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

PRESENT: O. PETER SHERWOOD Justice PART 49

FC 80 DEKALB ASSOCIATES, INC.,

Plaintiff,

-against-

SITE SAFETY LLC,

Defendant.

INDEX NO. 150040/2011

MOTION DATE Jan. 10, 2012

MOTION SEQ. NO. 001

MOTION CAL. NO. ____

The following papers, numbered 1 to ___ were read on this motion to dismiss action.

	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 the defendant's motion to dismiss the complaint is decided in accordance with the accompanying decision and order.

Dated: January 12, 2012

O. PETER SHERWOOD, J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

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FC 80 DEKALB ASSOCIATES, INC.,

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----------X

DECISION AND ORDER

Index No. 150040/2011

O. PETER SHERWOOD, J.:

I. OVERVIEW

This action arises from a project for the construction of a residential apartment building located at 80 DeKalb Ave., Brooklyn, New York (the "Project"). On or about January 7, 2008, Plaintiff, FC 80 DeKalb Associates, Inc. ("plaintiff" or "80 DeKalb"), the general contractor on the Project, entered into a contract with defendant, Site Safety, LLC ("defendant" or "Site Safety") by which defendant was to perform site safety management services for the Project. On or about January 15, 2008, Stephen Flavin, a flagman at the construction site, was injured at the Project site when he was struck by an excavator and fell 20 feet into an excavation pit. He commenced a personal injury action in Bronx County Supreme Court titled *Stephen Flavin v FC DeKalb Associates, LLC, et al.,* Index No. 300690/08, alleging violations of New York Labor Law §§ 200, 240 and 241, in that he sustained injuries because the excavator was "improperly constructed, improperly placed, improperly operated, improperly maintained" (Aff. Jonathan B. Bruno, ¶ 3, Ex. "A"). The Flavin action was settled in Flavin's favor in or about April 2011 for $800,000.

Plaintiff then commenced the instant action seeking to recover the full amount of the settlement in the *Flavin* case as against Site Safety on the grounds of: (1) common law contribution;

(2) common law indemnification; (3) breach of contract; and (4) contractual indemnification based upon defendant's failure to procure insurance required by the contract.

Defendant now moves to dismiss the complaint pursuant to CPLR § 3211 (a) (1) and (7). Defendant contends that: (1) the contract between itself and plaintiff, as well as relevant statutory law, establishes that Site Safety owed no duty to Flavin or plaintiff for worker safety, but rather its duty was limited to the safety of the public and property; (2) the allegations of the complaint fail to state a cause of action for breach of contract; (3) the specific language of the contract, as well as statutory law, limits defendant's Coordinator's duties to safety of property and the public, not workers; and (4) defendant maintained the requisite insurance coverage required by the parties' contract.

Plaintiff opposes the motion on the ground that under the terms of the contract, Site Safety's role in providing a full-time safety manager and developing a site health and safety plan inured to the benefit of all workers on the Project and, as such, defendant's failure to comply with the terms of the contract contributed to Flavin's accident. Plaintiff also argues that because Flavin was a flagman, he was a part of the site health and safety plan as to which Site Safety had a duty under the contract. Flavin was employed by a construction contractor working at the site. Plaintiff contends that, at the least, the terms of the contract raise an issue of fact as to whether defendant breached its duty to plaintiff.

In reply, defendant points to the provision of the contract that only requires indemnification for claims arising out of Site Safety's "acts or omissions" and provides that Site Safety was not responsible for directing employees at the Project site nor was it responsible for actually making the work site safe for workers. Defendant notes that nowhere in the contract is there a provision that Site

Safety will indemnify 80 DeKalb for worker injuries. Indeed, defendant contends that it could not have breached the contract with plaintiff with respect to Flavin's accident as it had no responsibility for worker safety. Thus, the complaint must be dismissed based upon documentary evidence, to wit, the contract, which provides a complete defense to plaintiff's cause of action for breach of contract.

Lastly, defendant observes that plaintiff has failed to dispute defendant's claim that it procured the requisite insurance. Therefore, the fourth cause of action must be dismissed. At oral argument, plaintiff conceded that the fourth cause of action should be dismissed.

