

**Parra v Trinity Church Corp.**

2013 NY Slip Op 30147(U)

January 22, 2013

Sup Ct, New York County

Docket Number: 114956/08

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: Jen. Doris Ling-Cohan  
Justice

PART 36

Index Number : 114956/2008  
PARRA, RAFAEL  
vs.  
TRINITY CHURCH  
SEQUENCE NUMBER : 003  
SUMMARY JUDGMENT

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

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for summary judgment  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1, 2  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 3  
Replying Affidavits \_\_\_\_\_ | No(s). 4

Upon the foregoing papers, it is ordered that this motion for summary judgment  
by defendants Trinity Church Corp. et al.  
is granted, in accordance with the attached  
memorandum decision.

**FILED**  
JAN 25 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 1/22/13

[Signature], J.S.C.  
JUDGE DORIS LING-COHAN

- 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: IAS PART 36

-----X

RAFAEL PARRA,

Plaintiff,

Index No.: 114956/08  
DECISION/ORDER

-against-

TRINITY CHURCH CORPORATION, PARISH OF  
TRINITY CHURCH and THE RECTOR,  
CHURCHWARDENS and VESTRYMEN OF  
TRINITY CHURCH IN THE CITY OF NEW YORK,  
Defendants.

Motion Seq. No.: 003

-----X

TRINITY CHURCH CORPORATION, PARISH OF  
TRINITY CHURCH, and THE RECTOR,  
CHURCHWARDENS and VESTRYMEN OF  
TRINITY CHURCH IN THE CITY OF NEW YORK,  
Third-Party Plaintiffs,

Third-Party Index No.  
590350/09

-against-

BOWNE & COMPANY, INC., BOWNE OF NEW  
YORK, INC. and BOWNE OF NEW YORK, LLC,  
Third-Party Defendants

**FILED**

HON. DORIS LING-COHAN, J.S.C.:

JAN 25 2013

NEW YORK  
COUNTY CLERKS OFFICE

In this personal injury action, defendants/third-party plaintiffs move to renew their prior motion for summary judgment for contractual injury caused by third-party defendants. For the following reasons, this motion is granted.

BACKGROUND

As stated previously in this court's decision/order dated June 13, 2011 denying the prior motion for summary judgment, plaintiff Rafael Parra (Parra) suffered injuries to his hands while performing repair work on an air conditioning unit in a building (the building) located at 345 Hudson Street, in the County, City and State of New York. Defendants/third-party plaintiffs Rector, Churchwardens and Vestrymen of Trinity Church in the City of New York, a religious

corporation registered to do business as “the Parish of Trinity Church” (hereinafter, the Trinity defendants), are the owners of the building. Third-party defendants Bowne & Company, Inc., Bowne of New York, Inc. and Bowne of New York, LLC (hereinafter, the Bowne defendants) leased a portion of the building, including the ninth floor, from the Trinity defendants pursuant to a lease, dated June 7, 1991 (the Bowne lease). Exh. M, Notice of Motion. The Bowne defendants were also Parra’s employers.

The relevant portions of the Bowne lease provides as follows:

22. Indemnity By Tenant...[t]he Tenant [i.e., the Bowne defendants] hereby indemnifies and agrees forever to save harmless the Landlord [i.e., the Trinity defendants] against any and all liabilities, penalties, claims, damages, expenses (including reasonable attorney’s and counsel fees) or judgments, arising from injury to person or property of any kind, occasioned wholly or in part by the Tenant’s failure to perform or abide by any of the covenants of this lease or occasioned wholly or in part by any act or acts, omission or omissions of the Tenant, or of the employees ... of the Tenant, or based on any matter or thing growing out of the Tenant’s use or occupation of the premises or any part of the building

Rider No. 2

41. The Tenant shall at its expense operate, maintain and repair all air conditioning machinery, connections, wiring and controls and all other portions of any air conditioning systems in the premises installed or supplied by Landlord or others in good, safe and serviceable condition.

*Id.*

This negligence action by Parra is based on theories of common-law negligence, and violations of Labor Law §§ 200 and 241 (6). According to Parra’s bill of particulars, his hands were injured when they were exposed to a “corrosive substance,” which he believed to be Freon gas, while he was performing repairs on the building’s air conditioning system. Exh. I, Notice of Motion.

