

Hoffman v Biltmore 47 Assoc., LLC
2012 NY Slip Op 32543(U)
October 2, 2012
Sup Ct, New York County
Docket Number: 108095/06
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: DEBRA A. JAMES
Justice

PART 59

LEONARD HOFFMAN and ROSALIA HOFFMAN,
Plaintiffs,

Index No.: 108095/06

Motion Date: 02/24/12

- v -

Motion Seq. No.: 10

BILTMORE 47 ASSOCIATES, LLC, MANHATTAN
THEATRE CLUB, INC., THE BILTMORE THEATER
CORP., THE BILTMORE THEATRE GR., INC.,
SWEET CONSTRUCTION CORP., BILTMORE THEATER
INDEPENDENT MANAGER CORP., BILTMORE
THEATRE, LLC., THE JACK PARKER CORP.,
BILTMORE TOWER, LLC, PARKER SECOND, LLC,
PARKER THEATRE ASSOCIATES, LLC., and
SWEET CONSTRUCTION of LONG ISLAND, LLC.,

Defendants.

BILTMORE 47 ASSOCIATES, LLC, MANHATTAN
THEATRE CLUB, INC., SWEET CONSTRUCTION
CORP., BILTMORE THEATER INDEPENDENT MANAGER
CORP., BILTMORE THEATRE, LLC, THE JACK
PARKER CORPORATION, BILTMORE TOWER, LLC,
PARKER SECOND, LLC, PARKER THEATER
ASSOCIATES, LLC and SWEET CONSTRUCTION OF
LONG ISLAND, LLC,

TP Index No.:
591083/07

Third-Party Plaintiffs,

- v -

MASS ELECTRIC CONSTRUCTION CO., ST. PAUL
FIRE AND MARINE INSURANCE CO.,

Third-Party Defendants.

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

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

BILTMORE 47 ASSOCIATES, LLC, MANHATTAN
THEATRE CLUB, INC., SWEET CONSTRUCTION
CORP., BILTMORE THEATER INDEPENDENT MANAGER
CORP., BILTMORE THEATRE, LLC, THE JACK
PARKER CORPORATION, BILTMORE TOWER, LLC,
PARKER SECOND, LLC, PARKER THEATER
ASSOCIATES, LLC and SWEET CONSTRUCTION OF
LONG ISLAND, LLC,

STP Index No.:
590494/09

Second Third Party-Plaintiffs

- v -

GENERAL CONCRETE CONSTRUCTION, INC.,
FEINSTEIN IRONWORKS, INC., CORD
CONTRACTING, INC., REACT INDUSTRIES, INC.,
REACT TECHNICAL, INC., REACT AC, AMERICAN
FINANCIAL GROUP, FIREMAN'S FUND AND
NATIONAL SURETY, INC., GREAT AMERICAN
INSURANCE COMPANY, GREAT AMERICAN E&S
INS. CO., AMERICAN INTERNATIONAL GROUP,
AIG CASUALTY COMPANY, AMERICAN HOME
ASSURANCE COMPANY, AMERICAN INTERNATIONAL
INSURANCE COMPANY, AMERICAN INTERNATIONAL
SPECIALTY, ACE USA, ACE GROUP OF COMPANIES,
WESTCHESTER FIRE INSURANCE CO., DIAMOND
STATE INSURANCE COMPANY, AXIS INSURANCE
COMPANY, ALLIANZ INSURANCE GROUP, FIREMAN'S
FUND INSURANCE COMPANY, NATIONAL SURETY
CORPORATION, NEW YORK MARINE & GENERAL
INSURANCE COMPANY and UNITED NATIONAL
INSURANCE COMPANY,

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Second Third-Party Defendants.

