concrete*, 89 N.Y.2d at 795. “[T]he statute does permit a partially negligent general contractor to seek contractual indemnification from its subcontractor *so long as the indemnification provision does not purport to indemnify the general contractor for its own negligence*. As such, the provision is enforceable and does not violate General Obligations Law § 5-322.1.” *Brooks v. Judlau Contr., Inc.*, 11 N.Y.3d 204, 207 (2008) (emphasis added).

Here, there has not been a determination of negligence on the part of IDI or Baccarat. Additionally, the indemnification provision does not require King Freeze to indemnify “Contractor” or “Owner” for their own negligence. Specifically, it limits King Freeze’s indemnification obligation “only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor, its subcontractors . . . .”

Contrary to King Freeze’s claim, the last clause of the provision – “regardless of whether or not such claim, damage, loss or expense is caused *in part* by a party indemnified hereunder” – does not expand King Freeze’s obligation to indemnify others

for their negligence. It simply provides that a particular damage or loss may be in part caused by an indemnitee; however, King Freeze is obligated to indemnify only to the extent that such damage or loss is caused by its own negligence. Accordingly, the indemnification provision in question does not violate Gen. Oblig. L. § 5-322.1. *See Brooks*, 11 N.Y.3d at 207.

At the same time, King Freeze's obligation to Baccarat is contingent on a determination of negligence by King Freeze or its subcontractors, such as Cool Wind. As King Freeze argues, such a determination has not been made yet. A determination of liability under Labor Law § 240 is "not the equivalent of a finding of negligence." *Gomez v. Sharon Baptist Bd. of Directors, Inc.*, 55 A.D.3d 446, 446 (1<sup>st</sup> Dept. 2008). Here, the First Department in *Weber v. Baccarat, Inc.*, 70 A.D.3d at 487-488, found only that King Freeze is statutorily liable, which is not a finding of negligence. *See Gomez*, 55 A.D.3d at 446-447. Accordingly, the indemnification provision has not been triggered yet.

Therefore, if King Freeze or its agents are found to be negligent, King Freeze is contractually obligated to indemnify Baccarat.

As King Freeze points out, neither the IDI contract nor the King Freeze Subcontract mentions 625 Madison or Related Management. Nor do they reference a rental agreement between Baccarat and 625 Madison. The clear intent of the parties to these contracts was for King Freeze to indemnify IDI and an "Owner," which is Baccarat.

King Freeze never agreed to, or intended to, indemnify 625 Madison or Related Management. Accordingly, pursuant to the King Freeze and IDI contracts, King Freeze is not obligated to indemnify 625 Madison or Related Management. *See Hooper Associates, Ltd.*, 74 N.Y.2d at 491-492.

625 Madison and Related Management next contend that they are entitled to indemnification as third-party beneficiaries to the King Freeze subcontract. This argument, however, lacks merit.

A party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost.

*State of Cal. Pub. Employees' Retirement Sys. v. Shearman & Sterling*, 95 N.Y.2d 427, 434-435 (2000) (internal citation and quotation marks omitted).

The King Freeze Subcontract, executed before the IDI contract, was intended to benefit an unidentified "Owner" with whom IDI would enter into a prime contract. Baccarat is the "Owner" with respect to the project, as defined by the IDI contract. Accordingly, the parties to the King Freeze Subcontract did not have a clear intent to benefit 625 Madison or Related Management. *State of Cal. Pub. Employees' Retirement Sys.*, 95 N.Y.2d at 434-435; *see also Branch v. Riverside Park Community LLC*, 74

A.D.3d 634 (1<sup>st</sup> Dept. 2010). Hence, they are not third-party beneficiaries to the subcontract.

#### Common-Law Indemnification

625 Madison and Related Management also maintain that they are entitled to common-law indemnification. It is well-settled that a property owner who is liable vicariously under the Labor Law is entitled to common-law indemnification from the negligent party. *See Kelly v. Diesel Constr. Div. of Carl A. Morse, Inc.*, 35 N.Y.2d 1, 6 (1974); *see also McCarthy v. Turner Constr., Inc.*, 72 A.D.3d 539, 539 (1st Dept 2010). However, the property owner, a prospective indemnitee, must establish that a prospective indemnitor “was either negligent or exclusively supervised and controlled plaintiff’s work site.” *Reilly v. S. DiGiacomo & Son, Inc.*, 261 A.D.2d 318, 318 (1<sup>st</sup> Dept. 1999); *see also McCarthy*, 72 A.D.3d at 539.

Here, it is undisputed that 625 Madison’s and Related Management’s liability is purely statutory. However, they have not made a prima facie showing that King Freeze was negligent or had exclusive supervision or control over Mr. Weber’s work. Specifically, King Freeze hired Cool Wind, Mr. Weber’s employer, to perform a portion of the HVAC work on the project, which indicates that King Freeze might not have had exclusive control over Mr. Weber’s work. Accordingly, 625 Madison and Related Management have failed to demonstrate their entitlement to common-law indemnification from King Freeze. *See e.g. Reilly*, 261 A.D.2d at 318; *McCarthy*, 72 A.D.3d at 539.

The Moving Defendants' contention that the court needs to determine whether King Freeze procured insurance, pursuant to the terms of the King Freeze Subcontract, is also without merit. The Moving Defendants have not asserted cross claims against King Freeze on this ground. Additionally, the movants must tender evidentiary proof that would establish their cause of action sufficiently to warrant judgment in their favor as a matter of law. *See Zuckerman*, 49 N.Y.2d at 562. The Moving Defendants have failed to do so.

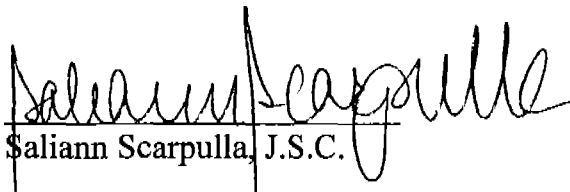
In accordance with the foregoing, it is

ORDERED that the motion of defendants Baccarat Inc., 625 Madison Avenue Associates, and Related Management Company L.P. for summary judgment on their cross claims against defendant King Freeze Mechanical Corp. for indemnification is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, NY  
January 18, 2011

ENTER:

  
Saliann Scarpulla, J.S.C.

**FILED**

**JAN 19 2011**

NEW YORK  
COUNTY CLERK'S OFFICE