

Bee v Henegan Constr. Co., Inc.

2014 NY Slip Op 31853(U)

July 16, 2014

Supreme Court, New York County

Docket Number: 115417/08

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

JOSEPH BEE and THERESA BEE,
Plaintiffs,

-against-

HENEGAN CONSTRUCTION CO., INC., FOREST
ELECTRIC CORP., EURO-TECH CONSTRUCTION
CORP., SKANSKA USA BUILDING, INC., NEW
AMSTERDAM DEVELOPMENT CORPORATION,
DISNEY WORLDWIDE SERVICES, INC. and
DISNEY CORE SERVICES,

Defendants.

INDEX NO. 115417/08

MOTION SEQ. NO. 013

HENEGAN GENERAL CONTRACTING CORP.,

Third-Party Plaintiffs,

-against-

GENERAL GLASS AND METAL, INC.,

Third-Party Defendant,

SKANSKA USA BUILDING, INC., NEW
AMSTERDAM DEVELOPMENT CORP., DISNEY
WORLDWIDE SERVICES, INC. also incorrectly sued
herein as DISNEY CORE SERVICES, INC.,

Second Third-Party Plaintiffs,

-against-

GENERAL GLASS AND METAL, LLC,

Second Third-Party Defendant,

The following papers were read on this motion by defendants for conditional summary judgment on their cross-claims.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Reply Affidavits — Exhibits (Memo) _____

FILED
JUL 18 2014
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED

Cross-Motion: Yes No

Motion sequence numbers 012 and 013 are hereby consolidated for disposition.

This action arises out of a construction site accident which occurred on May 20, 2008 at the New Amsterdam Theatre located at 214 West 42nd Street, New York, New York. Plaintiff Joseph Bee (Bee or plaintiff), a journeyman ironworker, alleges that he fell from a gang box while retrieving materials on the job site. In motion sequence number 012, plaintiffs move, pursuant to CPLR 3403, for a special trial preference in the interests of justice.

In motion sequence number 013, defendants Skanska USA Building, Inc. (Skanska), New Amsterdam Development Corporation (New Amsterdam), and Disney Worldwide Services, Inc., incorrectly sued herein as Disney Core Services (Disney) (collectively, the Disney defendants) move, pursuant to CPLR 3212, for conditional summary judgment on their cross-claims for contractual and common-law indemnification against defendant Henegan Construction Co., Inc. (Henegan).

BACKGROUND

It is undisputed that the premises were leased by New Amsterdam. By work authorization dated August 29, 2007, Disney, as owner of the New Amsterdam Theatre, hired Henegan to "provide and pay for all permits, fees, materials, tools, equipment, labor, labor supervision, and professional and non-professional services, and will perform all other acts and supply all other things necessary, to fully and complete the work which is more particularly described in the Contract Documents" (Mahoney affirmation in support, exhibit O). Exhibit A (Scope of Work) of the contract indicates that Henegan was to provide "[i]nterior and exterior upgrades and fit out of the spaces at the New Amsterdam Theater building at 214 West 42nd Street, New York, NY" (*id.*). Disney entered into a contract with Skanska pursuant to which Skanska was hired to act as the "owner's representative" and/or consultant on the project (*id.*, exhibit P). Henegan subcontracted the window installation to third-party defendant/second

third-party defendant General Glass and Metal, LLC (General Glass). Plaintiff was an employee of General Glass on the date of the accident.

Plaintiff testified at his deposition¹ that, on May 20, 2008, he was working as a journeyman ironworker for General Glass (Plaintiff EBT tr at 30). On the morning of the accident, plaintiff was instructed during a General Glass tool box meeting to install window material and to move recently delivered materials to a safe location to prevent them from being damaged (*id.* at 35-36). Plaintiff testified that he took directions regarding his work on the project from General Glass' project manager, and did not take any directions regarding how to do his work from anyone else (*id.* at 27-31, 107). Plaintiff did not receive any directions as to how to perform his work from Skanska or Henegan (*id.* at 34, 375). In addition, plaintiff did not know who the owner of the project was, and did not have any dealings with any of the Disney defendants (*id.* at 33, 383; Plaintiff 8/23/11 EBT tr at 10-12).

