

**Onofre v Board of Mgrs. of the Downtown
Condominium**

2014 NY Slip Op 31989(U)

July 11, 2014

Supreme Court, New York County

Docket Number: 114799/2010

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LUCY BILLINGS
J.S.C.

PRESENT: _____
Justice

PART 46

Index Number : 114799/2010
ONOFRE, MARICELA
vs.
BOARD OF MANAGERS
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion for partial 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 this motion is :

The court denies the motion by defendant - second third party plaintiff Maxons Restorations, Inc., for summary judgment on Maxons Restorations' contractual indemnification claim, pursuant to the accompanying decision. C.P.L.R. § 3212(b) and (c).

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

FILED

JUL 31 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/11/14

- 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: PART 46

-----x

MARICELA ONOFRE,

Index No. 114799/2010

Plaintiff

- against -

BOARD OF MANAGERS OF THE DOWNTOWN
CONDOMINIUM, DOWNTOWN CONDOMINIUM,
MAXONS RESTORATIONS, INC., and COOPER
SQUARE REALTY, INC.,

Defendants

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

MAXONS RESTORATIONS, INC.,

Index No. 590424/2011

Third Party Plaintiff

- against -

NEW CONCEPT ENVIRONMENTAL CLEANING
CORP.,

Third Party Defendant

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

MAXONS RESTORATIONS, INC.,

Index No. 590062/2012

Second Third Party Plaintiff

- against -

NEW CONCEPT ENVIRONMENTAL CLEANING
CORP.,

Second Third Party Defendant

-----x

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

FILED

JUL 31 2014

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff's action seeks to recover for her injuries from her fall off a ladder October 15, 2010, while employed by second third party defendant New Concept Environmental Cleaning Corp., which was performing mold removal at 15 Broad Street, New York County, under a contract with an emergency services contractor, defendant-second third party plaintiff Maxons Restorations, Inc. New Concept Environmental Cleaning's work was a component of Maxons Restorations' services at the site following a water leak there. Maxons Restorations moves for summary judgment on Maxons Restorations' contractual indemnification claim against New Concept Environmental Cleaning. C.P.L.R. § 3212(b) and (e).

I. THE PARTIES' CONTRACT GOVERNING THE WORK OCTOBER 15, 2010

Maxons Restorations has authenticated a contract between Maxons Restorations and New Concept Environmental Cleaning in responding to its notice to admit. C.P.L.R. § 3123(a). Maxons Restorations' Executive Vice President admitted under oath that a Vendor Agreement dated January 5, 2005, was a contract between the two parties and, despite its date, was in effect October 15, 2010, and that New Concept Environmental Cleaning's work at 15 Broad Street on that date was pursuant to that contract. Aff. in Supp. of Daniel W. London Exs. H-I. New Concept Environmental Cleaning's witness Angela Dominguez on whose deposition testimony Maxons Restorations also relies, however, testified that she executed multiple Vendor Agreements with Maxons Restorations on New Concept Environmental Cleaning's behalf. No one presents, let alone authenticates, a Vendor Agreement or another contract

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between Maxons Restorations and New Concept Environmental Cleaning that is dated after January 5, 2005, or refers specifically to 15 Broad Street. IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d 637, 638 (1st Dep't 2011); Giordano v. Berisha, 45 A.D.3d 416, 417 (1st Dep't 2007); Chubb Natl. Ins. Co. v. Platinum Customcraft Corp., 38 A.D.3d 244, 245 (1st Dep't 2007); Washington v. Montefiore Medical Ctr., 9 A.D.3d 271, 272 (1st Dep't 2004).

According to Maxons Restorations' attorney, the Vendor Agreement shown to Dominguez at her deposition was dated October 12, 2004. London Aff. Ex. K. This contract, however, is between Maxons Restorations and New Concept Cleaning Company, not second third party defendant New Concept Environmental Cleaning Corp. Although Dominguez testified that she executed this Vendor Agreement, and "New Concept" performed work at 15 Broad Street pursuant to this Vendor Agreement, id. Ex. F, at 16, she also identified it merely as "a vendor agreement that Maxons has us sign in order to perform work with them," id. Ex. F, at 11 (emphasis added), and did not specify when "New Concept" performed the work at 15 Broad Street pursuant to this agreement. Maxons Restorations' regional manager Christenson identified the same Vendor Agreement similarly, as "a vendor agreement between New Concept Cleaning and Maxons." Id. Ex. C, at 39 (emphases added).