The Trinity defendants impleaded the Bowne defendants asserting causes of action for: 1)

common-law indemnification; 2) contractual indemnification; and 3) breach of contract. The Trinity defendants assert that Parra's accident and subsequent injuries are sufficient to trigger the indemnity provision in the Bowne lease; the Bowne defendants dispute this.

Prior to the filing of a note of issue and the completion of discovery, the Trinity defendants previously moved for summary judgment on, *inter alia*, the issue of liability on their contractual indemnification claim against the Bowne defendants. Such motion was denied by decision/order of this court dated June 13, 2011, in which this court determined that the Trinity defendants failed to meet their burden of proof.

In its June 13, 2011 decision/order, this court stated, *inter alia*, that: "[t]he Trinity defendants have failed to establish as a matter of law, by the submission of evidence in admissible form, that they were free of negligence toward Parra, or that the Bowne defendants were guilty of some quantum of such negligence". This court further determined that, since, "discovery [was] incomplete and no note of issue [had] been filed [and] [i]n fact, [the Trinity defendants'] motion [for summary judgment] was prepared prior to the preliminary discovery conference being held and [was] filed less than one month after the preliminary conference was held,...the court is unable to determine the nature and extent, if any, of the Trinity defendants' alleged negligence toward Parra, as a matter of law". This court specifically noted that, at the time of the prior summary judgment motion, none of the parties had been deposed.

The Trinity defendants have now moved to renew their prior motion for summary judgment, asserting that, since discovery is now complete, the evidence shows that the Trinity defendants were without control over the accident location and committed no acts of negligence, and, therefore, they are entitled to contractual indemnification from the Bowne defendants. Specifically, the Trinity defendants maintain that the evidence before the court, including

deposition testimony of the parties, shows that the Trinity defendants did no repairs to the air conditioning in the area leased by the Bowne defendants, that the Bowne defendants maintained the subject air conditioning system, that the Trinity defendants did not control the Bowne defendants' repair work and were unaware of any hazardous conditions in the Bowne defendants' leased premises, that the complaint alleges no significant structural defect which would warrant the Trinity defendants to re-enter the leased premises and, therefore, they are entitled to indemnification, as a matter of law, in accordance with paragraph twenty-two (22) of the Bowne lease.

In opposition, the Bowne defendants argue that there are questions of fact which preclude the granting of summary judgment as to contractual indemnification, including which party installed the air conditioning units on the 9<sup>th</sup> floor of the subject premises and was responsible for the maintenance and repair of such conditioning units, prior to plaintiff's accident. The Bowne defendants also argue that the indemnity provisions of the lease do not apply because the provisions are limited to instances where there is loss or damage caused by fire or any of the risks referred to in paragraph 17 ( c) of the lease, which are not present here. It is noted that plaintiff has failed to submit papers in opposition to the within motion.

#### DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64, 69-72 (1st Dept 2002). Once this showing has been

made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 560 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1<sup>st</sup> Dept 2003). Moreover, the Court of Appeals has made it clear that “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat a motion for summary judgment. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

Here, the Trinity defendants have established entitlement to judgment as a matter of law as to their claim for contractual indemnification and, in opposition, the Bowne defendants have failed to come forward to sufficiently raise a factual issue, which would warrant a denial of summary judgment.

At the outset, the court notes that the Trinity defendants have established sufficient “good cause” to allow the filing of the within motion for summary judgment, beyond the 60 days required by this court’s preliminary conference order. *See* CPLR 3212. In particular the Trinity defendants assert that the delay was due to the late receipt of a deposition transcript of their witness Peter St. John, which was needed for the within motion. Given that the prior motion for summary judgment was specifically denied, due to the submission of only witness affidavits, rather than deposition testimony, the court deems such excuse sufficient.