Plaintiff further testified that his accident occurred as he was moving aluminum tubes known as "mullions" (Plaintiff EBT tr at 43, 46, 53). Plaintiff had made approximately four trips to retrieve those materials on the date of the accident (*id.* at 53-57). Immediately prior to his accident, plaintiff complained to his co-workers from General Glass and a laborer from Henegan that the work area was littered with materials (*id.* at 58-60). On his fourth trip to the accident area, plaintiff attempted to pick up a mullion which was resting against a column (*id.* at 63-64). According to plaintiff, there was a pipe rack to the left of the mullion which had numerous pipes on it and a bundle of studs which were stacked in front of the column (*id.* at 68-72). Plaintiff stepped onto the studs to access a gang box that was located a few inches from the mullion that he was attempting to access (*id.* at 71-72). Plaintiff testified that he had to stand on the gang box because it was surrounded by materials and he could not access the

¹ Plaintiff was deposed on four dates, including August 25, 2010, October 26, 2010, August 23, 2011, and July 19, 2013. The Court cites to the transcript of plaintiff's August 25, 2010 deposition, unless otherwise indicated.

mullion in any other way (*id.* at 72-75). After plaintiff retrieved the mullion, plaintiff turned around and began to step off the gang box with his left foot (*id.* at 75-88). At that point, the gang box, which was on wheels, shifted away from him, causing him to lose his balance and fall (*id.* at 77-78).

Christopher Drutjons (Drutjons) testified at his deposition² that he was Henegan's project director on the job (Drutjons EBT tr at 7-8). Drutjons testified that "[w]ith respect to delivery of materials, basically everything would be going through my super" (Drutjons 9/14/11 EBT at 159). Henegan's superintendent "would make arrangements with the hoist operator and make sure the stuff was brought onto the site and stored in such a way that it is not going to be in the way of other trades" (*id.*). Henegan's superintendent and the subcontractor's foreman determined where the materials were to be stored (*id.* at 159, 182). According to Drutjons, Henegan's superintendent and the subcontractor's foreman determined where the gang boxes were to be stored (*id.* at 175). Henegan employed laborers who performed debris removal and other clean-up functions on the project (*id.* at 177-178). Drutjons testified that Skanska served as the owner's representative on the project (*id.* at 149). As the owner's representative, Skanska was responsible for looking out for the owner's interest, including project financials, quality control of the project, and general oversight of the project schedule (*id.* at 33, 149). Skanska was really not responsible for the means and methods of the work on the project; Skanska acted as the "eyes and ears" of Disney on a daily basis (*id.* at 150).

Bill Fulton (Fulton) testified that he served as a consultant for Skanska on the project (Fulton EBT tr at 11-12). Skanska only had two employees on the project who dealt with project plans and specifications and oversight (*id.* at 12, 14). Skanska was brought onto the project after the work had already commenced to provide coordination to avoid disruption of the *Mary Poppins* play that was ongoing in the New Amsterdam Theatre located below the

² Drutjons testified on two occasions: on November 22, 2010 and on September 14, 2011.

construction project (*id.* at 14). Skanska did not coordinate the storage of materials on the project, and did not receive complaints about material storage (*id.* at 36). Skanska did not direct General Glass' work (*id.* at 38).

Frank Gibbons (Gibbons) testified that he was employed as a chief engineer for the New Amsterdam Theatre (Gibbons EBT tr at 9). According to Gibbons, the renovation project started in 2007 (*id.* at 12-13). Gibbons was responsible for making sure that the work did not interrupt the *Mary Poppins* play, and was also responsible for shutting down the sprinkler, plumbing and other existing building systems when the work affected those systems (*id.* at 15-16). Skanska served as the "owner's rep" on the project (*id.* at 24). As such, Skanska was responsible for managing Henegan's budget (*id.* at 24-25). He did not direct Henegan or General Glass as to how to perform their work (*id.* at 32).