Even if the Vendor Agreement dated October 12, 2004, was by second third party defendant New Concept Environmental Cleaning

Corp., the Vendor Agreement dated January 5, 2005, superseded the earlier contract. Dominguez was not shown the 2005 Vendor Agreement, but was shown only the superseded contract by New Concept Cleaning Company. The two contracts, combined with Dominguez's testimony concerning the renegotiation of her corporation's obligations to Maxons Restorations "on an annual basis," strongly suggest a series of Vendor Agreements between the parties and that neither the 2004 nor the 2005 agreement extended until October 15, 2010. Id. Ex. F, at 12-13.

II. THE INDEMNIFICATION PROVISION

The Vendor Agreements dated January 5, 2005, and before then that were authenticated by one party or another obligated the "Vendor" "to provide sufficient personnel supplies in order to perform the work and/or functions as assigned by Maxons." Id. Ex. H ¶ 1, Ex. K ¶ 1. In those agreements,

To the fullest extent permitted by law, Vendor agrees to defend, indemnify and hold harmless Maxons . . . against any and all claims . . . arising in whole or in part and in any manner from acts, omissions, breach or default of Subcontractor in connection with performance of any work by Subcontractor

Id. Ex. H ¶ 6, Ex. K ¶ 6 (emphases added).

This provision's plain terms obligate the Vendor to indemnify Maxons Restorations against claims arising from a Subcontractor's conduct. Quadrant Structured Prods. Co. v. Vertin, __ N.Y.3d __, 2014 NY Slip Op 04114, at *8 (June 10, 2014); J.D'Addario & Co., Inc. v. Embassy Indus., Inc., 20 N.Y.3d 113, 118 (2012); Cole v. Macklowe, 99 A.D.3d 595 (1st Dep't 2012); Nautilus Ins. Co. v. Matthew David Events, Ltd., 69 A.D.3d

457, 460 (1st Dep't 2010). All the obligations imposed by the Vendor Agreements are on the Vendor, a term used repeatedly throughout the agreements. The signature lines at the end of each Vendor Agreement identify "New Concept Environmental C," London Aff. Ex. H, at 2, and "New Concept Cleaning Company," id. Ex. K, at 2, as the Vendor.

The Vendor Agreements impose no obligations on a Subcontractor, implying that neither party to the agreement is a Subcontractor. It is a term that is distinct from a Vendor and used only in the indemnification provision. Dominguez consistently refers to her corporation as a "vendor for Maxons Restorations." Id. Ex. F, at 10. Although Maxons Restorations' attorney refers to his client as a general contractor, no evidence in the record does; Maxons Restorations' contracts with the condominium building, board of managers, and managing agent refer to Maxons Restorations as simply a contractor; and Christenson testified that: "The building had their own general contractor" separate from his employer. Id. Ex. C, at 25. Thus New Concept Environmental Cleaning's status as a contractor versus a subcontractor may be little different than Maxons Restorations' status as a contractor with the building owner or a subcontractor under another contract between the building and its agent or general contractor. See, e.g., id. Ex. L.

Yet, even if New Concept Environmental Cleaning may have been a subcontractor of general contractor Maxons Restorations, the Vendor Agreements identify the promisor, obligor, and

