

**Palamar v City of New York**

2011 NY Slip Op 30420(U)

February 18, 2011

Supreme Court, New York County

Docket Number: 114187-04

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
*Justice*

PART 10

Palamar et al

Plaintiff (s),

INDEX NO.

114 187-04

- v -

MOTION DATE

MOTION SEQ. NO.

[REDACTED] 012

City of NY et al  
Defendant(s).

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, the court's decision on this (these) motion (s) is as follows:

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

FEB 24 2011

NEW YORK  
COUNTY CLERK'S OFFICE

FEB 18 2011

Dated: Feb 18, 2011

[Signature]  
Hon. Judith J. Gische, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE  SETTLE/SUBMIT ORDER

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
Nelson C. Palamar and Fernanda Pinto, and  
Allan Palamar and John Anthony Palamar,  
Infants by their father and natural guardian  
Nelson C. Palamar,

Plaintiff (s),

**-against-**

City of New York, George Campbell  
Painting Corporation, Pro Safety  
Services, LLC s/h/a Pro Safety A  
Associates, LLC and Koch Skanska, Inc.,

Defendant (s).

-----X  
City of New York,

3<sup>rd</sup> Party Plaintiff,

**-against-**

George Campbell Painting Corporation,

3<sup>rd</sup> Party Defendant.

-----X  
Koch Skanska, Inc.,

Second 3<sup>rd</sup> Party Plaintiff,

**-against-**

George Campbell Painting Corporation,

Second 3<sup>rd</sup> Party Plaintiff.

-----X  
Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of  
this (these) motion(s):

**DECISION/ ORDER**

Index No.: 114187-04

Seq. No.:  012

**PRESENT:**

Hon. Judith J. Gische

J.S.C.,

T.P. Index No.:  
590820-05

**FILED**

**FEB 24 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

T.P. Index No.:  
591033-07

<b>Papers</b>	<b>Numbered</b>
Koch-Skanska n/m (3212) w/TJH affirm, exhs .....	1
City's reply on own motion w/KDG affirm .....	2
Campbell partial opp w/MR affirm, exhs .....	3
Koch-Skanska reply to Campbell w/TJH affirm .....	4

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*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

This is an action for personal injuries arising out of an accident at a work site. Plaintiff ("Palamar") alleges violations of the New York State Labor Laws setting forth site safety requirements (Labor Law §§ 240 [1], 241 [6] and 200) and common law negligence. Issue has been joined in the main action and the third party actions. Presently before the court is a timely motion by Defendant Koch Skanska, Inc. ("Koch Skanska") for summary judgment on Palamar's Labor Law claims, as well as on Koch Skanska's third party complaint against George Campbell Painting Corporation ("Campbell"). Since this motion is timely, it will be decided on the merits (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]). After these motions were made, Palamar settled his claims with the defendants in the direct action and the City withdrew its motion for summary. Palamar also withdrew its cross motion to amend the pleadings.

Given the extensive litigation history of this case, the reader is presumed to be familiar with the facts; they will only be repeated in a condensed form.

The court's decision and order is as follows:

**Arguments**

Palamar contends that he was exposed to lead paint while doing painting and

sandblasting on the Williamsburg Bridge. In addition to ongoing exposure to this toxic substance, Palamar contends lead paint was sprayed directly into his eyes when the painting device he was using malfunctioned. The third party actions by the City of New York and Koch Skanska are against Campbell, Palamar's employer, for contractual indemnification. There are two contracts each third party plaintiff relies on. One is the October 2003 Construction Contract that Koch Skanska entered into with the City of New York, Department of Transportation ("construction contract"). The other is Koch Skanska's agreement with Campbell, dated February 14, 2003 ("agreement").

