

**Silicato v Skanska USA Civ. N.E Inc.**

2014 NY Slip Op 31817(U)

June 26, 2014

Supreme Court, New York County

Docket Number: 101637/2011

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     

Index Number : 101637/2011  
SILICATO, JOSEPH  
vs.  
SKANSKA USA CIVIL  
SEQUENCE NUMBER : 304  
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 3, were read on this motion ~~and~~ for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 1

Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 2

Replying Affidavits \_\_\_\_\_ No(s) 3

Upon the foregoing papers, it is ordered that ~~the~~ motion is and adjudged that:

*The court denies third party defendant's motion for summary judgment, but discontinues specified claims in the third party complaint, pursuant to the accompanying decision. C.P.L.R. §§ 3212(b), 3217(b).*

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

**FILED**

JUL 14 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/26/14

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

- 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 OFFER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----x

JOSEPH SILICATO and JOY SILICATO,

Index No. 101637/2011

Plaintiffs

- against -

SKANSKA USA CIVIL NORTHEAST INC.,  
E.C.C.O. III ENTERPRISES, INC., J.F.  
WHITE CONTRACTING COMPANY, MALCOLM  
PIRNIE, INC., CH2M HILL, INC., CH2M  
HILL NEW YORK, INC., AMERICAN SAFETY  
CONSULTANTS, LLC, EARTHTECH  
CONTRACTING INC., and NEW YORK CITY  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION,

Defendants

-----x  
-----x

MALCOLM PIRNIE, INC., CH2M HILL, INC.,  
and CH2M HILL NEW YORK, INC.,

Index No. 590412/2012

Third Party Plaintiffs

- against -

WELSBACH ELECTRIC CORP.,

**FILED**

Third Party Defendant

JUL 14 2014

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DECISION AND ORDER

COUNTY CLERK'S OFFICE  
NEW YORK

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiffs sue for personal injuries and loss of services  
sustained January 24, 2011, when Joseph Silicato fell from a  
scissor lift while working on premises owned by the City of New  
York. The court has dismissed plaintiffs' claims against

defendant New York City Department of Environmental Protection. Silicato v. Skanska USA Civ. Northeast Inc., 112 A.D.3d 464, 455 (1st Dep't 2013). Third party defendant Welsbach Electric Corp., Joseph Silicato's employer, contracted with the City to perform electrical work on the premises. Defendant Skanska USA Civil Northeast Inc. contracted with the City to provide construction work there. Defendants-third party plaintiffs Malcolm Pirnie, Inc., CH2M Hill, Inc., and CH2M Hill New York, Inc., which contracted with the City defendant to provide construction management services at the premises, claims against Welsbach Electric for contractual and implied indemnification, contribution, and breach of contract.

Welsbach Electric moves for summary judgment dismissing the third party complaint. C.P.L.R. § 3212(b). At oral argument December 11, 2013, third party plaintiffs stipulated to discontinue their claims for implied indemnification and contribution and stipulated that the third party complaint does not claim a breach of contract based on Welsbach Electric's failure to procure insurance. See C.P.L.R. § 3217(a). For the reasons explained below, the court denies Welsbach Electric's motion for summary judgment dismissing the remainder of third party plaintiffs' claims. C.P.L.R. § 3212(b).

## II. STANDARDS FOR SUMMARY JUDGMENT

To obtain summary judgment, Welsbach Electric must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues

\* 4]

of fact. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). Only if Welsbach Electric satisfies this standard, does the burden shift to third party plaintiffs to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). If Welsbach Electric fails to meet its initial burden, the court must deny summary judgment despite any insufficiency in the opposition. JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384; Romero v. Morrisania Towers Hous. Co. Ltd. Partnership, 91 A.D.3d 507, 508 (1st Dep't 2012); Ruth B. v. Whitehall Apt. Co., LLC, 56 A.D.3d 273, 274 (1st Dep't 2008); Chubb Natl. Ins. Co. v. Platinum Customcraft Corp., 38 A.D.3d 244, 245 (1st Dep't 2007). In evaluating the evidence for purposes of the Welsbach Electric's motion, the court construes the evidence in the light most favorable to third party plaintiffs. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

### III. THE REQUIREMENTS FOR THIRD PARTY BENEFICIARY STATUS

Third party plaintiffs base their breach of contract and contractual indemnification claims on § 12.5 of the contract

executed January 14, 2008, between the City defendant and Welsbach Electric. While Welsbach Electric maintains third party plaintiffs are not third party beneficiaries of the contract, Welsbach Electric fails to establish such a conclusion as a matter of law.