Andrew Arel (Arel) testified that he was a manager and director of corporate real estate for the Walt Disney Company at the time of the accident (Arel EBT tr at 9). New Amsterdam "was part of the Walt Disney Company structure" (*id.* at 23). Henegan was the general contractor on the project (*id.* at 32). Arel testified that Skanska was hired to serve as an extension of the service that his group provided, i.e., contract administration (*id.* at 48-49). Skanska did not exercise any control over the renovation project (*id.* at 49). Skanska's inspections were limited to ensuring compliance with contract documents (*id.* at 55). Henegan and its subcontractors coordinated the movement and storage of materials (*id.* at 123, 171).

On November 17, 2008, plaintiffs commenced this action against defendants Henegan, Forest Electric Corp., Euro-Tech Construction Corp., and Skanska, asserting claims for violations of Labor Law §§ 200, 240, and 241(6) and for common-law negligence. Mrs. Bee asserts a derivative claim for loss of consortium. Henegan commenced a third-party action against General Glass, which was subsequently discontinued. Thereafter, plaintiffs filed a supplemental summons and amended complaint adding the Disney defendants as direct

defendants on February 10, 2011. Skanska and the Disney defendants commenced a second third-party action against General Glass on July 25, 2012. On August 16, 2013, the Court severed the second third-party action from the main action.

DISCUSSION

A. Skanska and the Disney Defendants' Motion for Conditional Contractual Indemnification and Common-Law Indemnification Against Henegan (Motion Sequence Number 013)

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (*id.*). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

1. Contractual Indemnification

Skanska and the Disney defendants move for conditional contractual indemnification against Henegan, pursuant to paragraph 11.7 of the general conditions of Henegan's contract, which provides, in pertinent part, that:

"INDEMNIFICATION. With the exception that this Paragraph 11.7 shall in no event be construed to require indemnification by Contractor to a greater extent than permitted under the public policy of the State of New York, Contractor shall indemnify, defend . . . and hold Owner, and the Owner's representative, the parent, subsidiary, related and affiliated companies of each . . . harmless from and against any and all claims . . . of any nature whatsoever (including actual attorney's fees) ("Claim") arising directly or indirectly, in whole or in part, from or out of any:

- (i) Act or omission of Contractor, its officers, directors, agents, employees, any

contractor, subcontractor or subconsultant of any tier or anyone directly or indirectly employed by any of them or anyone for whose acts of them may be liable;

- (ii) *Personal injury*, including but not limited to, bodily injury, . . . including but not limited to any employees or agents of Contractor, Owner, or any independent contractor, subcontractor or sub-subcontractor . . . *caused or alleged to be caused in whole or in part by any negligent act or omission of Contractor*, or anyone directly or indirectly employed or engaged by Contractor, contracting or subcontracting by or under Contractor, or anyone for whose acts Contractor may be liable, regardless of whether such personal injury or damages is caused in part by a party indemnified hereunder" (Mahoney affirmation in support, exhibit Q [emphases supplied]).

In moving for indemnification, Skanska and the Disney defendants note that Henegan's primary and excess insurer, Travelers, has afforded them additional insured coverage up to a \$1,000,000 primary limit and \$5,000,000 excess limit for a total of \$6,000,000 in additional insured coverage. Skanska and the Disney defendants argue first that they are entitled to conditional indemnification from Henegan, since plaintiff's claims arise, in whole or in part, out of any "act or omission" of Henegan because: (1) Henegan had overall responsibility for the delivery, movement, and storage of materials on the project, which plaintiff alleges was performed in a negligent manner; and (2) plaintiff's claim necessarily arose from Henegan's subcontractor's acts or omissions, since plaintiff was in the process of gathering his employer's materials when the accident happened. According to Skanska and the Disney defendants, their liability can only be vicarious under the Labor Law because they had no involvement in the delivery, movement, and storage of materials on the project, and did not direct, supervise or control plaintiff's work at the time of the accident. Second, Skanska and the Disney defendants contend that conditional indemnification from Henegan is warranted because plaintiff alleges in the pleadings that his injuries were "caused in whole or in part by the negligent acts or omissions of [Henegan]" and its subcontractor, General Glass. Thus, Skanska and the Disney defendants seek conditional indemnification to the extent that plaintiffs' damages exceed the limits of the additional insured coverage under Henegan's insurance policies.