Palamar testified at his deposition that Glenn Vivieros ("Vivieros") and Eli Tonelli ("Tonelli") recruited him to work on the project. Both men were employed by Campbell. Tonelli as a foreman and Vivieros as a supervisor. Palmar also testified at his deposition that he received all his safety equipment from Campbell, his employer. Campbell also provided shower stalls, sinks and towels so that workers (including him) working on the lead paint could clean up at any time and before heading home at the end of the day.

Among the equipment provided to Palamar were safety goggles and gloves. Palamar testified at his deposition that sometimes goggles were not available for him to use and that he had complained. He was told by his supervisor that the crew asked for "too much" and used "too much" equipment. His superiors at Campbell told him to keep reusing the same goggles and gloves. His requests for full face protection was denied.

Palamar had also complained – at least 10 times– about the paint spray device not working properly. His complaints were always made to Tonelli and Vivieros.

On the day of the accident, no goggles were available for Palamar to use. When

he complained to Vivieros, he was told the goggles were on order, but had not yet been delivered. Palamar sometimes brought his own goggles to work, but he did not have a pair with him that day.

Koch Skanska and the City each seek contractual indemnification. Each third party plaintiff argues that any liability on their part is purely vicarious, not active. They deny that either of them directed or controlled Campbell employees, including Palamar, during the course of their work. Both Koch Skanska and the City maintain that Palamar did his work under the exclusive control of Tonelli and Vivieros. They deny providing Palamar with any tools or safety equipment to do his work and deny they created a dangerous condition. Koch Skanska maintains that it was not actively negligent, and any finding of negligence would be purely vicarious due to the nature of the Labor Laws. Both 3<sup>rd</sup> party plaintiffs argue that contractual indemnification is available, although the issue of liability has not been decided (and presumably, because Palamar has settled his claims with the defendants).

The contractual indemnification provision (paragraph 7) in the Koch Skanska/ Campbell agreement that the City and Koch Skanska each relies on provides as follows:

7. The Subcontractor shall be full responsible for the means, methods, manner and control of his work and shall secure and protect his work, and shall bear and be liable, for any loss or damage of any work and shall secure and protect his work, and shall bear and be liable, for any loss or damage of any kind which may happen to the work at any time prior to the final acceptance thereof by the Owner, and the Contractor will not in any manner be answerable or, responsible for any loss or damage that shall happen to the work of the Subcontractor or any part thereof or for any material, equipment, or other

things, that may be employed herein or placed upon the grounds, by him, the Subcontractor being responsible therefore until the work has been fully completed and accepted by the Owner. The Contractor shall not be responsible for injury to any person, including death whether employed by the Subcontractor or otherwise, or to the public, or for damage to any property, whether belonging to the Subcontractor or to others, arising from the acts of the Subcontractor or his employees during the progress of the work against all of which injuries, death and damages to persons and property the Subcontractor must properly guard, and make good any such damage from whatever cause. **The Subcontractor shall Indemnify and save harmless the Contractor and the Owner, their officers, agents and servants, and each and every one of them from all damages or liability to which the Contractor and for the Owner, their officers, agents or servants may be Subjected by reason of injury, Including death at any time resulting there from, to the person or property of others arising out of or in connection with or as a consequence of the performance of the Work of the Subcontractor under this agreement, as well as any additional work, extra work or additional work whether caused in Whole or In part by the Subcontractor or any person or entity employed, either directly or Indirectly, by the Subcontractor Including any subcontractors thereof and their employees. The Subcontractor and Contractor expressly agree that this indemnification contemplates 1) full Indemnity In the event of liability by reason of statute, ordinance or regulation, by operation of law or otherwise; and 2) partial Indemnity in the event of any actual negligence on the part of the Indemnitors either causing or contributing to the underlying claim in which case, Indemnification for the negligent will be limited to any liability imposed over and above that percentage attributable to actual fault whether by statute, ordinance or regulation, by operation of law or otherwise. Where partial Indemnity is provided under this Subcontract, costs professional fees, attorney's fees, expenses and disbursements shall be**