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indemnitor not as a Subcontractor, but as the Vendor. To interpret a Subcontractor in the Vendor Agreements as distinct from the Vendor New Concept Environmental Cleaning, moreover, does not render the indemnification provision meaningless or produce an unreasonable result. Greenwich Capital Fin. Prods., Inc. v. Negrin, 74 A.D.3d 413, 415 (1st Dep't 2010). See Cole v. Macklowe, 99 A.D.3d at 596; Terex Corp. v. Bucyrus Intl., Inc., 94 A.D.3d 548, 550 (1st Dep't 2012); Nautilus Ins. Co. v. Matthew David Events, Ltd., 69 A.D.3d at 460; Fresh Del Monte Produce N.V. v. Eastbrook Caribe A.V.V., 40 A.D.3d 415, 418-19 (1st Dep't 2007). The Vendor Agreements do not prohibit the Vendor from subcontracting with a subcontractor to carry out part of the Vendor's obligations, "the work and/or functions as assigned by Maxons" under the agreements. London Aff. Ex. H ¶ 1, Ex. K ¶ 1. It would be only logical and reasonable for the Vendor then to be obligated to indemnify Maxons Restorations for "all claims . . . arising . . . from acts, omissions, breach or default of Subcontractor in connection with performance of any work by Subcontractor." Id. Ex. H ¶ 6, Ex. K ¶ 6. Under this plausible interpretation of the Vendor Agreements, even if one of the agreements presented governs, Maxons Restorations specifies no subcontractor's act, omission, breach, or default in connection with the performance of any work at the 15 Broad Street site October 15, 2010.

Nor does any evidence indicate that New Concept Environmental Cleaning drafted the Vendor Agreements, so that

they must be interpreted otherwise, in Maxons Restorations' favor. Cowen & Co. v. Anderson, 76 N.Y.2d 318, 323 (1990); Jacobson v. Sassower, 66 N.Y.2d 991, 993 (1985); Arbeeny v. Kennedy Exec. Search, Inc., 71 A.D.3d 177, 182 (1st Dep't 2010); Burgos v. Metro-North Commuter R.R., 40 A.D.3d 377, 378 (1st Dep't 2007). To the contrary, the agreements are entitled "Maxons Restorations Vendor Agreement" on Maxons Restorations letterhead. Thus the agreements themselves, along with Dominguez's testimony referring to "a vendor agreement that Maxons has us sign in order to perform work with them" demonstrate that Maxons Restorations drafted the Vendor Agreements. London Aff. Ex. F, at 11.

The specific circumstances under which the contracting parties intended to impose a duty on New Concept Environmental Cleaning to indemnify Maxons Restorations must be unambiguous. Otherwise the contract must be construed to avoid reading in a duty owed by New Concept Environmental Cleaning to indemnify Maxons Restorations under circumstances where, under the law, New Concept Environmental Cleaning owes no duty. 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). "Not only the intent to indemnify, but also the scope of the indemnification," including the occurrences and conduct that will trigger the duty to indemnify, must be "unmistakably clear."

Fresh Del Monte Produce N.V. v. Eastbrook Caribe A.V.V., 40 A.D.3d at 418. See Awards.com, LLC v. Kinko's, Inc., 84 A.D.3d 639, 640 (1st Dep't 2001); Van Deventer v. CS SCF Mgt. Ltd., 47 A.D.3d 503, 504 (1st Dep't 2008). Under either of the contracts Maxons Restorations presents, whose conduct triggers the Vendor New Concept Environmental Cleaning's duty to indemnify Maxons Restorations is ambiguous regarding whether that conduct is a New Concept Environmental Cleaning subcontractor's conduct or New Concept Environmental Cleaning's own conduct or who the "Subcontractor" referred to is. London Aff. Ex. H ¶ 6, Ex. K ¶ 6. If that triggering conduct is a New Concept Environmental Cleaning subcontractor's conduct, Maxons Restorations presents no such conduct to trigger New Concept Environmental Cleaning's duty to indemnify Maxons Restorations.