In opposition to the motion, Henegan contends that there are questions of fact as to Skanska and the Disney defendants' negligence, given that: (1) Skanska was hired as a construction manager, and had the responsibility to oversee the timing and performance of the work; (2) Skanska was responsible for overseeing safety-related issues with respect to the jobsite; (3) Skanska had the authority to stop work on the project; and (4) Skanska coordinated the schedules of the work performed by the subcontractors.

In reply, Skanska and the Disney defendants argue that Henegan's opposition papers should be disregarded as untimely. In any event, according to Skanska and the Disney defendants, Henegan has failed to raise an issue of fact as to their active negligence sufficient to deny their motion.

As a preliminary matter, the Court notes that it shall consider Henegan's affirmation in opposition. Even if Henegan's opposition papers were untimely served, given that Skanska and the Disney defendants submitted a reply, Skanska and the Disney defendants have not established any prejudice as a result (*see Marte v City of New York*, 102 AD3d 557, 558 [1st Dept 2013]; *Prato v Arzt*, 79 AD3d 622, 623 [1st Dept 2010]; *Dinnocenzo v Jordache Enters.*, 213 AD2d 219 [1st Dept 1995]).

"A party's right to contractual indemnification depends upon the specific language of the relevant contract" (*Konsky v Escada Hair Salon, Inc.*, 113 AD3d 656, 658 [2d Dept 2014]). The intention to indemnify must be "clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks omitted]). "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

General Obligations Law § 5-322.1(1) provides that:

"A covenant, promise, agreement or understanding in, or in connection with . . . a contract or agreement relative to the construction, alteration, repair or maintenance of a building . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable."

Thus, an indemnification clause in connection with a construction contract is void and unenforceable to the extent that such agreement contemplates full indemnification of a party for its own negligence (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], *rearg denied* 90 NY2d 108 [1997]). However, an indemnification clause which provides for partial indemnification by including recognized "savings" language (i.e., "to the fullest extent permitted by applicable law") does not violate the General Obligations Law (*see Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]). Even if the indemnification clause does not contain the savings language, it may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408 [1st Dept 2010]).

Here, as noted above, the indemnification provision provides that "this Paragraph 11.7 shall in no event be construed to require indemnification by Contractor to a greater extent than permitted under the public policy of the State of New York" (Mahoney affirmation in support, exhibit Q). Therefore, it does not violate General Obligations Law § 5-322.1 (*see Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, 100 AD3d 431, 432 [1st Dept 2012] [indemnification provision stating that "(i)n jurisdictions in which the indemnification provided for this Article is broader than that allowed by applicable law, this Article should be interpreted as providing the broadest indemnification permitted and should be limited only to the extent necessary to comply with that law" did not violate General Obligations Law § 5-322.1]).

The First Department has ruled that even where there are issues of fact as to the indemnitee's active negligence, an award of conditional indemnification is warranted where the indemnification provision does not violate the General Obligations Law (*see Cuomo v 53rd & 2nd Assoc., LLC*, 111 AD3d 548 [1st Dept 2013] ["Although, as third-party plaintiffs concede, there are issues of fact as to Plaza's active negligence, Plaza is entitled to conditional summary judgment on its claim for contractual indemnification; the extent of its indemnification depends on the extent to which any negligence on its part is found to have contributed to the accident"]; *Burton v CW Equities, LLC*, 97 AD3d 462, 463 [1st Dept 2012] ["Notwithstanding the above-discussed issues of fact as to its negligence on its part, CW Equities should have been granted summary judgment on its claim for indemnification, since the indemnification provision at issue does not require T.F.N. to indemnify C.W. Equities for C.W. Equities' own negligence"]; *see also Hernandez v Argo Corp.*, 95 AD3d 782, 783-784 [1st Dept 2012]; *Hughey v RHM-88, LLC*, 77 AD3d 520, 522-523 [1st Dept 2010]).