**apportioned on a pro rata basis.<sup>1</sup>**

Campbell opposes both motions. One argument propounded is that although paragraph 7 of the agreement does not require that the issue of negligence be resolved before Campbell's indemnity obligation is triggered, a rider to the agreement is more restrictive and, therefore controlling over the indemnification language in the agreement. The "Subcontractor Insurance Rider" sets forth the following language in Article VIII thereof:

**VIII) HOLD HARMLESS AGREEMENTS/  
INDEMNIFICATION AGREEMENT**

To the fullest extent permitted by law, the Subcontractor shall indemnify, hold harmless and defend the Contractor, Owner ... against all claims, damages, demands, losses, expenses, causes of action, suits or other liabilities, (including all costs and reasonable attorney's fees), including employment related liability claims arising out of or resulting from the performance of Subcontractor's work under the Subcontract, provided any such claim, damage, demand, loss or expense is attributable to bodily injury, personal injury [etc.] to the extent caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable, regardless whether it is caused by a party indemnified hereunder. This indemnification shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor under any worker's compensation acts, disability benefits acts. This indemnification shall be in addition to any indemnity liability imposed by the contract documents.

Thus, according to Campbell, since there has yet to be a finding that Campbell was negligent sufficient to trigger any indemnity obligation owed to the City or Koch

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<sup>1</sup>This language is printed in bold type in the original.

Skanska, their motions for summary judgment must be denied as premature. Campbell argues that there are “numerous issues of fact” whether the City and/or Koch Skanska supervised or controlled Palamar’s work and/or actively negligent. According to Campbell, the City had a strong presence at the job site and Koch Skanska had safety personnel on site who had the right to shut down the site if a worker appeared to be in imminent danger. Campbell primarily relies on the deposition testimony of the City’s witness, Anil Rudra, an assistant engineer, who testified he was at the site every day along with the City’s engineer in charge. Rudra also testified that Koch Skanska was responsible for workers to have such things as eye protection, proper washing facilities and clean filters.

In reply, Koch Skanska argues that Campbell’s legal interpretation of the rider and indemnification provisions is incorrect because the rider clearly states that “this indemnification shall be in addition to any indemnity liability imposed by the contract documents” meaning the rider supplements the agreement, but does not define their obligations, rights and duties.

#### **Law Applicable to Motions for Summary Judgment**

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case ” (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324

[1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing (See: Hindes v. Weisz, 303 A.D.2d 459 [2<sup>nd</sup> Dept 2003]).

### Discussion

#### *The two indemnification provisions*

The purpose of contract interpretation is to give effect to the intention of the parties (AGCO Corp. v. Northrop Grumman Space & Mission Systems Corp., 61 A.D.3d 562 [1<sup>st</sup> Dept. 2009]). Hall & Co. v. Orient Overseas Assoc., 65 A.D.2d 424, 411 N.Y.S.2d 233, affd. 48 N.Y.2d 958, 425 N.Y.S.2d 66, 401 N.E.2d 189). In adjudicating the rights of parties to a contract, the court may not fashion a new contract under the guise of contract construction (Morjee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16 [1961]). Thus, where the intention of the parties is clearly and unambiguously set forth, effect must be given to the intent as indicated by the language used.

The provisions of paragraph 7 of the agreement are not inconsistent with the terms in the Subcontractor Insurance Rider when both are carefully examined.

Whereas Campbell's agreement with Koch Skanska requires Campbell to "hold harmless and indemnify" the owner and the contractor, the Subcontractor Insurance Rider requires that Campbell obtain insurance for the benefit of the owner and the contractor. Tellingly, the rider obligates Campbell to defend and indemnify Koch Skanska and the City for its own negligence by, within the context of the rider, obtaining insurance and having the owner and contractor named as additional insureds.

