Muevecela v 117 Kent Ave., LLC
2014 NY Slip Op 33550(U)
December 23, 2014
Supreme Court, Kings County
Docket Number: 32377/08
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of December, 2014.

PRESENT:

HON. DEBRA SILBER,
Justice.

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IVAN MUEVECELA,

Plaintiff,

- against -

117 KENT AVENUE, LLC,
66-68 WASHINGTON AVENUE, LLC, and
EIGHTH AVENUE BUILDER CORP.,

Defendants.

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EIGHTH AVENUE BUILDER CORP.,

First Third-Party Plaintiff,

- against -

CHS CONTRACTING, LLC,

First Third-Party Defendant.

----------X

117 KENT AVENUE, LLC, and 66-68 WASHINGTON AVENUE, LLC,

Second Third-Party Plaintiffs,

- against -

CHS CONTRACTING, LLC,

Second Third-Party Defendant.

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AND ADDITIONAL THIRD-PARTY ACTIONS

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DECISION AND ORDER

Index No. 32377/08

Mot. Seq. No. 16

Date Submitted: 09/04/14

First Third-Party
Index No. 75657/09

Second Third-Party
Index No. 75261/10

The following papers numbered 1 to 6 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3, 4
Reply Affidavits (Affirmations)	5, 6

Upon the foregoing cited papers, the Decision / Order on this motion is as follows:

Subcontractor CHS Contracting, LLC (CHS) moves to reargue the portions of the court's decision and order, dated October 19, 2013 (the prior order), which (1) denied the branch of CHS' motion for summary judgment dismissing the contractual indemnification claim against it by the building owners, 117 Kent Avenue, LLC and 66-68 Washington Avenue, LLC (collectively, the Owners), (2) denied the branch of CHS' motion for summary judgment dismissing the contractual indemnification claim against it by the general contractor, Eighth Avenue Builder Corp. (Eighth Avenue), and (3) granted the branch of the Owners' motion for summary judgment on their contractual indemnification claim against CHS. The prior order was served with notice of entry on November 22, 2013. CHS timely served the instant motion on November 27, 2013. The Owners and Eighth Avenue oppose the motion.[1] The underlying action was settled by plaintiff on the record on January 9, 2014.[2]

The court grants CHS leave to reargue and, on reargument, adheres to its original decision.

On the prior motion, the court held that (1) the Owners were entitled to contractual indemnification from CHS, and (2) CHS was not entitled to the dismissal of the Owners' and Eighth Avenue's indemnification claims against it. The indemnification clause, which is set forth in Eighth Avenue's subcontract with CHS and runs in favor of the Owners and Eighth Avenue, states that:

> "To the fullest extent permitted by law, Subcontractor [CHS] will indemnify and hold harmless Eighth Avenue . . . and Owner[s] . . . from and against any and all claims . . ., including legal fees and all court costs . . . [,] arising in whole or in part

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[1] A portion of the prior order that is the subject of CHS' reargument motion is currently on appeal to the Second Department by CHS. The appeal has not been calendared for oral argument as of the date of this decision and order.

[2] Because plaintiff had not moved for partial summary judgment on liability, the prior order did not address defendants' potential liability to him.

> and in any manner from injury . . . of person . . . resulting from the acts, omissions, breach or default of Subcontractor [and] its . . . employees . . . in connection with the performance of any work by . . . Subcontractor pursuant to any contract . . ., except [when] these claims, suits, liens, judgments, damages, losses and expenses [are] caused by the negligence of Eighth Avenue. . . . Subcontractor will defend and bear all costs of defending any actions or proceedings brought against Eighth Avenue . . . and/or Owner[s], . . . arising in whole or in part out of any such acts, omissions, breach or default. The foregoing indemnity shall include injury . . . of any employee of the . . . Subcontractor. . . ."

In the prior order, the court held that the Owners made a prima facie showing that CHS was obligated to indemnify them under the foregoing clause because the accident arose from CHS' work – plaintiff fell as he was retrieving the metal studs he needed to perform his work for CHS. Because the court found that CHS failed to rebut the Owners' prima facie showing, the court granted the Owners' motion and held CHS liable for indemnification. This required the Court to deny CHS' motion. To be clear, the court in the decretal paragraphs of the prior order expressly granted the Owners contractual indemnification against CHS and further expressly denied the branch of CHS's motion which was for dismissal of the Owners' contractual indemnification against it.

On the prior motion, the Court also denied the branch of Eighth Avenue's motion for contractual indemnification against CHS under the same indemnification clause. The court held that a factual dispute between Eighth Avenue and CHS regarding which of them allegedly created, or had actual or constructive notice of, the inadequate planks-and-plywood cover over the stairwell opening through which plaintiff fell precluded the court from granting the branch of Eighth Avenue's motion which was for contractual indemnification against CHS. Considering this factual dispute, it was determined that dismissal of Eighth Avenue's contractual indemnification claim was inappropriate. To that end, the Court in the decretal paragraphs of the prior order expressly, and separately, denied relief to both Eighth Avenue and CHS on the matter of contractual indemnification.