Moreover, plaintiff's accident necessarily arises, in whole or in part, out of an "[a]ct or omission" of Henegan (Mahoney affirmation in support, exhibit Q), since plaintiff, an employee of Henegan's subcontractor, was injured while gathering General Glass' materials when the accident occurred (*see Brown*, 76 NY2d at 178 [where indemnification clause provided for indemnification of any claim "arising out of, in connection with or as a consequence of the performance of the Work and/or any acts or omission of the Subcontractor," subcontractor was required to indemnify contractor even though there was no evidence of negligence on the subcontractor's part]). In addition, plaintiff alleges that his injuries were "caused in whole or in part by any negligent act or omission of [Henegan]" (Mahoney affirmation in support, exhibit Q). In this connection, the Court notes that the antisubrogation rule does not bar Skanska and the Disney defendants' claim for indemnification to the extent that plaintiffs' damages exceed the limits of Henegan's insurance policy (*see Gallagher v New York Post*, 55 AD3d 488, 491 [1st

Dept 2008], *revd on other grounds* 14 NY3d 83 [2010]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 [2d Dept 2000]).

Therefore, Skanska and the Disney defendants are entitled to conditional contractual indemnification over and against Henegan to the extent that plaintiffs' damages exceed the limits of the additional insured coverage afforded by Henegan's insurer.

2. *Common-Law Indemnification*

Skanska and the Disney defendants also move for conditional common-law indemnification against Henegan, arguing that their liability is purely vicarious. In addition, Skanska and the Disney defendants contend that the responsibility for the accident clearly rests with Henegan in light of the evidence that: (1) Henegan's duties included coordination of the delivery, movement, and storage of materials on the project which plaintiff claims was the cause of his accident; and (2) Henegan's laborers actually moved the subcontractors' materials on the project.

In opposition, Henegan contends that there are questions of fact as to its negligence.

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *see also Muriqi v Charmer Indus. Inc.*, 96 AD3d 535, 536 [1st Dept 2012]). "Where the proposed indemnitee's liability is purely statutory and vicarious, conditional summary judgment for common-law indemnification against a proposed indemnitor is premature absent proof, as a matter of law, that the proposed indemnitor 'was either negligent or exclusively supervised and controlled plaintiff's work site'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 685 [2d Dept 2005], quoting *Reilly v DiGiacomo & Son*, 261 AD2d 318 [1st Dept 1999]).

In this case, Skanska and the Disney defendants have failed to make a prima facie

showing of entitlement to a conditional award of common-law indemnification against Henegan. Although Skanska and the Disney defendants argue that Henegan was responsible for coordinating the delivery, movement, and storage of materials on the project, they failed to show that Henegan was negligent as a matter of law. Henegan's project director testified that Henegan's superintendent and the subcontractors' foremen determined where materials were to be stored, including gang boxes (Drutjons EBT tr at 159, 175, 182). "[A]n award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties" (*Aragundi v Tishman Realty & Constr. Co., Inc.*, 68 AD3d 1027, 1030 [2d Dept 2009]; see also *Priestly v Montefiore Med. Center/Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). Skanska and the Disney defendants have also not shown that Henegan exclusively supervised plaintiff's work. Plaintiff testified that Henegan did not direct him as to how to do his work (Plaintiff EBT tr at 34). Accordingly, Skanska and the Disney defendants' request for conditional common-law indemnification against Henegan is denied.

B. Plaintiffs' Motion for a Special Trial Preference in the Interests of Justice (Motion Sequence Number 012)

CPLR 3403(a)(3) provides that a special trial preference shall be granted in "an action in which the interests of justice will be served by an early trial." "A special trial preference is an extraordinary privilege. The granting of a preference amounts to favoring one case over many others awaiting trial. It should be granted only where unusual or extraordinary hardship is demonstrated" (*Bernard v Hyman*, 155 AD2d 403 [2d Dept 1989]). The court should analyze each application for a special trial preference in light of the unique circumstances of each case (*Patterson v Anderson Ave. Assoc.*, 242 AD2d 430, 431 [1st Dept 1997]). Whether the interests of justice will be so served rests within the sound discretion of the trial court (*Nold v City of Troy*, 94 AD2d 930 [3d Dept 1983]).