To recover for breach of a contract as third party beneficiaries, third party plaintiffs, at trial or upon their motion for summary judgment, must establish that a contract provision was intended for their benefit and that this benefit was sufficiently immediate as to impose a duty on the contracting parties to compensate third party plaintiffs if they lost this benefit. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 181-82 (2011); Mendel v. Henry Phipps Plaza W., Inc., 6 N.Y.3d 783, 786 (2006); Edge Mgt. Consulting, Inc. v. Blank, 25 A.D.3d 364, 368 (1st Dep't 2006); LaSalle Natl. Bank v. Ernst & Young, 285 A.D.2d 101, 108 (1st Dep't 2001). The benefit to third party plaintiffs must be evident from the face of the contract.

LaSalle Natl. Bank v. Ernst & Young, 285 A.D.2d at 108. See Adelaide Prods., Inc. v. BKN Intl. AG, 38 A.D.3d 221, 226 (1st Dep't 2007). An intent by the contracting parties, Welsbach Electric and the City defendant, to confer a direct benefit on third party plaintiffs, which are neither signatories to nor named in the contract, must be unambiguous. Otherwise the contract must be construed to avoid reading in a duty owed by Welsbach Electric to indemnify third party plaintiffs that statutorily Welsbach Electric did not owe. 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 486, 490 (2004); Cordeiro v. TS Midtown Holdings, LLC, 87 A.D.3d 904, 906 (1st Dep't 2011); Suazo v. Maple Ridge Assoc., L.L.C., 85 A.D.3d 459, 460 (1st Dep't 2011).

IV. THE CONTRACT'S PROVISIONS FOR THIRD PARTY BENEFICIARIES

Section 12.5 on which third party plaintiffs rely provides:

Should the Contractor sustain any damage through any act or omission of any Other Contractor having a contract with the City for the performance of work upon the Site or of work which may be necessary to be performed for the proper prosecution of the Work to be performed hereunder, or through any act or omission of a Subcontractor of such Contractor, the Contractor shall have no claim against the City for such damage, but shall have a right to recover such damage from the Other Contractor under the provision similar to the following provisions which apply to this Contract and have been or will be inserted in the contracts with such Other Contractors:

12.5.1 Should any Other Contractor having . . . a contract with the City for the performance of work upon the Site sustain any damage through any act or omission of the Contractor hereunder . . . , the Contractor agrees to reimburse such Other Contractor for all such damages and to defend at its own expense any suit based upon such claim and if any judgment or claims (even if the allegations of the suit are without merit) against the City shall be allowed the Contractor shall pay or satisfy such judgment or claim and pay all costs and expenses in connection therewith and agrees to indemnify and hold the City harmless from all such claims.

Aff. of Scott Brouwer Ex. A, at 13. The contract's express terms are the best evidence of the contracting parties' intent to confer third party beneficiary status. Edge Mgt. Consulting, Inc. v. Blank, 25 A.D.3d at 369; 243-249 Holding Co. v. Infante, 4 A.D.3d 184, 185 (1st Dep't 2004); Alicea v. City of New York, 145 A.D.2d 315, 318 (1st Dep't 1988). Section 12.5.1 expressly confers upon Other Contractors, such as third party plaintiffs, a

right to reimbursement and defense of a lawsuit for damages arising from the Contractor Welsbach Electric's acts or omissions. Edward J. Minskoff Equities, Inc. v. Crystal Window & Door Sys., Ltd., 92 A.D.3d 469 (1st Dep't 2012); Edge Mgt. Consulting, Inc. v. Blank, 25 A.D.3d at 369; Condren, Walker & Co., Inc. v. Wolf, 19 A.D.3d 151, 152 (1st Dep't 2005). Although third party plaintiffs are not specifically named, as Other Contractors they are intended to be included as third party beneficiaries. National Union Fire Ins. Co. of Pittsburgh, Pa. v. Red Apple Group, 309 A.D.2d 657 (1st Dep't 2003).