A motion for leave to reargue must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]). Leave to reargue is granted, since it appears that the issues raised by CHS herein were not fully explored in the court's prior order.

In support of its reargument motion, CHS contends that the Court erred in (1) granting the branch of the Owners' motion which was for contractual indemnification against it, and (2) denying the branches of its motion which were for dismissal of the Owners' and Eight Avenue's contractual indemnification claims against it. CHS assigns two errors to the Court's resolution of the contractual indemnification claims. The first assignment of error is based on the Court's alleged misinterpretation of the indemnification clause as merely requiring an inquiry of whether plaintiff was performing work for CHS at the time of the accident. Although plaintiff was undisputedly working for CHS at the time,[3] CHS posits that more was required before the court could impose indemnification. According to CHS, the court should have inquired whether the premises condition which caused plaintiff's accident – an inadequately secured planks-and-plywood cover over a stairwell opening – was CHS' work product. CHS maintains that because its subcontract had nothing to do with the stairway opening, the claims resulting from plaintiff's accident did not arise "in connection with the performance of any work by . . . [CHS] pursuant to any contract" and, therefore, are outside the scope of the indemnification clause. The court finds CHS' proposed interpretation of the indemnification clause to be unduly restrictive.

The indemnification clause encompasses any claim, arising in whole or in part, and in any manner, from an injury to any person, including a CHS employee, resulting from such

[3] CHS' interchangeable use of the words "presence" and "work" in characterizing plaintiff's activity at the site on the day of the accident is misleading. Plaintiff was more than "present" at the site – he was framing walls and retrieving metal studs for additional walls.

employee's acts in connection with the performance of "any work" which CHS was contracted to perform. At the time of the accident, plaintiff was supervised by his employer, CHS. The accident resulted from the combination of two events; first, his search on one of the building's floors for the metal studs to perform his work for CHS, and, second, the presence of an inadequately secured planks-and-plywood cover over an unbarricaded stairwell opening on that floor. Plaintiff's accident, therefore, arose, at least in part, from the same framing work CHS had been contracted to perform. Accordingly, CHS' first assignment of error has no merit.

The second assignment of error is based on the Court's alleged failure to consider a portion of the indemnification clause that absolves CHS from liability for those "claims, suits, liens, judgments, damages, losses and expenses [that are] caused by the negligence of Eighth Avenue." CHS contends that it is not contractually liable because, in its view, Eighth Avenue was *solely* responsible for the accident, and Eighth Avenue allegedly conceded liability in that regard.

The indemnification clause must be enforced according to its terms. Its saving (and introductory) phrase "[t]o the fullest extent permitted by law" contemplates partial indemnification and is intended to limit CHS' contractual indemnity solely to its (CHS') own negligence. The record on the prior motions did not reach a conclusion as to the relative degree of fault between CHS and Eighth Avenue regarding the accident. Eighth Avenue never conceded liability for the accident, and the Court never made a finding that Eighth Avenue was solely at fault for causing the accident. CHS, thus, cannot be absolved of its obligation for indemnification, whether to the Owners or to Eighth Avenue, without a determination that Eighth Avenue is solely at fault for causing the accident. Hence, CHS'

second assignment of error also lacks merit.[4]

Accordingly, the Court, on reargument, adheres to its rulings in the prior order that (1) CHS is not entitled to the dismissal of the Owners' and Eighth Avenue's contractual indemnification claims against it; (2) the Owners are entitled to complete contractual indemnification against CHS; and (3) Eighth Avenue is not entitled to contractual indemnification from CHS. Additional authorities supporting these rulings are *Francis v Plaza Constr. Corp.*, 121 AD3d 427, 428 (1st Dept 2014), *Gonzalez v Magestic Fine Custom Home*, 115 AD3d 796, 798 (2d Dept 2014), *Urbina v 26 Court St. Assoc., LLC*, 46 AD3d 268, 274 (1st Dept 2007), *Longwood Cent. School Dist. v American Employers Ins. Co.*, 35 AD3d 550, 552 (2d Dept 2006), *Shaughnessy v Huntington Hosp. Assn.*, 2014 NY Slip Op 30821(U), *6 (Sup Ct, Suffolk County), *Pylilo v Metropolitan Tower Life Ins. Co.*, 2011 NY Slip Op 30145(U), *11 (Sup Ct, NY County), *Pizarro v City of New York*, 2009 WL 6451989 (Sup Ct, Kings County).

This shall constitute the Decision and Order of the Court.

E N T E R,

Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court

FILED
DEC 23 2014
KINGS COUNTY CLERK'S OFFICE

[4] It is beside the point that the prior order awarded the Owners contractual indemnification against both CHS and Eighth Avenue. Although the Owners now have their choice to enforce their contractual indemnification rights against either CHS or Eighth Avenue or both, that is a matter of loss allocation between the carriers.