Plaintiffs move for a special trial preference, arguing that plaintiff sustained serious injuries to his thoracic spine in the accident, which have worsened since the accident, and is currently unable to work. Plaintiffs submit an affirmed report dated March 25, 2011 from William Bee Head, Jr., M.D., indicating that:

"Mr. Bee has sustained from his accident a right-sided thoracic radiculopathy from T4-T8, in the absence of any myelopathic features. He also has sustained a herniated disc at T4-T8, in conjunction with a preexisting bone spur which has been treated surgically in my opinion. He still has protruding herniated discs at T6-T7 and T7-T8, according to Dr. Mechtler's review of his films. His thoracic disc herniations were caused by the May 20, 2008 accident and have caused him to experience significant pain and dysfunction and have interfered with his ability to work and to engage in his usual and customary daily activities. Due to these injuries, he will never be able to work again" (Minchew affirmation in support, exhibit B).

Plaintiffs also rely on an unsworn and unaffirmed report dated March 1, 2012 from James M. Pascuiti, M.A., C.R.C., a vocational rehabilitation practitioner, which states that "[d]ue to Mr. Bee's combination of a physical and a psychological disability and his limited education, he is not capable of working in the Competitive Labor Market. Mr. Bee is not capable of performing the duties and responsibilities of any of the jobs which he was employed [in] prior to his accident" (*id.*, exhibit C).

According to plaintiffs, this case is more than five years old due to the seven discovery motions that they were required to make in order to obtain basic discovery from the defendants. In addition, plaintiffs contend that prior to the accident, plaintiff provided the majority of household income, supporting his wife and three children (Plaintiff aff, ¶ 4). Plaintiffs claim that Mrs. Bee had to stop working due to complications from a brain tumor which affect her adrenal and pituitary glands, and has been hospitalized on several occasions due to adrenal crisis (Plaintiff aff, ¶ 5; Minchew affirmation in support, exhibits D, H). While plaintiff is receiving Medicare, his wife and children do not have medical insurance; they have only been approved for the New Jersey Hospital Care Assistance Program, which covers hospital visits (*id.*, exhibit E). As argued by plaintiffs, their application for food stamps has recently been approved (*id.*,

exhibit F), and they are awaiting a determination on Medicaid and heating assistance coverage. Furthermore, plaintiffs assert that their family home has been in foreclosure for three years (*id.*, exhibit G).

In response to plaintiffs' motion, Skanska and the Disney defendants argue that plaintiff's medical records and history raise significant questions regarding whether his injuries were caused by the accident. Moreover, according to their CPLR 3101(d) expert disclosure, plaintiff is employable in a number of jobs, including engineering technician, electronics technician, computer-aided designer/drafter, CNC machinist, industrial technician, quality assurance inspector, construction project assistant manager, cost estimator, and facility manager. Skanska and the Disney defendants also argue that plaintiff has failed to demonstrate that he is presently indigent, since he receives approximately \$750 every two weeks in Worker's Compensation benefits and approximately \$2,200 per month in Social Security disability benefits (Plaintiff 7/19/13 EBT tr at 89-91), and plaintiffs' monthly mortgage payment is only \$1,913.37 (Minchew affirmation in support, exhibit G). Skanska and the Disney defendants further contend that plaintiff contributed to any delays in completing discovery in this action. For its part, Henegan argues, in opposition, that (1) plaintiff has not specified any instances of bad faith or deliberate delay by any defendant in this case, and (2) it is disputed whether plaintiff is disabled and unable to work, and plaintiff's circumstances are no different from other cases pending before this Court.

In reply, plaintiffs submit a letter indicating that he was approved for Social Security disability benefits (Minchew affirmation in reply, exhibit A), and a letter showing that Mrs. Bee was approved for Medicaid (*id.*, exhibit B).