Further, the Bowne defendants argument that the indemnity provision of the lease, specifically paragraph 22, doe not apply because such provision is limited to instances where there is loss or damage caused by fire or any of the risks referred to in paragraph 17 ( c) of the lease, is misplaced. Paragraph 22 of the lease provides for indemnity for all “claims...arising from injury to person or property of any kind...occasioned wholly or in part by the Tenant’s

failure to perform or abide by any act or acts...of the Tenant...”. Paragraph 17( c), incorrectly relied upon by the Bowne defendants, applies when there is property damage caused by fire, and not with respect to personal injuries, as is the case herein.

As to the Trinity defendants’ motion for summary judgment on the issue of liability on their contractual indemnification claim against the Bowne defendants, in accordance with the plain language of paragraph 22 of the Bowne lease, indemnification is appropriate here, as the evidence has shown that the Trinity defendants were free from active negligence towards Parra, and any liability found on their behalf, would be based upon a statutory violation, *ie* Labor Law. *See Cava Construction Co., Inc. v. Gealtec Remodeling Corp.*, 58 AD3d 660 (2<sup>nd</sup> Dept 2009)(a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributes to the accident, it cannot be indemnified therefore...” [citations omitted]). Significantly, the unambiguous terms of the indemnification provision indicate that its applicability for resulting personal injuries *is not contingent* upon a finding of negligence by the tenants (the Bowne defendants’), but, rather, provides for indemnification to the landlord (the Trinity defendants), resulting from “any act or acts”of the tenant, or its employees, “growing out of the [t]enant’s use or occupation of the premises”. Exh. M, Notice of Motion.

As to the Trinity defendants’ lack of active negligence, the evidence presented, including deposition testimony of the parties, shows that the Trinity defendants: (1) lacked control over the work that plaintiff Parra was involved in at the time of the accident; (2) failed to maintain or perform any repairs to the air conditioning unit at issue; and (3) did not create or have notice of any defect or hazardous condition that may have caused plaintiff’s accident. Thus, as the Trinity defendants have established their lack of active negligence with respect to plaintiff’s injuries, they have established a *prima facie* entitlement to summary judgment on their contractual

indemnification claim against the Bowne defendants. *See Hernandez v. 151 Sullivan Tenant Corp.*, 307 AD2d 207 (1<sup>st</sup> Dept 2003)(contractual indemnification found to be properly granted where owner did not have control of the work in which the injured plaintiff was engaged at the time of his accident and that the owner's liability was purely statutory); *Haynes v. Estate of Sol Goldman*, 62 AD3d 519 (1<sup>st</sup> Dept 2009)(contractual indemnification awarded where defendants did not create or have notice of any defect that could have caused the accident); *Macedo v. J.D. Posillico, Inc.*, 68 AD3d 508 (1<sup>st</sup> Dept 2009)(summary judgment on a contractual indemnification claim properly granted where the indemnitor directed and controlled the injured plaintiff's work and the only liability on the part of the indemnitee would be vicarious and statutory).

In opposition, the parties have failed to raise any material issues, as to whether the Trinity defendants were free from active negligence with respect to Parra's accident. It is noted that plaintiff has not opposed the within motion by the Trinity defendants. While the Bowne defendants assert that there is a factual issue as to the installation and ownership of the air conditioning units in the subject leased premises, this court disagrees.

The testimony of the parties confirms that the air conditioner was in fact maintained by the Bowne defendants. Peter St. John, the assistant vice president of property management for Trinity Church, testified, *inter alia*, that, while he was unaware of who installed the air conditioning units on the ninth floor, it was the Bowne defendants' responsibility to maintain the air conditioning system and that the Trinity defendants' outside contractor performed no work to the air conditioning system on the ninth floor. *See* St. John, EBT Transcript, Exh. J, Notice of Motion, at 10, lines 24-25; at 13, lines 16-24; at 23-24. The Bowne defendants' witness Brian Piazza, their maintenance mechanic, testified, *inter alia*, that the Bowne defendants would hire another

company Sound AC, to make repairs to the air conditioning system and would pay their invoices, that during the nine years that he was employed at the subject building he never observed anyone from the Trinity defendants look around the ninth floor premises and never saw any employee of the Trinity defendants in the air conditioning room on the ninth floor, he knows of no instances when the Trinity defendants performed repairs to the ninth floor air conditioning system, was unaware of the Trinity defendants retaining anyone to make repairs to such air conditioning system and never complained to the Trinity defendants as to the air conditioning system. *See* Piazza EBT Transcript, Exh. L, Notice of Motion at 44-45; 56-58; Plaintiff testified that he never saw any of the Trinity defendants' employees make repairs to the air conditioners in the Bowne premises, that the Trinity defendant employees were never called when repairs were needed to the 9<sup>th</sup> floor air conditioning. *See* Parra EBT Transcript, Exh. K, Notice of Motion at 101, lines 9-25; at 102, lines 2-17

