

**Almonte v Cauldwell-Wingate Co., LLC**

2012 NY Slip Op 32653(U)

October 5, 2012

Supreme Court, New York County

Docket Number: 110365/2010

Judge: Lucy Billings

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

PRESENT: LUCY BILLINGS  
J.S.C. Justice

PART 46

Index Number : 110365/2010  
ALMONTE, WILSON  
vs  
CAULDWELL-WINGATE  
Sequence Number : 003  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 6 were read on this motion to/for DISMISS CLAIMS

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-2</u>
<u>3-4</u>
<u>5-6</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered ~~that this motion~~ and adjudged that:  
The court grants the motion by third party defendant Bradshaw Mechanical Co., Inc., to dismiss the amended third party complaint and all cross-claims against Bradshaw Mechanical Co. to the extent set forth pursuant to the accompanying decision and 3/29/12 stipulation. C.P.L.R. § 3211(a)(1) and (7).

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/5/12

Lucy Billings  
LUCY BILLINGS J.S.C.

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 46

-----x

WILSON ALMONTE and BELKIS ALMONTE, Index No. 110365/2010

Plaintiffs

- against -

CAULDWELL-WINGATE COMPANY, LLC,

Defendant

-----x

-----x

CAULDWELL-WINGATE COMPANY, LLC, Index No. 590697/2010

Third Party Plaintiff

- against -

ASM MECHANICAL SYSTEMS, BRADSHAW  
MECHANICAL CO., INC., TOTAL SAFETY  
CONSULTING, L.L.C., DONALDSON  
INTERIORS, INC., W5 GROUP LLC, AABCO  
SHEET METAL CO., INC., and LEND LEASE  
(US) CONSTRUCTION INC. f/k/a BOVIS  
LEND LEASE, INC.,

Third Party Defendants

-----x

DECISION AND ORDER

APPEARANCES:

For Defendant-Third Party Plaintiff

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AABCO Sheet Metal Co., Inc.

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For Third Party Defendant Bradshaw Mechanical Co., Inc.  
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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Third party defendant Bradshaw Mechanical Co., Inc., has moved to dismiss the amended third party complaint and all cross-claims against Bradshaw Mechanical Co., based on the failure to state a claim for relief under third party defendant ASM Mechanical Systems' subcontract with Bradshaw Mechanical Co. C.P.L.R. § 3211(a)(1) and (7). In a stipulation dated March 29, 2012, Bradshaw Mechanical Co. withdrew its motion insofar as it sought to dismiss cross-claims by ASM Mechanical Systems (ASM). No other third party defendant opposes the motion.

The parties do not dispute that Bradshaw Mechanical Co. employed plaintiff, who claims injury while engaged in his employment at a construction site where his employer was a subcontractor. Defendant-third party plaintiff Cauldwell-Wingate Company, LLC, seeks contribution and indemnification for any liability to plaintiff from Bradshaw Mechanical Co. These third party claims may not be maintained against plaintiff's employer absent a "grave injury" to plaintiff or a written contract providing for contribution or indemnification by his employer to third party plaintiff. N.Y. Workers' Comp. Law § 11; Flores v. Lower E. Side Serv. Ctr., 4 N.Y.2d 363, 367 (2005); Tonking v. Port Auth. of N.Y. & N.J., 3 N.Y.3d 486, 490 (2004); Hansen v. 510 Manhattan Affordable Hous., 2 A.D.3d 274 (1st Dep't 2003).

See Rodrigues v. N & S Bldg. Contrs., Inc., 5 N.Y.3d 427, 431-32 (2005); Portelli v. Trump Empire State Partners, 12 A.D.3d 280, 281 (1st Dep't 2005); Petrillo v. Durr Mech. Constr., 306 A.D.2d 25, 26 (1st Dep't 2003); Pena v. Chateau Woodmere Corp., 304 A.D.2d 442, 444 (1st Dep't 2003). The parties also do not dispute that plaintiff claims he sustained a fractured wrist, which is not a grave injury.

