

Rivera v 44 E. 28 Penn Plaza Properties, LLC

2012 NY Slip Op 30496(U)

February 29, 2012

Supreme Court, New York County

Docket Number: 113450/10

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. JUDITH J. GISCHKE

PRESENT: _____ **J.S.C.**
Justice

PART _____

Index Number : 113450/2010
RIVERA, JOSE
vs.
44 W. 28 PENN PLAZA PROPERTIES
SEQUENCE NUMBER : 003
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) _____
Answering Affidavits — Exhibits _____ | No(s) _____
Replying Affidavits _____ | No(s) _____

FILED

Upon the foregoing papers, it is ordered that this motion is

MAR 01 2012
NEW YORK
COUNTY CLERK'S OFFICE

**motion(s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

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

Dated: 2/29/12

HON. JUDITH J. GISCHKE
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**Supreme Court of the State of New York
County of New York: Part 10**

-----x
 JOSE RIVERA, **Decision/Order**
Plaintiff, Index No.: 113450/10
-against- Seq. No. : 003
 44 E. 28 PENN PLAZA PROPERTIES, LLC, INTERIOR
 CONSTRUCTION CORP. and ARCUS FOUNDATION ,
Defendants. **Present:**
Hon. Judith J. Gische
J.S.C.

-----x
 INTERIOR CONSTRUCTION CORP., **FILED**
Third-Party Plaintiff, Index No.: 590161/11
-against- MAR 01 2012
 TECHNIQUE DRY WALL, INC., NEW YORK
Third-Party Defendant. COUNTY CLERK'S OFFICE

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

Papers	Numbered
3P Plt's n/m [3215] w/CES affirm, exhs	1
3P Plt's JB affid, exhs [sep back]	2

Hon. Gische, J.S.C.:

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

This is a third-party action arising from injuries plaintiff allegedly sustained while working at a construction site. Third-party plaintiff Interior Construction Corp. ("Interior") now moves for an order directing the Clerk of the Court to enter a default judgment (CPLR § 3215), in its favor, against third-party defendant Technique Dry Wall, Inc. ("Technique"). The third-party action against Technique alleges a cause of action for contractual indemnification and a cause of action for Technique's breach of contract for failure to

indemnify Interior and to procure insurance naming Interior as an additional insured. Technique has not submitted any opposition, despite due proof of service of the instant motion. Therefore, this motion is considered and decided on default against Technique.

Interior has provided proof that it served Technique pursuant to CPLR § 311 and BCL § 306. This third-party action was commenced by the filing of a third-party summons and verified complaint on February 16, 2011. Thereafter, the third-party summons and verified complaint were served upon Technique by service upon the Secretary of State on March 20, 2011. Interior also served Technique by personally serving Ahmet Ekici, who is identified as the chairman/ceo in the certificate of incorporation, and Ismail Ekici, at the principal executive office. An additional copy of the third-party summons and the verified complaint was served upon the Secretary of State and mailed to all other addresses on September 20, 2011 pursuant to CPLR § 3215 (g)(4). Therefore, the court has jurisdiction over Technique.

At no time prior to this decision has Technique interposed an answer to the third-party complaint, nor has Technique requested that its time to answer be extended by the court. Interior has shown that Technique has defaulted in this matter and that it is entitled to a judgment if it can otherwise establish a *prima facie* case. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3rd Dept 2001); Zelnik v. Bidermann Industries U.S.A., Inc., 242 A.D.2d 227 (1997). Technique's default in answering the third-party complaint constitutes an admission of the relevant factual allegations therein and the reasonable inferences which may be made therefrom. Rokina Optical Co., Inc. v. Camera King, Inc., 63 N.Y.2d 728 (1984).

The following is established by the third-party complaint, the documents submitted

(Purchase Order, ACORD Certificate of Liability Insurance, Notice of Disclaimer, and other papers in this matter) and the sworn affidavit of Joseph Bruzzese, the president of the 3P plaintiff Interior ("Bruzzese"):

Plaintiff alleges that he was injured while working as a construction laborer for Technique at a project at 50 West 28th Street, in Manhattan, on August 6, 2010.