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits

No (s) . 1

Answering Affidavits - Exhibits

No (s) . 2, 3, 4,

Replying Affidavits - Exhibits

No (s) . 5, 6, 7

Cross-Motion:

☒ Yes

☐ No

Upon the foregoing papers, that portion of Mass Electric Construction Co.'s ("Mass Electric") motion seeking summary judgment dismissing the cause of action asserted as against it to provided defense for defendants/third-party plaintiffs in the underlying personal injury action and for an alleged breach of its contractual obligation to procure insurance, is granted, but the motion is otherwise denied.

That portion of defendants/first third party plaintiffs' Biltmore 47 Associates, Manhattan Theatre Club, Inc. Sweet Construction Corporation's ("Sweet") cross motion seeking to dismiss plaintiffs' cause of action based on a violation of Labor Law § 240 (1) is granted, as previously stipulated, and the remainder of the cross motion is denied.

The indemnification provision of the agreement between Sweet, the construction manager for the project, and Mass Electric, its electrical subcontractor, provides for only potential indemnification, but does not include defense costs. Mass Electric "is not an insurer, and the contract of indemnity to which it is bound, strictly construed, does not impose upon it a defense obligation comparable in breath to that ordinarily borne by an insurer; its duty to defend is no broader than its duty to indemnify [internal citations omitted]." Viacom Inc. v Philips Electronics North America Corp., 16 AD3d 215, 215-216 (1st Dept 2005).

In reviewing the insurance documents provided with the papers, the court agrees with Mass Electric that it has purchased the general commercial liability insurance mandated by its agreement with Sweet. "The insurer's refusal to indemnify [defendants/third-party plaintiffs] under the coverage purchased by [Mass Electric] does not alter this conclusion." Perez v Morse Diesel International, Inc., 10 AD3d 497, 498 (1st Dept 2004).

Turning to the issue of contractual indemnification, the court finds that the indemnification provision appearing in the contract entered into by and between Mass Electric and Sweet is a broad one that provides for indemnification that arises out of Mass Electric's work, even if Mass Electric itself was not negligent. Brown v Two Exchange Plaza Partners, 76 NY2d 172 (1990), Urbina v 26 Court Street Associates, LLC, 46 AD3d 268 (1st Dept 2007).

Careful scrutiny of the indemnification provision shows that Mass Electric would have to indemnify Sweet in one of two instances: one, if Mass Electric were negligent, thereby causing the accident; or two, if the accident arose in connection with Mass Electric's work, regardless of Mass Electric's negligence.

Although the court agrees with Mass Electric's contention that it cannot be found to have negligently supervised Hoffman while he was engaged in a common and ordinary activity

(Consolidated Edison Company of New York, Inc. v Vilsmeier Auction Co., Inc., 21 AD3d 726 [1st Dept 2005]; Hernandez v Board of Education of City of New York, 264 AD2d 709 [2d Dept 1999]), it would still be obligated to indemnify Sweet if Hoffman's claim arose in connection with services or work performed by Mass Electric pursuant to the terms of the contract.¹

In the case at bar, Hoffman was at the job site, working for Mass Electric, when he walked across the floor, carrying a ladder, to get from one work area to another. In interpreting insurance contract provisions providing coverage for injuries "arising out of work" at a job site, courts have consistently held that activities at the job site that are incidental to the actual work being performed "arise out of" such work; examples are: worker falling into a hole in the floor while walking back to a field office to obtain a can of paint (Hunter Roberts Construction Group, LLC v Arch Insurance Company, 75 AD3d 404 [1st Dept 2010]); worker injured while entering the job site en route to work (Chelsea Associates, LLC v Laquila-Pinnacle, 21

¹Alessio's second deposition does not establish that Mass Electric was performing the work that created either the hole or the debris. Alessio only averred that Mass Electric was working in the area in and around the days surrounding the occurrence, and Hoffman definitively stated that Mass Electric was not working in that area on the day of the accident and the debris and tarp that hid the hole from his view did not belong to Mass Electric. Hayes testified that Mass Electric provided the temporary lighting for the project, which included the area where the hole or debris were located.

