

**Paszko v Roman Catholic Church of St. Ignatius
Loyola**

2012 NY Slip Op 31229(U)

May 7, 2012

Sup Ct, NY County

Docket Number: 107025/2011

Judge: Saliann Scarpulla

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SCANNED ON 5/10/2012

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

PRESENT: Scarpulla
Justice

PART 19

Index Number : 107025/2011
PASZKO, ARTUR
vs.
ROMAN CATHOLIC CHURCH
SEQUENCE NUMBER : 002
SUMMARY 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). _____

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

*decided in accordance with the
accompanying memorandum decision.*

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

FILED

MAY 10 2012

NEW YORK
COUNTY CLERK'S OFFICE
Sarah Scarpulla
S. Scarpulla J.S.C.

Dated: 5/7/12

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: CIVIL TERM: PART 19

-----X
ARTUR PASZKO,

Plaintiff,

- against-

ROMAN CATHOLIC CHURCH OF ST. IGNATIUS
LOYOLA and THE SAINT IGNATIUS LOYOLA
SCHOOL,

Defendants.

-----X

ROMAN CATHOLIC CHURCH OF ST. IGNATIUS
LOYOLA and THE SAINT IGNATIUS LOYOLA
SCHOOL,

Third-Party Plaintiffs,

-against-

C.F.C. CONTRACTING CORP.,

Third-Party Defendant.

-----X

For Defendants/Third-Party Plaintiffs:
French & Casey, LLP
29 Broadway
New York, NY 10006

For Third-Party Defendant:
Shayne, Dachs, Corker, Sauer & Dachs, LLP
114 Old Country Road, Suite 410
Mineola, NY 11501

Papers considered in review of this cross motion for summary judgment:

Notice of Cross Motion	1
Aff in Support	2
Aff in Opp	3
Memo of Law	4
Reply Aff	5
Memo of Law	6

Index No.: 107025/2011
Submission Date: 2/15/12

FILED

MAY 10 2012

NEW YORK
COUNTY CLERK'S OFFICE

Third-Party Index No.:
590548/2011

DECISION AND ORDER

RECEIVED
MAY 10 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, third-party defendant C.F.C. Contracting Corp. (“CFC”) moves for an order granting summary judgment against defendants/third-party plaintiffs Roman Catholic Church of St. Ignatius Loyola (the “Church”) and the Saint Ignatius Loyola School (the “School”) (collectively “St. Ignatius”).

Plaintiff Artur Paszko (“Paszko”), a CFC employee, commenced this action to recover for an accident which occurred on November 11, 2009, during construction at the School. St. Ignatius then commenced a third-party action against CFC seeking contribution, common law indemnification, contractual indemnification and breach of contract.

In the third-party complaint St. Ignatius alleges that on or about January 9, 2009, St. Ignatius entered into a contract with CFC for the renovation of the second floor of the school, and St. Ignatius annexed a copy of that contract to the third-party complaint. CFC answered the third-party complaint, denying most of the allegations. CFC also alleged affirmative defenses and counterclaims, asserting that the contract annexed to the third-party complaint did not govern the work in which Paszko was engaged at the time of the accident.

CFC now moves for summary judgment dismissing the third-party complaint, and in support of the motion, submits an affidavit from Chester Cupinski (“Cupinski”), CFC’s

president. In his affidavit, Cupinski concedes that, at one point, Paszko was working on the second floor of the School, but states that the work on the second floor was completed before Paszko's accident on November 11, 2009. Cupinski further states that the work Paszko was engaged in at the time of his accident was on the school's first floor. The work on the first floor was performed pursuant to a separate proposal, which was distinct from the work CFC previously performed on the second floor pursuant to the January 9, 2009 contract.