Further supporting third party plaintiffs' status as third party beneficiaries, the contract promises Contractor Welsbach Electric's performance, "to reimburse . . . for all such damages and to defend at its own expense any suit" based on a claimed act or omission of the Contractor, Brouwer Aff. Ex. A, at 13 ¶ 12.5.1, directly to the Other Contractors. Williams v. Sidley Austin Brown & Wood, L.L.P., 38 A.D.3d 219, 220-21 (1st Dep't 2007); Edge Mgt. Consulting, Inc. v. Blank, 25 A.D.3d at 368; LaSalle Natl. Bank v. Ernst & Young, 285 A.D.2d at 108; Alicea v. City of New York, 145 A.D.2d at 318. The provision that Other Contractors alone will receive a defense against and reimbursement for damages from Welsbach Electric's act or omission shows the contracting parties' intent to confer third party beneficiary status to Other Contractors such as third party plaintiffs. National Union Fire Ins. Co. of Pittsburgh, Pa. v. Red Apple Group, 309 A.D.2d 657; Alicea v. City of New York, 145

A.D.2d at 317-18.

Notably, in Article 7 of the contract, Welsbach Electric agrees to indemnify the City, just as Welsbach Electric agrees to do in § 12.5.1. Section 7.6 of Article 7, however, specifically provides that: "The provisions of this Article shall not be deemed to create any new right of action in favor of third parties against the Contractor . . . ." Brouwer Aff. Ex. A, at 11. See Mendel v. Henry Phipps Plaza W., Inc., 6 N.Y.3d at 786-87; Edward J. Minskoff Equities, Inc. v. Crystal Window & Door Sys., Ltd., 92 A.D.3d at 470. The omission of such a provision from §§ 12.5 and 12.5.1 and elsewhere in Article 12 must be interpreted to indicate further that the contracting parties intended not to insulate Contractor Welsbach Electric from Other Contractors's claims of damages from Welsbach Electric's act or omission. Quadrant Structured Prods. Co. v. Vertin, \_\_\_ N.Y.3d \_\_\_, 2014 NY Slip Op 04114, at \*9 (June 10, 2014); Matter of New York City Asbestos Litig., 41 A.D.3d 299, 302 (1st Dep't 2007).

#### V. CONCLUSION

Third party plaintiffs allege that they have been or will be damaged by Welsbach Electric's failures to perform its contractual obligations. Welsbach Electric presents no evidence of having committed no act or omission that caused third party plaintiffs damage, to demonstrate the absence of any duty to indemnify them under § 12.5.1 of the contract. See Biotronik A.G. v. Conor Medsystems Ireland, Ltd., \_\_\_ A.D.3d \_\_\_, 2014 WL 1923633, at \*3 (1st Dep't May 15, 2014). While Welsbach Electric

maintains that the only "act or omission" for which it may be held liable under § 12.5.1 is its failure to coordinate with the other contractors, that sections's express language is not so limited.

Since Welsbach Electric has failed to meet its initial burden of demonstrating entitlement to judgment as a matter of law, the court need not address third party plaintiffs' contention that Welsbach Electric's motion for summary judgment motion was premature. C.P.L.R. § 3212(f). Finally, since third party plaintiffs have discontinued their claims for implied indemnification and for contribution against Welsbach Electric, any dispute over whether plaintiff sustained a "grave injury" is moot. N.Y. Workers' Comp. Law § 11.

For all the reasons discussed, the court denies third party defendant Welsbach Electric Corp.'s motion for summary judgment, C.P.L.R. § 3212(b), but discontinues the claims for implied indemnification and contribution and any claims for breach of contract based on third party defendant's failure to procure insurance in the third party complaint. C.P.L.R. § 3217(b). This decision constitutes the court's order.

DATED: June 26, 2014

*Lucy Billings*

LUCY BILLINGS, J.S.C.

FILED  
JUL 14 2014  
COUNTY CLERK'S OFFICE  
NEW YORK