Contrary to Skanska and the Disney defendants' contention, plaintiffs are not required to show that the accident caused the alleged indigence (*see Vasquez v Soriano*, 106 AD3d 545, 545-546 [1st Dept 2013]). Rather, plaintiffs must show that the "interests of justice will be

served by an early trial" (CPLR 3403[a][3]).

A special trial preference is warranted where the plaintiff is unable to work and is indigent or in difficult financial circumstances. In *Thompson v City of New York* (140 AD2d 232, 233 [1st Dept 1988]), the Court reasoned that "[i]n view of plaintiff's indigency and her inability to work, dating from the time of her accident and continuing until the present time, a special trial preference should have been granted." In making this determination, the Court noted that granting a special trial preference would cause no prejudice to the defendants, since the case was already four years old (*id.*). Similarly, in *Patterson*, (242 AD2d at 431), the First Department held that "plaintiff's proofs of a serious injury worsening over time, his inability to work, and his role as a single parent of four children (ages 4 to 12) subsisting on Social Security disability benefits of about \$1,000 per month, present a case in which the interests of justice will be served by an early trial."

In *Roman v Sullivan Paramedicine, Inc.* (101 AD3d 443 [1st Dept 2012]), the plaintiff was entitled to a special trial preference where her disabling injury prevented her from working, she exhausted her no-fault coverage, received food stamps, and lacked the necessary resources to pay for medical care. In *Kellman v 45 Tiemann Assoc.* (213 AD2d 151 [1st Dept 1995], *affd on other grounds* 87 NY2d 871 [1995]), the First Department held that the trial court did not abuse its discretion in granting the plaintiff a special trial preference in the interests of justice in view of the uncontroverted evidence that she was rendered paraplegic as a result of the accident and was receiving Social Security disability payments to help her meet her financial burdens.

In the exercise of its discretion, the Court finds that plaintiffs are entitled to a special trial preference in the interests of justice (*see* CPLR 3403[a][3]). In light of the evidence that plaintiff suffered a serious injury and is unable to work, that plaintiffs are subsisting on public assistance, and that their home is currently in foreclosure, an early trial will best serve all

parties (see *Patterson*, 242 AD2d at 431; *Thompson*, 140 AD2d at 233). Moreover, granting a special trial preference will cause no prejudice to defendants, given that this case is six years old (see *Thompson*, 140 AD2d at 233).

CONCLUSION

Accordingly, it is hereby

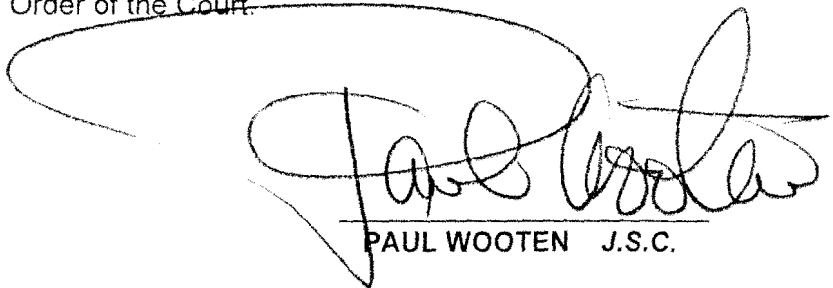
ORDERED that the motion (sequence number 012) of plaintiffs Joseph Bee and Theresa Bee for a special trial preference in the interests of justice is granted; and it is further,

ORDERED that the motion (sequence number 013) of defendants Skanska USA Building, Inc., New Amsterdam Development Corporation, and Disney Worldwide Services, Inc., incorrectly sued herein as Disney Core Services, for summary judgment is granted to the extent of granting them conditional contractual indemnification over and against defendant Henegan Construction Co., Inc. to the extent that plaintiffs' damages exceed the limits of the additional insured coverage afforded by defendant Henegan Construction Co., Inc.'s insurer, and is otherwise denied; and it is further,

ORDERED that counsel for plaintiffs is directed to serve a copy of this order upon all parties and upon the General Clerk's Office, which shall effect the preference for trial; and it is further,

This constitutes the Decision and Order of the Court.

Dated: 7.16.14


PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED

JUL 18 2014