There is no contract directly between third party plaintiff and Bradshaw Mechanical Co. Third party plaintiff contracted directly with ASM, which in turn subcontracted with Bradshaw Mechanical Co. Third party plaintiff relies on that subcontract between ASM and Bradshaw Mechanical Co., which the parties stipulate the court may consider authenticated and admissible for purposes of this motion. C.P.L.R. § 3211(a)(1). E.g., Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 571 (2005); Kinberg v. Kinberg, 50 A.D.3d 512, 513 (1st Dep't 2008); Hicksville Dry Cleaners, Inc. v. Stanley Fastening Sys., L.P., 37 A.D.3d 218 (1st Dep't 2007); Zanett Lombardier, Ltd. v. Maslow, 29 A.D.3d 495 (1st Dep't 2006). In that subcontract, "the Subcontractor agrees to indemnify and hold harmless the Contractor (insert any additional parties), their officers, directors, agents, employees and partners" for all claims arising from, in connection with, or as a consequence of plaintiff's work on the construction site. Aff. in Supp. of Peter M. Canty Ex. F ¶ 6; Aff. of Jessica L. Rothman in Opp'n Ex. B ¶ 6. No "additional parties" are inserted; nor does the contract anywhere refer to third party

plaintiff; nor does it claim to be an officer, director, agent, employee, or partner of the contracting party ASM.

II. THIRD PARTY PLAINTIFF'S CLAIMS AGAINST BRADSHAW MECHANICAL CO.

Third party plaintiff describes itself as the general contractor (GC) for the construction project: "hired by the General Services Administration for the performance of certain general contracting services for the infrastructure upgrade of the Thurgood Marshall U.S. Courthouse" in New York County. Rothman Aff. in Opp'n ¶ 4. Third party plaintiff then contracted with ASM for the mechanical heating, ventilation, and air conditioning (HVAC) work on the project. ASM then subcontracted with Bradshaw Mechanical Co. to perform part of this work. Third party plaintiff points out that this subcontract between ASM and Bradshaw Mechanical Co. provides for "indemnity in the event liability is imposed against the Indemnitees without negligence and solely by reason of statute, operation of law or otherwise." Canty Aff. in Supp. Ex. F ¶ 6; Rothman Aff. in Opp'n Ex. B ¶ 6. Therefore third party plaintiff maintains that where the subcontract provides for indemnification of the "Contractor," it must refer to third party plaintiff, because as the GC it may be liable to plaintiff without negligence and solely by reason of vicarious liability under New York Labor Law §§ 240(1) and 241(6) for contractors' and subcontractors' acts or omissions.

Labor Law §§ 240(1) and 241(6), however, impose absolute liability on construction site owners and general contractors "and their agents for any breach of the statutory duty which has

proximately caused injury." Sanatass v. Consolidated Inv. Co., Inc., 10 N.Y.3d 333, 338 (2008). See Ferluckaj v. Goldman Sachs & Co., 12 N.Y.3d 316, 320 (2009); Walls v. Turner Constr. Co., 4 N.Y.3d 861, 863-64 (2005). Thus ASM, which contracted with Bradshaw Mechanical Co., qualifies as a "Contractor" that, as the GC's agent under Labor Law §§ 240(1) and 241(6), may be liable to plaintiff without negligence and solely by reason of vicarious liability under the statutes for acts or omissions by ASM's subcontractor Bradshaw Mechanical Co. Walls v. Turner Constr. Co., 4 N.Y.3d at 863-64; Burke v. Hilton Resorts Corp., 85 A.D.3d 419, 420 (1st Dep't 2011); Pacheco v. Kew Garden Hills Apt. Owners, Inc., 73 A.D.3d 578 (1st Dep't 2010); Weber v. Baccarat, Inc., 70 A.D.3d 487, 488 (1st Dep't 2010).