AD3d 739 [1st Dept 2005]); and worker injured while using the restroom facilities at the job site (Turner Construction Company v. Pace Plumbing Corp., 298 AD2d 146 [1st Dept 2002]). The rationale behind these decisions is that in construing the phrase "arising out of", the court must not look simply at the precise cause of the accident, but must consider the general nature of the operation in the course of which the injury was sustained. David Christa Construction, Inc. v American Home Assurance Company, 59 AD3d 1136 (4th Dept 2009).

In the case at bar, the broad indemnification provision in the contract between Mass Electric and Sweet stated that Mass Electric would indemnify Sweet for "all claims of [its] employees ... for any matter whatsoever in connection with services and work performed under this contract ...". This court sees no reason why it should not apply the same reasoning in its interpretation of "arising out of work" as it would in defining "in connection with work." Since there is no question that Hoffman was working at the job site at the time of the occurrence, and was carrying a ladder from one area to another, the court concludes that his injuries arose in connection with his work for Mass Electric, pursuant to Mass Electric's contract with Sweet.

However, even if Mass Electric might be obligated to indemnify Sweet for Hoffman's injuries, such obligation would not

arise if it is determined that Sweet was in some way responsible for causing the dangerous condition that caused Hoffman's accident.

"Mass [Electric]'s contention that the indemnification provisions of the contracts signed by [it and Sweet] are unenforceable pursuant to General Obligations Law § 5-322.1 is unavailing. Where, as here, the provision provides for full indemnification, General Obligations Law § 5-322.1's proscription of indemnification is only applicable if the indemnitee is found negligent to any extent.

Moreover, where the contractor's negligence has not been litigated and a triable issue of fact is raised, the contractor's request for summary judgment for contractual indemnification must be denied. Because the record raises questions of fact as to ... Sweet []'s negligence, the enforceability of the contractual indemnification provision cannot be decided at this time; therefore, the motions of Mass [Electric] ... and Sweet [] requesting a declaration as to the duties [of the parties are] appropriately denied [internal citations omitted]."

Auriemma v Biltmore Theatre, LLC, 82 AD3d 1, 12 (1st Dept 2011).

Consequently, since Sweet was contractually bound to maintain the job site free from debris, there is a question of fact as to whether Sweet was negligent in fulfilling this obligation, regardless of any alleged negligence on the part of Mass Electric.

For the same reason, no party is entitled to summary judgment with respect to the common-law indemnification claim.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also

prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident' [internal citation omitted]." Perri v Gilbert Johnson Enterprises, Ltd., 14 AD3d 681, 684-685 (2d Dept 2005). As discussed, none of the parties has yet met this burden.

The court notes that the third-party complaint asserts numerous causes of action against Mass Electric, but only the claims concerning indemnification and defense are addressed by the parties in their motion papers. Hence, as to the remainder of the third party claims asserted Mass Electric, the court may afford no relief at this juncture.

Based on the foregoing, it is hereby

ORDERED that the branch of Mass Electric Construction Co.'s motion seeking summary judgment dismissing the causes of action asserted as against it for breach of contract in failing to procure insurance and requiring it to provide defense for defendants/third-party plaintiffs in the underlying personal injury action is granted and such causes of action are dismissed; and it is further

ORDERED that the remainder of Mass Electric Construction Co.'s motion for summary judgment is denied; and it is further

ORDERED that the branch of defendants/third-party plaintiffs Biltmore 47 Associates, LLC, Manhattan Theatre Club, Inc., and Sweet Construction Corp.'s cross motion seeking to dismiss

plaintiffs' cause of action based on a violation of Labor Law § 240 (1) is granted and such cause of action is dismissed; and it is further

ORDERED that the remainder of defendants/third-party plaintiffs' cross motion is denied.

This is the decision and order of the court.

Dated: October 2, 2012

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.

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