F & S Contr., LLC v Egg Elec., Inc.
2015 NY Slip Op 32191(U)
October 23, 2015
Supreme Court, Queens County
Docket Number: 702489 2014
Judge: Carmen R. Velasquez
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VALESQUEZ IA Part 38
Justice

F & S CONTRACTING, LLC, x
Plaintiff,

-against-

EGG ELECTRIC, INC.

Defendant.
x

Index Number 702489 2014

Motion Date July 20, 2015

Motion Seq. No. 2

The following papers numbered 1 to 15 read on this motion by plaintiff F & S Contracting, LLC (plaintiff), to renew or reargue its prior motion for summary judgment on its claims for common-law and contractual indemnification against defendant Egg Electric, Inc. (defendant), which this court denied as premature, in an order dated March 17, 2015.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-11
Reply Affidavits	12-15

Upon the foregoing papers it is ordered that the motion is determined as follows:

This action is related to two other, separate actions sounding in violation of Labor Law, wrongful death and negligence, *Guadalupe v MTA Bus Company* (Index No. 700946/12), and *Delgreco v New York City Transit Authority* (Index No. 17697/12). Although the instant action seeks common-law and contractual indemnification arising out of the occurrences in the two related actions, it has not been consolidated or otherwise joined to those actions. Since the time that this court denied plaintiff's prior motion as premature,

the court has rendered decisions in both related actions regarding the negligence attributable to the parties.

Although plaintiff has moved for both renewal and reargument, reargument is not the appropriate vehicle for this motion and plaintiff has failed to demonstrate that "the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law" in determining the prior motion (*McGill v Goldman*, 261 AD2d 593, 594 [1999]; CPLR 2221 [d] [2]; *Pryor v Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434, 436 [2005]). Therefore, plaintiff is not entitled to reargument.

CPLR 2221 (e) provides in relevant part that "[a] motion for leave to renew . . . shall be identified specifically as such . . . shall be based upon new facts not offered on the prior motion that would change the prior determination . . . [and] shall contain reasonable justification for the failure to present such facts on the prior motion." "A motion for leave to renew or reargue is addressed to the sound discretion of the Supreme Court" (*Central Mtge. Co. v McClelland*, 119 AD3d 885, 886 [2014]; *see Singh v Avis Rent A Car Sys., Inc.*, 119 AD3d 768, 771 [2014]).

Plaintiff has demonstrated a reasonable justification for its failure to present the new facts upon the prior motion (CPLR 2221 [e][3]). Therefore, the court grants renewal upon the instant motion and will now address the merits of plaintiff's motion for summary judgment.

Plaintiff has moved for summary judgment on its claims for common-law and contractual indemnification. In support of its motion, plaintiff has pointed to the court's determinations in the two related actions. In the related action, *Guadalupe v MTA Bus Company* (Index No. 700946/12), in a decision dated November 10, 2014, the court concluded that while plaintiff was liable under Labor Law § 240, plaintiff did not direct, supervise or control the work of defendant's employees which led to the subject accident, that only defendant directed, supervised and controlled the injury-producing work of its own employees, and that plaintiff was not liable under Labor Law § 200 or for common-law negligence. In the related action, *Delgreco v New York City Transit Authority* (Index No. 17697/12), in a decision dated November 14, 2014, the court concluded that plaintiff was not negligent in the happening of the accident under Labor Law § 200 or for common-law negligence and that plaintiff was entitled to contractual indemnification from defendant.

Summary judgment on a claim for common-law indemnification 'is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved' " (*Coque v Wildflower Estates Developers, Inc.*, 31 AD3d 484, 489 [2006], quoting *La Lima v Epstein*, 143 AD2d 886, 888 [1988]). "The principle of

common-law, or implied, indemnification permits a party who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages the party paid to the injured party" (*Arrendal v Trizechahn Corp.*, 98 AD3d 699, 700 [2012]; *see Bigelow v General Elec. Co.*, 120 AD3d 938, 939-940 [2014], quoting *Nourse v Fulton County Community Heritage Corp.*, 2 AD3d 1121, 1122 [2003]). Thus, a party whose liability is purely vicarious ... may be entitled to common-law indemnification from the party actually responsible for the accident (*see Cunha v City of New York*, 12 NY3d 504, 508 [2009]; *Kelly v Diesel Constr. Div. of Carl A. Morse, Inc.*, 35 NY2d 1, 7 [1974]). On its motion, plaintiff has the burden of making a prima facie showing that it was free from negligence in the happening of the accident (*see Weitz v Anzek Constr. Corp.*, 65 AD3d 678, 681 [2009]; *Coque v Wildflower Estates Developers, Inc.*, 31 AD3d at 489).

Based upon plaintiff's showing that the court determined that it was free of negligence in the two related actions and that defendant and its employees alone supervised, controlled and directed the injury-producing work, plaintiff has satisfied its burden. In opposition, defendant has failed to adequately raise a triable issue of fact and plaintiff is, thus, entitled to summary judgment on its claim for common-law indemnification.

Turning next to plaintiff's claim for contractual indemnification against defendant, rules similar to those regarding common-law indemnification, also apply to claims for contractual indemnification (*see Maxwell v Toys R Us*, 258 AD2d 630 [1999]). "The right to contractual indemnification depends upon the specific language of the contract" (*Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 994 [2009] [internal quotes and citation omitted]). A party is entitled to full contractual indemnification provided that the intent to indemnify can be clearly implied by the language and purpose of the agreement language and the surrounding facts and circumstances (*see Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2009]).

In this matter, the contract between the parties provided, in relevant part, that the indemnidication is triggered if the incident arose out of the work to the extent, in whole or in part, of defendant's negligent acts or omissions or those of its direct or indirect employees. The indemnification provision specifically provided that defendant would "indemnify and hold harmless the owner, contractor ... and agents and employees of any of them from and against all claims, damages ... arising out of or resulting from the performance of the subcontractor's work under this subcontract." While the court in the related action, *Guadalupe v MTA Bus Company* (Index No. 700946/12), concluded that plaintiff was liable under Labor Law § 240, plaintiff has demonstrated that its liability under that section is only statutory in nature and, thus, that it is, nevertheless, entitled to recover under its contract for indemnity from defendant (*see Shea v Bloomberg, L.P.*, 124 AD3d 621, 622 [2015]; *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]). Based upon this court's considered

determinations that plaintiff was not negligent in the related actions, and based upon the plain language of the indemnification agreement between the parties, plaintiff has adequately demonstrated its entitlement to contractual indemnification. In opposition, defendant has failed to point to sufficient evidence to adequately raise a triable issue of fact. Therefore, plaintiff is entitled to summary judgment on its claim for contractual indemnification.

Accordingly, the branches of plaintiff's motion for renewal and for summary judgment on its claims for common-law and contractual indemnification are granted, while its motion is denied in all other respects.

Dated: October 23 2015

CARMEN R. VELASQUEZ, J.S.C.