

**Carroll v 1156 APF LLC**

2011 NY Slip Op 32968(U)

November 1, 2011

Supreme Court, New York County

Docket Number: 110725/2008

Judge: Emily Jane Goodman

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

PRESENT: GOODMAN  
Justice

PART 17

CARROLL, SEAN, ETAL.

INDEX NO. 110725/08

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

- v -

1156 APF LLC, ETAL.

MOTION SEQ. NO. 07

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 is decided for Carroll

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Dated: 11/11/11

EMILY JANE GOODMAN  
SG

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 17

-----X

Sean Carroll a/k/a Sean Carragher,  
Plaintiff,

Index  
Number  
110725/2008

-against-

1156 APF LLC, APF Properties LLC  
and B. Geller Restoration, Inc.,  
Defendants.

-----X

1156 APF LLC and APF Properties LLC,  
Third-Party Plaintiffs,

-against-

Rockledge Scaffolding Corporation,  
Third-Party Defendant.

-----X

B. Geller Restoration, Inc.,  
Second Third-Party Plaintiff,

-against-

Rockledge Scaffolding Corporation,  
Second Third-Party Defendant.

-----X

Emily Jane Goodman, J.S.C.:

Plaintiff's employer, Rockledge Scaffolding Corporation  
(Rockledge), the company responsible for erection and removal of  
a sidewalk bridge, moves to reargue and renew the Court's  
Decision and Order, dated September 6, 2011, to the extent that  
it granted the cross motion of co-defendant B Geller Restoration,  
Inc. (Geller), the general contractor for facade work, for  
contractual indemnification against Rockledge. Rockledge argues

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that the Court erred in finding that Geller was the agent of the owner 1156 APF LLC. and APF Properties LLC (the "Owner"), for purposes of contractual indemnification, even though it concedes that Geller may be the agent of the Owner for purposes of the Labor Law. At most, it contends that Newmark Knight Frank is the agent of the Owner for purposes of contractual indemnification, because it entered into a contract on behalf of the Owner for facade repairs and for erection and removal of a sidewalk bridge.

Geller, however, maintains that although it was not a party to the relevant agreements, it is the agent of the Owner for purposes of contractual indemnification, pointing to the instructions that it received from Mr. Thompson at Newmark Knight Frank regarding removal of the sidewalk bridge, which Geller passed on to Rockledge.

The Rockledge proposal (the "Proposal") with Newmark Knight Frank (referred to as the "Customer") contains an indemnification clause which states:

"Rockledge Scaffolding Corporation agrees to indemnify, defend and hold the Customer, its directors, officers, partners, agents and employees harmless from and against all claims, damages, losses, suits, judgments, actions and expenses (including attorneys' fees and costs) caused directly and solely by Rockledge Scaffolding Corporation, its employees or other persons under the direct and immediate control of Rockledge Scaffolding Corporation."

The Newmark Knight Frank Purchase Order (the "Purchase Order") contains terms and conditions, including a provision which states:

"Vendor {Rockledge] shall indemnify, defend and hold harmless Owner and Newmark Knight Frank and all partners, members, principals, officers, directors, shareholders, trustees, employees and agents of the foregoing, from and against all liabilities, damages, penalties, and liabilities, including reasonable legal and professional costs and fees, arising out of, or in connection with any act, negligence, omission or breach of any of the terms of this Agreement by Vendor" (emphasis added)

Although the language of Proposal appears to be limited to the agents of the Customer (Newmark Knight Frank) as it applies to "its directors, officers, partners, agents and employees" the language of the Purchase Order applies to both the Owner (APF), Newmark Knight Frank, and, the agents of both (i.e., the "foregoing").

As noted by Geller, the court may determine, as a matter of law, that a party is entitled to contractual indemnification as an agent of the owner (see *Kenny v Fuller Co.*, 87 AD2d 183 [2d Dept 1982] [court granted a directed verdict on contractual indemnification in favor of the owner's representative, where the hold harmless clause applied to the owner and its "agents" and the evidence established that the owner's representative was an

agent of the owner, despite the fact that the representative was designated as an independent contractor under a separate agreement]). Here, based on the evidence submitted, the Court properly determined that Geller was entitled to contractual indemnification as an agent of the owner under the Purchase Order. Further, the Purchase Order could have provided that contractors and subcontractors are not deemed agents of the Owner had that been the parties' intent.

Rockledge's citation to *Tonking v Port Authority of New York and New Jersey* (3 NY3d 486 [2004]) and *Lipshultz v K & G Industries, Inc.* (294 AD2d 338 [2d Dept 2002]) does not compel a different result. In *Tonking*, the Court of Appeals held that an indemnification provision did not apply to a subcontractor who performed management services on behalf of the owner because, although the provision applied to the owner and its agents, the contract specifically referenced the construction manager, by name, more than 130 times, and referred to the terms "agents" and "construction manager" as separate classifications, leading the Court to conclude that the failure to name the construction manager as an agent was intentional. The Court further found that such an interpretation was consistent with Section 11 of the Workers' Compensation Law. Similarly, in *Lipshultz*, the Court

found that a third party defendant was not entitled to contractual indemnification because the provision specifically referred to the contractor (but not the general contractor) and the general contractor was specifically referred to in numerous other provisions of the contract.

It is hereby

ORDERED that motion by Rockledge Scaffolding Corporation to reargue and renew the Court's Decision and Order, dated September 6, 2011 is granted, and upon reargument the Court adheres to its prior Decision, for the reasons stated herein<sup>1</sup>.

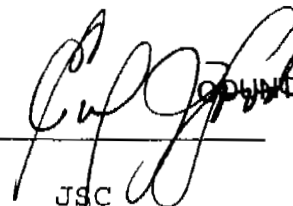
This Constitutes the Decision and Order of the Court.

Dated: November 1, 2011

ENTER:

NOV 09 2011

**FILED**

  
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JSC

**EMILY JANE GOODMAN**

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<sup>1</sup>The Court notes that first ordered paragraph on page 21 of the Decision and Order, dated September 6, 2011 refers to contractual indemnity when it should have referred to common law indemnity.