CFC submits both the *January 9, 2009 contract and the first floor proposal.*

Cupinski notes in his affidavit that the proposal, unlike the January 9, 2009 contract, does not contain an agreement to indemnify St. Ignatius or to procure insurance for the Church and the School's benefit. CFC also notes that the "Scope of Work" for the January 9, 2009 contract is stated as follows: "Renovation of Second Floor Grammar School as per CFC Contracting Proposal dated January 8th, 2009."

CFC asserts that St. Ignatius was mistaken in pursuing the third-party complaint against CFC on the basis of the January 9, 2009 contract, and CFC contacted St. Ignatius' counsel and informed them of this mistake. CFC asserts that because St. Ignatius chose to continue to pursue the third-party complaint even after CFC pointed out the difference between the January 9, 2009 contract and the first floor proposal, St. Ignatius' actions were frivolous and it should therefore be sanctioned.

CFC also submits an attorney affirmation. In this affirmation, CFC's attorney asserts that should St. Ignatius raise an issue of fact as to whether CFC did agree to name it as additional insureds under CFC's policy, "CFC fully complied therewith." In support, CFC submits a Certificate of Insurance, dated November 12, 2009 (the day after Paszko's accident) which provides that "the Catholic Mutual group, the Archdiocese of New York, . . . all organizations and their schools or properties with the Archdiocese [sic] and all organizations and their properties rented, owned or operated throughout the Archdiocese of New York are listed as additional insureds."

In opposition to CFC's summary judgment motion, St. Ignatius first argues that this motion is premature because there has yet been no discovery. St. Ignatius asserts that "it is crucial to this case to determine exactly what each respective party understood the terms and conditions of their agreement(s) to mean regarding the subject work, including but not limited to, each party's understanding as to which written document(s) constituted their agreement, the custom and practice of the parties throughout their relationship, whether any oral agreements were made regarding indemnification and/or insurance, etc." St. Ignatius argues that both parties would have to submit to depositions in order to determine each party's respective understanding as to issues of indemnification and insurance.

St. Ignatius also asserts that the proposals for the first floor work were not complete, as they did not contain the all of the terms and conditions between St. Ignatius and CFC, specifically the indemnification language that was contained in all other

agreements between CFC and St. Ignatius for the school construction project. Further, St. Ignatius claims that the underlying relationship between CFC and St. Ignatius must be explained to understand why the proposal is incomplete. In support, St. Ignatius submits the affidavit of Fernando Castro (“Castro”), Treasurer of the Church of St. Ignatius Loyola. Castro stated “[u]pon information and belief” that the construction project was conducted in phases per floor, and purports to annex to his affidavit contracts between CFC and St. Ignatius for each phase of the project.¹

St. Ignatius also asserts that CFC has taken a contradictory position, thereby establishing issues of fact. St. Ignatius notes that CFC in the Cupinski affidavit asserts that there was no indemnity agreement between St. Ignatius and CFC, and no agreement to procure insurance for St. Ignatius’ benefit. However, as St. Ignatius notes, CFC submitted a copy of the November 12, 2009 Certificate of Insurance which purports to name the Church and the School as additional insureds.

As to the motion for sanctions, St. Ignatius argues that non-tort matters, such as claims for breach of contract, are beyond the purview of CPLR §8303(a), so therefore the Court cannot award costs and fees even upon a finding that the third-party action is

¹ The Castro affidavit was submitted to the Court as a separate document, with no exhibits attached. Exhibit “E” to St. Ignatius’s opposition (which the attorney affirmation indicates is where the Castro affidavit should be annexed) begins on “Page 6 of 11” of a Construction Contract dated 8/27/2002, of which page 11 was signed July 2006. It is followed by four documents entitled “Owner-Contractor Agreement,” which state they are for work on the second through sixth floors of the School.

frivolous. St. Ignatius also asserts that there is no showing of bad faith, and the third-party complaint is supported by a reasonable basis in both fact and law.

Lastly, St. Ignatius argues that leave to amend should be freely given. St. Ignatius claims that “[w]hile the proposals submitted by CFC may have governed the physical work on the 1st floor and in following, the work giving rise to the underlying action,” St. Ignatius maintains that the proposals are not the complete agreement and do not state the entire understanding between the parties. As such, St. Ignatius argues that it should be permitted to amend its pleadings after discovery has proceeded.

