SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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PEDRO CARABALLO

Plaintiff,

-against-

CITY OF NEW YORK, CAMPA CONSTRUCTION CORP., MICHAEL PACELLO and MKG DEVELOPMENT CORP,.

Defendants.

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CAMPA CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

ABLE ISLAND PLUMBING WATER MAIN & SEWER LTD.

Third-Party Defendant.

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PART C-2
Present:
Hon. Thomas P. Aliotta

DECISION AND ORDER

Index No. 103477/08
Motion Nos. 3124-003
3766-004

Index No. 75535/08

The following papers number 1 to 8 were fully submitted on the 2nd day of February, 2011:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendant/Third-Party Plaintiff, with Supporting Papers and Exhibits (dated September 15, 2010)	1
Affirmation in Opposition by Third-Party Defendant, with Supporting Papers and Exhibits (dated October 25, 2010)	2
Notice of Motion to Compel Discovery by Defendant/Third-Party Plaintiff, with Supporting Papers and Exhibits (dated November 16, 2010)	3
Affirmation in Opposition by Third-Party Defendant, with Supporting Papers and Exhibits (dated November 16, 2010)	4

Upon the foregoing papers, the motion for summary judgment and to compel discovery by defendant/third-party plaintiff Campa Construction Corp. (hereinafter "Campa") are denied.

This is an action for personal injuries allegedly sustained by plaintiff on May 3, 2007 while performing work at 417 O'Gorman Avenue, also known as 45 Keegans Lane, on Staten Island. To the extent relevant, plaintiff, an employee of third-party defendant Able Island Plumbing Water Main & Sewer Ltd. (hereinafter "Able") was connecting sewer pipes in an outside trench when its walls collapsed on top of him. It is undisputed that defendant/third-party plaintiff Campa was retained as the general contractor for the project, and that Able, its plumbing subcontractor, had dug the trench.

In Motion No. 3124-003, Campa moves for summary judgment on its third-party claims against Able for (1) common-law and contractual indemnification, and (2) breach of contract for the failure to procure insurance. In support, Campa submits a copy of the agreement between the two parties dated January 15, 2007 (*see* Campa's Exhibit "A"). According to its terms, it appears that the subcontractor was obligated to, inter alia, file a Certificate of Liability Insurance in the amount of $2,000,000 ($1,000,000 per occurrence) naming general contractor Campa as an additional insured, as well as a Workers Compensation Certificate (id.). Also provided is a copy of a general liability policy (No. CLS1360102) issued to Able by the Scottsdale Insurance Company (hereinafter "Scottsdale") (*see* Campa's Exhibit "G").

In opposition, Able maintains that it procured the required liability insurance policy, and offers in support a copy of the Blanket Additional Insured Endorsement (Form No. GLS-150s [10-04]) contained within the Scottsdale policy (*see* Campa's Exhibit "G"). However, in its reply papers, Campa has provided a copy of a letter from Scottsdale stating that the requirements for such additional endorsement were never satisfied (*see* Campa's Exhibit "A" annexed to Reply Affirmation). Nevertheless, the Scottsdale letter is unsworn or otherwise authenticated, and is inadmissible in support of summary judgment (*see Schulman v. Indian Harbor Ins Co*, 40 AD3d 957, 958 [2nd Dept 2007]).

In the opinion of this Court, Campa has failed to establish its right to judgment on its cause of action for breach of contract as a matter of law. In any event, the documents submitted by the subcontractor are themselves sufficient to raise a triable issue of fact as to its procurement of the required insurance (*see Friends of Animals Inc. v. Associated Fur Mfrs*, 46 NY2d 1065, 1068 [1979]). Thus, that branch of Campa's summary judgment motion as addresses its third-party cause of action for breach of contract must be denied *(cf. Quilliams v. Half Hollow Hills School Dist*, 67 AD3d 763, 765 [2nd Dept 2009]; *Hakl v. Ginsburg Dev Corp*, 17 AD3d 636, 638 [2nd Dept 2005]).