III. APPLICATION OF THE INDEMNIFICATION PROVISION AS CONSTRUED BY MAXONS RESTORATIONS

Whether the conduct triggering the Vendor's duty to indemnify Maxons Restorations is by the Vendor's Subcontractor, the Vendor as a Subcontractor, or even Maxons Restorations as a Subcontractor, once the applicable agreement is authenticated and construed its indemnification provision is enforceable pursuant to the qualifying phrase, "To the fullest extent permitted by law." Id. Based on that qualifier, Maxons Restorations may enforce the Vendor Agreement's indemnification provision if the evidence establishes that the indemnification is not for damages attributable to Maxons Restorations' negligence or other culpable conduct. N.Y. Gen. Oblig. Law § 5-322.1; Brooks v. Judlau

Contr., Inc., 11 N.Y.3d 204, 207, 210 (2008); Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d 786, 795 n.5 (1997); Brown v. Two Exch. Plaza Partners, 76 N.Y.2d 172, 175, 180-81 (1990); Macedo v. J.D. Posillico, Inc., 68 A.D.3d 508, 510 (1st Dep't 2009). See Colozzo v. National Ctr. Found., Inc., 30 A.D.3d 251, 252 (1st Dep't 2006); Masciotta v. Morse Diesel Intl., 303 A.D.2d 309, 311-12 (1st Dep't 2003). Although the indemnitee may not be indemnified for its culpable conduct, based on the contract's terms, even if the conduct triggering the duty to indemnify is by the indemnitor and Vendor New Concept Environmental Cleaning, the indemnitor's conduct need not be negligent or otherwise culpable. Therefore, to be entitled to indemnification, Maxons Restorations must only establish that it is not being indemnified for its contribution to plaintiff's injury and need not also establish that New Concept Environmental Cleaning was culpable. DePaul v. NY Brush LLC, 114 A.D.3d 609, 610 (1st Dep't 2014); Macedo v. J.D. Posillico, Inc., 68 A.D.3d at 510-11; De La Rosa v. Philip Morris Mgt. Corp., 303 A.D.2d 190, 193 (1st Dep't 2003). See Picaso v. 345 E. 73 Owners Corp., 101 A.D.3d 511, 512 (1st Dep't 2012); Fiorentino v. Atlas Park LLC, 95 A.D.3d 424, 426 (1st Dep't 2012); Pardo v. Bialystoker Ctr. & Bikur Cholim, Inc., 10 A.D.3d 298, 299 (1st Dep't 2004).

Maxons Restorations' regional manager testified at his deposition that on October 15, 2010, he "was probably in the office" and thus fails to establish his personal knowledge of Maxons Restorations employees' presence or absence at the 15

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Broad Street work site October 15, 2010. London Aff. Ex. C, at 31. See Rodriguez v. Board of Educ. of City of N.Y., 107 A.D.3d 651, 652 (1st Dep't 2013); Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d 248, 254 (1st Dep't 2011); Babikian v. Nikki Midtown, LLC, 60 A.D.3d 470, 471 (1st Dep't 2009); Dorsey v. Les Sans Culottes, 43 A.D.3d 261 (1st Dep't 2007). Although he testified that Maxons Restorations did not supply "any safety equipment" for the emergency services project as a whole, he did not specify what "safety equipment" included, other than by a reference to safety harnesses, or whether Maxons Restorations supplied any other equipment for the work New Concept Environmental Cleaning's employees performed that day. London Aff. Ex. C, at 29. Angela Dominguez further testified, however, that New Concept Environmental Cleaning supplied all the equipment for plaintiff's work that day, and only New Concept Environmental Cleaning's crew chief supervised plaintiff. Nevertheless, her testimony falls short of establishing that no Maxons Restorations employees' acts or omissions caused plaintiff's fall off her ladder.

To begin, the record Maxons Restorations presents does not reveal the conditions that contributed to plaintiff's fall, except hearsay that, when plaintiff was working on a ladder in a bathroom of one of the building's apartments, "the ladder slipped," id. Ex. F, at 28, and "twisted because of the way the bathroom is." Id. Ex. F, at 29. Other unsworn hearsay indicates the floor and subfloor in her work area were partially removed.