In reply, CFC asserts that the meaning of the applicable agreement can plainly be ascertained from the four corners of the agreement, and that no further information or interpretation is required. CFC also argues that the proposal for the first floor work was facially complete. CFC maintains that the certificates of insurance for the work on the second through sixth floors were still in effect at the time of Paszko’s accident, as they were required to be pursuant to the applicable contracts for the other floors. CFC claims that failure to read or express dissatisfaction with the insurance policies in effect is no defense to this motion. Lastly, CFC maintains that it is entitled to sanctions for frivolous conduct by St. Ignatius in prosecuting the third-party action against CFC.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any

material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the 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).

At oral argument on this motion, St. Ignatius conceded that the first and second causes of action for contribution and common law indemnification must be dismissed as Paszko did not suffer a “grave injury.” Accordingly, this decision addresses the motion as directed against the third and fourth causes of action for contractual indemnification and breach of contract.

“It is well settled that when the terms of an agreement are clear and unambiguous, the court will not look beyond the four corners of the agreement and will enforce the writing according to its terms.” *Continental Ins. Co. v. 115-123 West 29th St. Owners Corp.*, 275 A.D.2d 604, 605 (1st Dep’t 2000). Terms of a contract should be interpreted in accordance with their plain meaning, and courts will interpret an agreement to give meaning to each provision. *Petracca v. Petracca*, 302 A.D.2d 576 (2nd Dept. 2003). “The question of whether a writing is ambiguous is one of law to be resolved by the courts.” *In re Wallace*, 86 N.Y.2d 543, 548 (1995).

“In determining whether the parties entered into a contractual agreement and what its terms were, it is necessary to look to the objective manifestations of the intent of the parties, as evidenced by the totality of their expressed words and deeds. The court must

look to the attendant circumstances, the situation of the parties, and the objectives they were striving to attain.” *Ruane v. The Allen-Stevenson School*, 82 A.D.3d 615, 616 (1st Dep’t 2011) (citing *Brown Bros. Elec. Contrs. v. Beam Constr. Corp.*, 41 N.Y.2d 397 (1977)).

Here, CFC establishes that on its face, the January 9, 2009 contract pertains to construction work performed on the second floor of the school. The Cupinski affidavit states that the work on the second floor, performed pursuant to the January 9, 2009 contract, was completed before the date of Paszko’s accident. As there is nothing in the record to dispute that Paszko’s accident occurred while he was working on the first floor, the January 9, 2009 contract relied on by St. Ignatius is not applicable.

CFC also makes a prima facie showing that the invoice and proposal for the first floor work constituted the pertinent agreement between the parties for the work Paszko was engaged in at the time of his accident. The invoice, dated September 2, 2009, and proposal, dated July 17, 2009, submitted by CFC in support of its motion clearly state they are for work at the school’s first floor. Moreover, the invoice indicates that it was approved on September 4, 2009, and paid on September 17, 2009. These documents contain no provisions regarding indemnification or procuring insurance for St. Ignatius’ benefit. Accordingly, as the agreement for the first floor work, which was in effect at the time of Paszko’s accident, is silent as to indemnification or insurance obligations, CFC has

made its prima facie showing of entitlement to summary judgment on the third and fourth causes of action.

In opposition, St. Ignatius' fails to show that there exist material issues of fact. As a threshold matter, St. Ignatius fails to put forth any evidence or testimony by a person with first hand knowledge of the work performed at the School. St. Ignatius relies on its attorney affirmation as well as the Castro affidavit, both of which make all factual allegations "upon information and belief." It is well settled that on a motion for summary judgment "the opposing affidavit should indicate that it is being made by one having personal knowledge of the facts." *S. J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 342 (1974). Allegations made merely "upon information and belief," such as those relied on here, are "pure speculation and [are] insufficient to raise a question of fact to preclude summary judgment." *Lockwood v. Layton*, 79 A.D.3d 1342, 1344 (3d Dep't 2010). *See also Wood v. Nourse*, 124 A.D.2d 1020, 1021 (4th Dep't 1986) ("The contentions of plaintiff and his attorney, made only upon information and belief . . . do not suffice as proof in evidentiary form to create a question of fact requiring trial.")