If, however, Campbell failed to obtain insurance for the benefit of the contractor and the owner or, for some reason, the insurer disclaimed coverage, Campbell would still, pursuant to the terms of paragraph 7 of the agreement, be required to indemnify and hold the owner and contractor harmless. Whereas the language in Article VIII of the Subcontractor Insurance Rider might relieve Campbell's insurer from having to indemnify, hold harmless and defend Koch Skanska or the City if the claim is not "caused in whole or in part by any negligent act or omission of the Subcontractor [Campbell] . . ." under the agreement, Campbell would still be obligated to indemnify both third party plaintiffs. Thus, Campbell's argument that the rider language supercedes the language in its agreement with Koch Skanska presents an unavailing defense.

*Is the motion for contractual indemnification premature?*

Since the agreement does not condition Campbell's obligation to indemnify Koch Skanska on a finding that Campbell was negligent, Campbell's obligation to indemnify Koch Skanska (and the owner) owner with respect to Palamar's Labor Law §§ 240 [1] and 241 [6] claims is unconditional (Pope v. Supreme-K.R.W. Const. Corp., 261 A.D.2d 523 [2<sup>nd</sup> Dept 1999]). Although GOL § 5-322.1 prohibits indemnification contracts purporting to indemnify an indemnitee for its own negligence (Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d 786 [1997]), the indemnification provision in Campbell's agreement with Koch Skanska does not violate the statute and is enforceable because of the limitation on the promisor's indemnification obligation (Brooks v. Judlau Contracting, Inc., 11 N.Y.3d 204 [2008]). Consequently, the indemnification provision is not void, nor is Koch Skanska's motion for summary

judgment on its indemnification claims premature.

Campbell's arguments, that there are "numerous issues of fact" as to whether the City and Skanska Koch were actively negligent, is not supported by anything in this record. At most, Koch Skanska and the City maintained a watchful presence over the project. According to Koch Skanska's witness (John Pouso) safety personnel were not responsible for, nor did they, check the equipment being used by the subcontractors at the job site. Under its contract with Koch Skanska, Campbell was obligated to insure the safety of its employees (Domino v. Professional Consultation, Inc., 57 AD3d 713 [2<sup>nd</sup> Dept 2008]).

Palamar testified at his EBT that he took all directions from his supervisors (Tonelli and Vivieros), both Campbell employees. All the equipment for his task which he needed, or should have been provided with, came from his employer. Each time Palamar complained about a problem with his equipment, lack thereof, or the conditions at the work site, he made those complaints directly to his immediate supervisors at Campbell and no one else. Furthermore, pursuant to its agreement, Campbell assumed all responsibility "for the means, methods, manner and control of [its] work..." (Agreement paragraph 7).

It is well established law that neither an owner nor a general contractor may be held liable for the negligent acts of others over whom such owner or general contractor has no direction or control (Reilly v. Newireen Associates, 303 A.D.2d 214 [1<sup>st</sup> Dept 2003]). General supervisory duties in the absence of actual authority to control the activity bringing about the injury, will not suffice to hold a general contractor liable under Labor Law § 200 or in common law negligence (Loiacono v. Lehrer McGovern Boyis,

270 A.D.2d 464 [1<sup>st</sup> Dept 2003]).


Koch Skanska has established that it was not actively negligent. In opposition to Koch Skanska's motion for summary judgment, Campbell has failed to raise any material triable issue of fact that Koch Skanska was actively negligent. Nor has Campbell presented any facts tending to show that Koch Skanska (and the City) may have maintained anything more than an overarching watchfulness over the project to make sure general safety precautions were being observed. Koch Skanska has also proved that it did not create a dangerous condition at the construction site. Therefore, the motion by Koch Skanska for summary judgment on its claims for contractual indemnification must be, and hereby is, granted.

#### **Conclusion**

Koch Skanska's motion for summary judgment on its third party complaint against Campbell is granted for the reasons stated. Any relief requested but not specifically addressed is hereby denied. This constitutes the decision and order of the court.

Date: New York, New York  
February 18, 2011

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**

FEB 24 2011

NEW YORK  
COUNTY CLERK'S OFFICE