Interior claims that the affidavit of Bruzzese and the accompanying executed Purchase Order, dated May 17, 2010, by and between Interior and Technique, establish that Technique was retained to provide drywall and other services at the construction site. Interior further claims that these documents support a finding that Technique agreed to defend, indemnify and hold Interior harmless for any claim or loss arising out of Technique's work on that project.

Interior also claims that Technique agreed to list Interior as an additional insured on its commercial general liability policy, and Technique provided Interior with an ACORD certificate of insurance listing Interior as such. Therefore, since plaintiff alleges in his complaint that he was injured while working for Technique on that project, Interior claims that it is entitled to a defense and indemnification from Technique and its commercial general liability policy in this matter. Technique's insurance carrier has, however, refused to provide coverage to Interior and denied that Interior is an additional insured on Technique's policy. Technique itself has also failed to defend or indemnify Interior, as contracted to in the Purchase Order.

Discussion

Contractual Indemnification

"A party is entitled to full contractual indemnification provided that the 'intention to

indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” Drzewinski v. Atlantic Scaffold & Ladder Company, Inc., 70 N.Y.2d 774, 777 [1987], quoting Margolin v. New York Life Insurance Company, 32 N.Y.2d 149, 153 [1973]; see Torres v. Morse Diesel International, Inc., 14 A.D.3d 401, 403 [1st Dept 2005].

The purchase order between Interior and Technique contains an indemnification provision, which states, in pertinent part:

“The undersigned further agrees to defend, indemnify and hold Interior Construction Corporation, and owner harmless from any and all claims arising out, under or in connection with the Purchase Order and/or the performance of any and all Work at the above project, including reasonable attorney’s fees and expenses.” (Bruzzese Affidavit, Exhibit A, Purchase Order)

Thus, the indemnity provision of the purchase order clearly expresses the intent of the parties that Technique indemnify Interior in the event of “any and all claims arising out, under or in connection with the Purchase Order and/or the performance of any and all Work at the above project.” Therefore, Interior has established that it is entitled to contractual indemnification and Interior’s first cause of action is granted on default.

Technique’s Breach of Contract For Failure to Indemnify Interior

And to Procure Insurance Naming Interior as an Additional Insured

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant’s failure to perform; and (4) resulting damage. Furia v. Furia, 116 A.D.2d 694 (2d Dept. 1986). The Purchase Order is a form of contract.

Technique obtained the general liability insurance policy with Rutgers Casualty

Insurance Company, Policy Number SKP 3105071-16, effective November 28, 2008 through November 29, 2010. In the Purchase Order, Technique agreed to maintain general liability insurance naming the "Interior Construction Corporation as an additional insured." (Bruzzese Affidavit, Exhibit A, Purchase Order). Although Technique provided interior with an ACORD Certificate of Liability Insurance, demonstrating that Interior was named as an additional insured, a certificate is not evidence of coverage and merely establishes that there is a general contractor/sub-contractor relationship between these parties. Horn Maintenance Corp. v Aetna Cas. & Sur. Co., 225 A.D.2d 443 (1st Dept. 1996). Furthermore, Technique's insurance carrier has refused to provide coverage, based in part because "[t]endering party is not a named or additional insured under this policy" and in part because form RCG 00 06 - Exclusion of Injury To Employees, Contractors And Employees of Contractors excludes coverage for the plaintiff. (Interiors's Notice of Motion, Exhibit G, Notice of Disclaimer). The court finds that Interior has established Technique's breach of contract for failure to indemnify Interior and to procure insurance naming Interior as an additional insured. Therefore, plaintiff's second cause of action is granted on default, as to liability. Damages, if any, shall be determined at the inquest, which shall be held at the same time as the trial of the underlying case.

In accordance with the foregoing,

IT IS HEREBY

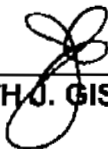
ORDERED that Interior Construction Corp.'s motion for entry of a default judgment on its first cause of action against Technique Dry Wall, Inc. is **GRANTED** on default; and it is further

ORDERED that Interior Construction Corp.'s motion for entry of a default judgment

on its second cause of action, against Technique Dry Wall, Inc., is GRANTED on default, as to liability; damages, if any, shall be determined at the inquest, which shall be held at the same time as the trial of the underlying case; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
February 29 2012

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.

FILED
MAR 01 2012
NEW YORK
COUNTY CLERK'S OFFICE