Moreover, even were I to accept the allegations contained in the supporting documents, St. Ignatius has failed to raise a triable issue of fact. St. Ignatius argues that in order to fully understand the agreement pertaining to the work on the first floor, the course of conduct between the parties must be considered. However, as stated above, a review of the documents for the first floor construction do "not reveal any genuine ambiguity, so that

there is no occasion to consider the parties' course of conduct." *239 East 79th Owners Corp. v. Lamb 79 & 2 Corp.*, 30 A.D.3d 167, 128 (1st Dep't) (citing *Continental Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 651 (1993)).

Further, even were I to examine the course of conduct, there is nothing to suggest that the terms of the January 9, 2009 contract, or of the contracts pertaining to the work on the other floors, were applicable to the first floor work. Notably, St. Ignatius does not make an assertion that there were incomplete or ongoing negotiations regarding indemnification or insurance as terms of work for the first floor. *See Flores v. The Lower East Side Service Center, Inc.*, 4 N.Y.3d 363, 371 (2005). In fact, St. Ignatius establishes the opposite – that the proposal and invoice formed a complete agreement. St. Ignatius submits copies of its checks, proof that it paid the amount noted in the invoice. It is also not disputed that CFC performed the work on the first floor as specified in the proposal and invoice. Therefore, the terms of the documents, along with the parties' actions, make clear that the parties entered into a binding agreement, which makes no mention of indemnification or insurance for the benefit of St. Ignatius. "The manifestation or expression of assent necessary to form a contract may be by word, act, or conduct which evinces the intention of the parties to contract." *Maffea v. Ippolito*, 247 A.D.2d 366, 367 (2d Dep't 1998). Looking "to the attendant circumstances, the situation of the parties, and the objectives they were striving to obtain," *Ruane*, 82 A.D.3d at 616, St. Ignatius failed to establish any issues of fact.

Further, St. Ignatius' argument that this motion is premature as there has not yet been any discovery conducted is without merit. St. Ignatius "failed to show that facts essential to justify opposition to the motion may emerge upon further discovery. A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence."

Bailey v. New York City Transit Authority, 270 A.D.2d 156, 157 (1st Dep't 2000). *See also Ruttara & Sons Construction So., Inc. v. J. Petrocelli Construction, Inc.*, 257 A.D.2d 614 (2d Dep't 1999).

Lastly, that part of CFC's motion in which it seeks sanctions is denied. Pursuant to 22 NYCRR §130-1.1, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct. *See also Llantin v. Doe*, 30 A.D.3d 292 (1st Dept. 2006). Sanctions are within the sound discretion of the trial court and are reserved for serious transgressions. There is no showing here that St. Ignatius pursued this action in bad faith. As such, no sanctions are appropriate.

In accordance with the foregoing, it is hereby

ORDERED that third-party defendant C.F.C. Contracting Corp.'s motion for summary judgment dismissing the third-party complaint of Roman Catholic Church of St. Ignatius Loyola and the Saint Ignatius Loyola School is granted; and it is further

ORDERED that the third-party complaint is severed and dismissed with costs and disbursements; and it is further

ORDERED that C.F.C. Contracting Corp.'s motion for sanctions against the Roman Catholic Church of St. Ignatius Loyola and the Saint Ignatius Loyola School is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
May 7, 2012

FILED

MAY 10 2012

ENTER:

NEW YORK
COUNTY CLERK'S OFFICE

Saliann Scarpulla
Saliann Scarpulla, J.S.C.