It is well settled that a party seeking contractual indemnification must prove itself to be free from negligence, "because to the extent its negligence contributed to [an] accident, it cannot be indemnified" (*Mott v. Tromel Constr Corp*, 79 AD3d 829 [2nd Dept 2010]; *see Brooks v Judlau Contr Inc.,* 11 NY3d 204, 207 [2008]). Moreover, where a claim predicated on section 200 of the Labor Law and/or common-law negligence arises out of a subcontractor's means or methods, a recovery cannot be had against an owner or general contractor unless it is shown that said party had the authority to supervise or control the work during which the injury occurred (*see Erickson v. Cross Ready Mix, Inc*., 75 AD3d 519, 522 [2nd Dept 2010]). For these purposes, an owner or contractor will be said to have the requisite authority when it bears the responsibility for the manner in which the work is performed (id.).

Here, Campa has made a prima facie showing of its entitlement to judgment as a matter of

law on its cause of action for contractual indemnification by demonstrating that it did not have authority to supervise or control the work which brought about plaintiff's injury. The deposition testimony in this regard is uncontradicted. Nevertheless, the president and owner of Campa did testify that he was present at the work site and conducted general inspections of the work being performed. While such activity is insufficient to raise a triable issue of fact in a "means and methods" case (*see Mott v. Tromel Constr Corp*, 79 AD3d at 829*; Quilliams v. Half Hollow Hills School Dist*, 67 AD3d at 765), his presence at the worksite for the purpose of conducting inspections cannot be relied upon to establish prima facie that Campa lacked actual or constructive notice of the danger posed by the unshored trench, or the authority to stop the work in the face of a dangerous condition. Thus, Campa has failed to meet its burden of proving its freedom from negligence as required for summary judgment. Accordingly, Campa's motion for summary judgment on its third-party claim for contractual and, by extension, common-law indemnification is denied.

In Motion No. 3766-004, Campa seeks to compel plaintiff to provide it with authorizations to access his "current and historical Facebook, Myspace and Twitter pages and accounts, including all deleted pages and related information", as requested in its discovery demand dated September 30, 2010 (*see* Campa's Exhibit "E"). Plaintiff has resisted this demand on the ground that it is overbroad, intrusive and the information sought is irrelevant (*see* Campa's Exhibit "F").

In support of its motion, Campa maintains that the records from these social networking sites are "just as relevant as plaintiff's medical records to the extent that there are photographs, status reports, [and] videos that depict plaintiff engaging in activities that contradict his injury claims in this case" (*see* Affirmation of Matthew P. Levy, Esq. dated January 24, 2011). As authority, Campa purports to rely on a recent order of this Court issued on January 20, 2011 in an unrelated action, *Fernandez v. Metropolitan Tr Auth.* (Index Number 102662/09), wherein the movant's request for access to plaintiff's Myspace account was granted (*see* Campa's Exhibit "A" annexed to Supplemental Reply Affirmation). However, in the *Fernandez* case, plaintiff had testified at her deposition as to the types of information which she posted on this networking site (*see* Campa's

Exhibit "B" annexed to Supplemental Reply Affirmation). This is not such a case. Rather, the discovery demand at issue is overly broad, and Campa has failed to establish a factual predicate with respect to the relevancy of the information the sites may contain (*see McCann v. Harleysville Ins Co of N.Y.*, __AD3d__, 910 NYS2d 614, 615 [4th Dept 2010] *citing Slate v. State of New York*, 267 AD2d 839 [3rd Dept 1999]). In the opinion of this Court, digital "fishing expeditions" are no less objectionable than their analog antecedents (id.).

Based on the foregoing, Campa's motion to compel discovery is denied without prejudice to the service of a proper discovery demand (id.).

Accordingly, it is

ORDERED that the motion for summary judgment by defendant/third-party plaintiff Campa Construction Corp. is denied; and it is further

ORDERED that said party's further motion to compel discovery is denied without prejudice to the service of a proper discovery demand.

ENTER,

/s/
Hon. Thomas P. Aliotta
J.S.C.

DATED: March 4, 2011