II. RELEVANT PROVISIONS OF THE CONTRACT

The scope of the services Site Safety was obligated to perform on the Project is defined under the contract in an attached Exhibit "A" (Bruno Aff. Exhibit "C"). It included, *inter alia,* providing a Site Safety Manager "in accordance with the New York City Building Code and Chapter 26 of the Rules of the City of New York" to monitor the Project (§I [2] [b]); developing and drafting "a site specific health and safety plan" (*id.* [c]); "[a]dvis[ing] the Program Manager of any Trades/Subcontractors who fail to comply with the Site Safety Program" (*id.* [d]); maintaining a safety log book with daily reports and any accident or incident reports and "shall immediately notify the Program Manager and Owner of any incident or accident, or occurrence that [it] believes or should believe may result in a claim against the Owner or the Project" (*id.* [f]); and designing and drafting a safety and logistics plan (*id.* [h]). The contract provided further that Site Safety "shall not perform any extra or unit price work without prior written approval from the Program Manager or the Owner" (*id.*).

The Standard Terms and Conditions of the contract contained both an indemnification provision as well as a provision for maintaining certain insurance coverage.

> **(Q) Indemnity.** To the fullest extent permitted by law, Safety Firm shall Indemnify and hold harmless the Owner from and against any and all actions, liabilities, claims, losses, costs, injuries, damages and expenses, including reasonable attorneys' fees, that may be incurred by Owner * * * ("Indemnitees") to the extent caused by the acts or omissions of Safety Firm or anyone for whom it is legally responsible, in connection with the Services . . .

Subdivision (R) of the contract provided that Site Safety was to obtain and maintain during the term of the Project certain insurance policies including commercial general liability, worker's compensation, and business automobile.

III. DISCUSSION

A. Standard of Review

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support therefor (*see, Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]).

Notwithstanding these principles, where documentary evidence conclusively establishes a defense, dismissal may be warranted under CPLR § 3211 (a) (1) but only where such documentary evidence submitted resolves all factual issues and definitively disposes of plaintiff's claims (*see, 511*

W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002]; *Wallach v Hinckley*, 12 AD3d 893 [3d Dept. 2004]). In order to prevail on a motion to dismiss pursuant to CPLR § 3211 (a) (1), such motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]" (*McCully v. Jersey Partners, Inc.*, 60 Ad3d 562, 562 [1st Dept. 2009]).

B. Common Law Contribution

Contribution is available under CPLR § 1401, with certain exceptions including § 11 of the Workers' Compensation Law, where "two or more persons . . . are subject to liability for damages for the same personal injury, injury to property or wrongful death." "[A] defendant may seek contribution from a third party even if the injured plaintiff has no direct right of recovery against that party . . . and even when the contributor has no duty to the injured plaintiff [internal citations omitted]" (*Raquet v Braun*, 90 NY2d 177, 182 [1997]). A contribution claim may be asserted in such circumstances "if there has been a breach of a duty that runs from the contributor to the defendant who has been held liable" (*id.*). "The 'critical requirement' for apportionment by contribution under CPLR article 14 is that 'the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought'" (*Raquet, supra* at 183, quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]).

The threshold and dispositive question then in this regard is whether Site Safety owed a duty of care to either the injured plaintiff or to 80 DeKalb. An independent contractor does not owe a duty to a non-contracting third party unless the contractor either creates or increases an unreasonable risk of harm; or where the injured party reasonably relied upon the contractor's continuing performance arising out of a contractual obligation; or where the contractor has entirely misplaced

the other party's duty to maintain the premises safely (*see Church ex rel. Smith v Callahan Indus. Inc.*, 99 NY2d 104, 111 [2002]).

Site Safety's argument that it owed no duty to the injured plaintiff or to 80 DeKalb to assure implementation and compliance with the safety plan it devised, is well supported in the law of New York (*see, e.g. Domenech v Associated Engineers* (257 AD2d 403 [1st Dept 1999]) and *Carter v Vollmer Assocs.* (196 AD2d 754 [1st Dept 1993]). In *Domenech*, the court held that liability for an injury sustained by a worker may not be imposed upon an engineering firm which was hired to assure compliance with construction plans and specifications as there was no evidence that it had any duty or authority to require any type of corrective action in response to its inspection, but rather it was the agent of the Department of Environmental Protection (DEP) and its function was simply to report to DEP. Similarly, in *Carter,* the court held that an engineering firm, as inspecting engineer for the worksite pursuant to a contract with the State, could not be held liable to an injured worker for failure to provide a safe place to work in the absence of a contractual right to control the injury-producing activity. Therein, the contract limited the engineering firm's responsibilities to "construction inspection services" and did not delegate any authority to direct or control the work of the contractor. Furthermore, the contract only obligated the engineering firm to report any deviations from the project designs or delays to the engineer in charge and did not indicate that it had the authority to direct that any action be taken by the State in response to its inspection.