The contract between third party plaintiff and ASM that third party plaintiff itself presents authorizes ASM to supervise and control all HVAC work, which third party plaintiff GC delegated to ASM, and which included that work performed by ASM's subcontractor Bradshaw Mechanical Co. Burke v. Hilton Resorts Corp., 85 A.D.3d at 420; Pacheco v. Kew Garden Hills Apt. Owners, Inc., 73 A.D.3d 578; Weber v. Baccarat, Inc., 70 A.D.3d at 488. Even if third party plaintiff retained "concomitant or overlapping authority to supervise" the entire infrastructure upgrade of the courthouse, including the HVAC work, third party plaintiff's authority does not negate ASM's authority. Weber v. Baccarat, Inc., 70 A.D.3d at 488.

Whether ASM actually supervised plaintiff is also

irrelevant. Id. ASM was third party plaintiff's statutory agent, even if ASM "did not exercise that supervisory authority with respect to plaintiff's particular task." Burke v. Hilton Resorts Corp., 85 A.D.3d at 420. Nor has third party plaintiff shown that plaintiff's injury did not arise from the HVAC work third party plaintiff GC delegated to ASM as the GC's agent.

Moreover, the subcontract between ASM and Bradshaw Mechanical Co. provides for indemnity to only one "Contractor," particularly since no "additional parties" are inserted where specifically permitted. Although the subcontract refers to more than one "Indemnitees," they encompass the "officers, directors, agents, employees and partners" of the "Contractor." Canty Aff. in Supp. Ex. F ¶ 6; Rothman in Opp'n Ex. B ¶ 6. The contracting parties' intent to confer a direct benefit on a party that is neither a signatory to ASM's contract with Bradshaw Mechanical Co., nor named in the contract, must be unambiguous; otherwise the contract must be construed to avoid reading in a duty to indemnify that statutorily Bradshaw Mechanical Co. did not bear. Bradley v. Earl B. Feiden, Inc., 8 N.Y.3d 265, 274 (2007); Tonking v. Port Auth. of N.Y. & N.J., 3 N.Y.3d at 490; Suazo v. Maple Ridge Assoc., L.L.C., 85 A.D.3d 459, 460 (1st Dep't 2011); Fresh Del Monte Produce N.V. v. Eastbrook Caribe A.V.V., 40 A.D.3d 415, 418 (1st Dep't 2007). Not only the intent to indemnify, but also the scope of the indemnification, "the number and identity of the indemnitees, must be "unmistakably clear." Fresh Del Monte Produce N.V. v. Eastbrook Caribe A.V.V., 40

A.D.3d at 418.

Third party plaintiff's insistence that the term "Contractor" in the subcontract is susceptible of more than one interpretation is but a suggestion that a contractual intent to confer a benefit on third party plaintiff and impose a duty on Bradshaw Mechanical Co. is ambiguous, rather than unambiguous. If the subcontract's indemnity provision is ambiguous, then it may not be construed to provide indemnification except in the context where the obligation is unmistakable. E.g., Tonking v. Port Auth. of N.Y. & N.J., 3 N.Y.3d at 490; Hooper Assocs. v. AGS Computers, 74 N.Y.2d 487, 492-93 (1989); Gonclaves v. 515 Park Ave. Condominium, 39 A.D.3d 262, 263 (1st Dep't 2007); Mikulski v. Adam R. West, Inc., 78 A.D.3d 910, 912 (2d Dep't 2010). As the subcontract provides for indemnity to one contractor and unquestionably provides for indemnity to ASM, the subcontract does not provide for indemnification of third party plaintiff, which contracted with ASM and not with Bradshaw Mechanical Co.

### III. CONCLUSION

Consequently, the court grants the motion by third party defendant Bradshaw Mechanical Co., Inc., to dismiss the amended third party complaint and all cross-claims against Bradshaw Mechanical Co., except any cross-claims by third party defendant ASM Mechanical Systems. The amended third party complaint and the cross-claims, other than by ASM, fail to state a claim for relief against Bradshaw Mechanical Co. under ASM's subcontract

with Bradshaw Mechanical Co. and under Workers' Compensation Law  
§ 11. C.P.L.R. § 3211(a)(1) and (7).

DATED: October 5, 2012

*Lucy Billings*  
\_\_\_\_\_  
LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
**J.S.C.**