As no evidence has been submitted that the Trinity defendants maintained or assumed control of the air conditioner on the 9<sup>th</sup> floor where Parra sustained his injuries, based upon the terms of the parties' lease, the issue of the installation and/or ownership of the air conditioner is not relevant to the Bowne's defendants indemnification obligations. The lease specifically provides in paragraph 41 of Lease Rider 2 that: "the tenant [the Bowne defendants] shall at its expense, operate, maintain and repair all air conditioning machinery, connections, wiring and controls and all other portions of any air conditioning systems in the premises installed or supplied by Landlord [Trinity defendants] or others in good, safe and serviceable condition. Moreover, paragraph three (3) of the Bowne lease obligates the tenant (the Bowne defendants) to repair and maintain "fixtures, appurtenances, equipment and facilities installed by the Tenant in the premises". Therefore, in accordance with the express terms of the Bowne lease, whether the air

conditioner on the 9<sup>th</sup> floor was installed by the landlord or the tenant, it was nonetheless the obligation of the tenant, the Bowne defendants, to maintain. Thus, the Trinity defendants' motion for summary judgment on their contractual indemnification claim against the Bowne defendants is granted.

Additionally, as the lease's indemnification clause, paragraph twenty-two, explicitly provides for attorneys' fees, the Trinity defendants are entitled to recover the reasonable attorneys' fees expended in defending the within action by plaintiff, as well as the third-party action.

#### DECISION

Accordingly, for the foregoing reasons, it is

ORDERED that the motion by defendants/third-party plaintiffs Rector, Churchwardens and Vestrymen of Trinity Church in the City of New York, and the Parish of Trinity Church, pursuant to CPLR §3212, for summary judgment as to its contractual indemnification claim against the Bowne defendants, including reasonable attorneys' fees in defending the within action and the third-party action, is granted; and it is further

ORDERED that, within 60 days of entry of this decision/order, the Trinity defendants are directed to submit an accounting of the costs and attorneys' fees incurred in defending this action, including the third-party action, by affidavit/affirmation setting forth the hours expended, normal hourly rate charged, years of experience of counsel, *etc.*, and the Bowne defendants are directed to review such accounting and, should they agree with such costs/fees, satisfy such defense costs/fees incurred by the Trinity defendants or provide to the Trinity defendants, by affidavit/affirmation, specific reasons for their disagreement within such accounting, within 30 days from receipt of the accounting. If the parties are unable to agree on the amount of the defense costs/fees owed to the Trinity defendants, the parties shall *meet and confer to resolve such issues*, to be initiated by the

Trinity defendants. If unable to resolve within 30 days of their meeting, either side shall file a motion to set such costs/fees with a copy of this attached, within 150 days of the date of entry, which, upon final submission, may be referred to a Special Referee to hear and determine<sup>1</sup>; and it is further

ORDERED that the cross motion of the plaintiff City of New York is granted, to the extent of authorizing the voluntary discontinuance, without prejudice, of the City's claims for indemnification by Zurich in the *Rothfeder* action, and the City's cross motion is otherwise denied; and it is further

ORDERED that within 30 days of entry of this order, defendants/third-party plaintiff's shall serve a copy upon all parties, with notice of entry.

Dated: New York, New York  
January 22, 2013

**FILED**  
JAN 25 2013  
NEW YORK  
COUNTY CLERK'S OFFICE  
Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\2 parravtrinity.frank lane.wpd

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<sup>1</sup> Failure to comply may be deemed a waiver or default on this claim, as appropriate.