Although the contract between the parties created an obligation on Site Safety's part to develop, design and draft a health and safety plan for the Project and to report to the Program Manager or the Owner any failures to comply with the Site Safety Program, the contract did not confer on Site Safety authority to supervise and/or enforce safety procedures at the Project site.

Moreover, there is no allegation that Site Safety exercised actual control or supervision over construction procedures and safety measures employed at the Project site or committed any affirmative act of negligence.

C. Common Law Indemnification

Common-law or implied indemnification permits a party who has been compelled to pay for the wrongdoing of another to recover from the wrongdoer the damages it paid to the injured party (*see D'Ambrosio v City of New York,* 55 NY2d 454, 460 [1982]; *McDermott v City of New York,* 50 NY2d 211, 217 [1980]; *17 Vista Fee Assocs. v Teachers Ins. and Annuity Assoc. of Amer.*, 259 AD2d 75, 80 [1st Dept 1999]). "Since the predicate of common law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.,* 109 AD2d 449, 453 [1st Dept 1985]; *see Richards Plumbing & Heating Co., Inc. v Washington Group Internat'l., Inc.,* 59 AD3d 311, 312 [1st Dept 2009]; *17 Vista Fee Assocs.,* 259 AD2d at 80; *Dormitory Auth. of the State of N.Y. v Scott,* 160 AD2d 179, 181 [1st Dept 1990], *lv denied* 76 NY2d 706 [1990]). Thus, in order to be entitled to indemnification on the basis of common-law indemnity, the owner or contractor "must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought" (*17 Vista Fee Assocs.,* 259 AD2d at 80).

Application of these principles to the facts of this case require dismissal of the second cause of action for common law indemnification as there is no evidence that Site Safety had the authority to direct, supervise and control the work giving rise to the injury (*see Hernandez v Two E. End Ave. Apt. Corp.,* 303 AD2d 556, 557 [2d Dept 2003]).

D. Contractual Indemnification

"A contract that provides for indemnification will be enforced as long as the intent to assume such a role is 'sufficiently clear and unambiguous'" (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 [2007], quoting *Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005]). When the intent is clear, an indemnification agreement will be enforced even if it provides indemnity for another's negligence (*see Levine v Shell Oil Co.*, 28 NY2d 205, 210 [1971]).

Under the indemnification provision of the contract, Site Safety's duty to indemnify 80 DeKalb can only be triggered after a finding of negligence against it. Site Safety contends that its contract with 80 DeKalb did not obligate it to ensure the safety of workers at the Project site. Thus, it argues that the documentary evidence conclusively establishes a defense to this claim as a matter of law and requires dismissal of the contractual indemnification cause of action.

In opposition, plaintiff proffers the deposition testimony of plaintiff and of 80 DeKalb's labor foreman on the Project in the *Flavin* case (*see* Exhibits "B" & "C" to Affirmation of Eric L. Cooper in Opposition). Specifically, plaintiff notes that the labor foreman testified that Site Safety had a safety manger who was on site on a daily basis, kept a daily log, and reported anything that needed to be taken care of. He also testified that the Site Safety Manager could stop the work on site if he observed any unsafe practices. The labor foreman had never seen and was not conversant with the terms of the contract. Flavin testified that on the date of the accident, the Site Safety manager was observing the excavation work being performed at the site and was no more than two to three feet from plaintiff when the accident occurred. Prior to the accident, Flavin exchanged pleasantries with the Site Safety manager, but was given no safety instructions.

In *Martinez v 342 Property LLC* (89 AD3d 468 [1st Dept 2011]), a case involving a contractual indemnification claim against Site Safety based on a contract that, like the contract here, unambiguously limited Site Safety's indemnification duty to instances of negligence by Site Safety, the court held that the plaintiff was not entitled to contractual indemnification since Site Safety lacked control over the plaintiff's work. The court further rejected the plaintiff's claim that it relied upon Site Safety to correct unsafe work practices because the contract made no mention of plaintiff's intention to rely on Site Safety to correct unsafe work practices. The *Martinez* precedent mandates that the third cause of action be dismissed.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the complaint pursuant to CPLR §3211 (a)(1), (a)(7) and (c) is granted in its entirety; and it is further

ORDERED that the complaint is hereby DISMISSED in its entirety with costs and disbursements to the defendant as taxed by the Clerk upon submission of a proper bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

DATED: January 12, 2012

E N T E R,

O. PETER SHERWOOD
J.S.C.