Christenson testified that he visited the 15 Broad Street work site approximately every other day from September 29 to October 15, 2010. He displayed an awareness of the conditions at the work site and specifically testified to his awareness of the workers' regular use of ladders and the absence of safety harnesses there, yet he took no corrective action. If plaintiff's fall and injury are attributable to a hazardous condition on the floor or elsewhere in the bathroom where plaintiff was working, Maxons Restorations has not demonstrated that, through Christenson's inspections or otherwise, it did not receive actual or constructive notice of that hazardous condition. DePaul v. NY Brush LLC, 114 A.D.3d at 610-11; Hauptner v. Laurel Dev., LLC, 65 A.D.3d 900, 902-903 (1st Dep't 2009); Urban v. No. 5 Times Sq. Dev., LLC, 62 A.D.3d 553, 556 (1st Dep't 2009). See Picaso v. 345 E. 73 Owners Corp., 101 A.D.3d at 512; Colozzo v. National Ctr. Found., Inc., 30 A.D.3d at 252. Christenson's frequent regular inspections suggest that Maxons Restorations would be charged with that notice.

If plaintiff's fall and injury are attributable to the absence of safety harnesses at the site, Christenson was aware of that hazardous condition. Even if Maxons Restorations neither supplied nor was responsible for supplying safety harnesses, if it was responsible for site safety, it was responsible for assuring that New Concept Environmental Cleaning or another supplier supplied them. Maxons Restorations did not assign responsibility for providing equipment or for site safety to any

other contractor or subcontractor in either of the Vendor Agreements or any other contract in the record. New Concept Environmental Cleaning was responsible only "to provide sufficient personnel supplies in order to perform the work." London Aff. Ex. H ¶ 1, Ex. K ¶ 1. Given the inadequate record regarding the circumstances of plaintiff's fall and the parties' responsibilities for equipment and safety as well as their practices, her injury may be attributable to the absence of other equipment that Maxons Restorations was responsible for supplying or the conduct of a Maxons Restorations employee whose presence Christenson was unaware of. See Urban v. No. 5 Times Sq. Dev., LLC, 62 A.D.3d at 556; Pardo v. Bialystoker Ctr. & Bikur Cholim, Inc., 10 A.D.3d at 299; Cavanaugh v. 4518 Assoc., 9 A.D.3d 14, 19 (1st Dep't 2004).

Upon this record, Maxons Restorations fails to present conclusive evidence of having committed no act or omission that caused plaintiff's injury, to permit Maxons Restorations' indemnification by New Concept Environmental Cleaning under ¶ 6 of the Vendor Agreement. Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d at 789-90, 794-95; Picaso v. 345 E. 73 Owners Corp., 101 A.D.3d at 512; Williams v. 7-31 Ltd. Partnership, 54 A.D.3d 586, 587 (1st Dep't 2008); Pardo v. Bialystoker Ctr. & Bikur Cholim, Inc., 10 A.D.3d at 301-302. Thus, again under either of the contracts Maxons Restorations presents, even if the conduct triggering that indemnification is New Concept Environmental Cleaning's own conduct, Maxons

Restorations has not eliminated a question whether Maxons Restorations' own negligent act or omission caused plaintiff's fall, to enforce the contract's indemnification provision.

IV. CONCLUSION

A contract may not be construed to provide indemnification except in a context where the obligation is unmistakable: a context that is not fleshed out in this record. 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); Bijak v. Gramercy Capital Corp., 95 A.D.3d 469, 471 (1st Dep't 2012); Gonclaves v. 515 Park Ave. Condominium, 39 A.D.3d 262, 263 (1st Dep't 2007). In fact, this record fails to establish the governing contract. Nevertheless, even if it is one of the contracts Maxons Restorations presents, the contract does not unmistakably provide for indemnification arising from New Concept Environmental Cleaning's act or omission, and Maxons Restorations does not establish that plaintiff's claim arose from any other party's or nonparty's conduct. E.g., Biotronik A.G. v. Conor Medsystems Ireland, Ltd., 117 A.D.3d 551, 553 (1st Dep't 2014). Finally, even if the contract does provide for indemnification arising from New Concept Environmental Cleaning's act or omission, Maxons Restorations has not established circumstances permitting the provision's enforcement.

For each of these three independent reasons, the court denies the motion by second third party plaintiff Maxons Restorations, Inc., for summary judgment on Maxons Restorations'

contractual indemnification claim. C.P.L.R. § 3212(b) and (e).
This decision constitutes the court's order.

DATED: July 11, 2014

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED

JUL 31 2014

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