

**Jimenez v Gagliano**

2016 NY Slip Op 30773(U)

April 27, 2016

Supreme Court, New York County

Docket Number: 155247/12

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
JAIRO JIMENEZ,

Plaintiff,

Index No. 155247/12

-against-

**DECISION/ORDER**

THOMAS DOMINICK GAGLIANO, et al.

Defendants.

-----X  
THOMAS DOMINICK GAGLIANO,

Third-Party Plaintiff,

Index No. 590441/13

-against-

TITANIUM INTERIORS CONSTRUCTION CORP.,

Third-Party Defendant,

-----X  
TITANIUM INTERIORS CONSTRUCTION CORP.,

Second Third-Party Plaintiff,

Index No. 590129/14

-against-

SHEPARD INDUSTRIES LLC,

Second Third-Party Defendant,

-----X  
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers  
Notice of Motion and Affidavits Annexed.....

Numbered  
1

Affidavit in Opposition.....	2
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Plaintiff Jairo Jimenez commenced the instant action to recover for injuries he allegedly sustained as a result of being struck by power-operated equipment while working at a construction site. Defendant/Third-Party Plaintiff Thomas Dominick Gagliano (“Gagliano”) now moves for an Order pursuant to CPLR § 3212 granting him summary judgment (1) dismissing plaintiff’s claims for common law negligence and violation of New York Labor Law (“Labor Law”) § 200; and (2) on his third-party claims for contractual indemnification and breach of contract against third-party defendant Titanium Interiors Construction Corp. (“Titanium”). For the reasons set forth below, Gagliano’s motion is granted in part and denied in part.

The relevant facts and procedural history of this case are as follows. This action arises out of a construction project being performed at the premises located at 25 Broad Street, New York, New York (the “subject premises”) (hereinafter referred to as the “Project”). In his capacity as the court-appointed receiver of the subject premises, Gagliano contracted with nonparty LCOR, the general contractor of the Project, to perform renovation work at the subject premises. LCOR then contracted with Titanium to perform the work on the interior of the subject premises (hereinafter referred to as the “Contract”). Thereafter, Titanium contracted with Second Third-Party Defendant Shepard Industries LLC (“Shepard”), plaintiff’s employer, for the performance of power washing work at the subject premises.

On or about May 25, 2011, while working at the Project, plaintiff was preparing to fuel a power washer and was allegedly struck by a man-lift operated by his coworker, Jaime Venegas (the “accident”). Thereafter, in or around August 2012, plaintiff commenced the instant action

against Gagliano and other entities asserting claims for common law negligence and violations of Labor Law §§ 200 and 241(6). Thereafter, Gagliano commenced a third-party action against Titanium for indemnification and breach of contract for failure to procure insurance. On or about February 4, 2014, Titanium commenced a third-party action against Shepard, plaintiff's employer, for common law indemnification, contractual indemnification, contribution and breach of contract.

As an initial matter, that portion of Gagliano's motion which seeks an Order pursuant to CPLR § 3212 granting him summary judgment dismissing plaintiff's claims for common law negligence and violation of Labor Law § 200 is granted without opposition.

The court next turns to Gagliano's motion for summary judgment against Titanium on his third-party claims for contractual indemnification and breach of contract. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

That portion of Gagliano's motion which seeks an Order pursuant to CPLR § 3212 granting him summary judgment against Titanium on his third-party claim for contractual indemnification is granted. A party is entitled to contractual indemnification when the intention to indemnify is "clearly implied from the language and purposes of the entire agreement and the surrounding circumstances." *Torres v. LPE Land Dev. & Constr., Inc.*, 54 A.D.3d 668 (2d Dept

2008). A party seeking contractual indemnification "must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor." *Cava Constr. Co., Inc. v. Gealtex Remodeling Corp.*, 58 A.D.3d 660, 662 (2d Dept 2009).

In the instant action, Gagliano has established his *prima facie* right to summary judgment on his third-party claim for contractual indemnification against Titanium. Pursuant to Paragraph 7(a) of the Contract,

To the fullest extent permitted by law [Titanium] shall indemnify, defend and hold harmless [LCOR], [Gagliano],...from and against any and all loss, cost, expense, damage, injury, liability, claim, demand, penalty or cause of action (including attorneys' fees), *directly or indirectly arising out of, resulting from or related to (in whole or in part)*, (i) the Work performed hereunder, (ii) this Agreement or (iii) *the act or omission of [Titanium], any of its subcontractors* or suppliers, or any individual, partnership, joint venture, limited liability company or corporation (a) directly or indirectly employed by [Titanium] or (b) for whose acts or omissions [Titanium] or any of its subcontractors or suppliers may be liable (excluding property damage to the Project itself covered by [Gagliano's] all-risk builder's risk insurance, if any) (emphasis added).

Based on this contractual provision, Gagliano is entitled to summary judgment on his claim for contractual indemnification against Titanium as plaintiff's claim, either directly or indirectly, arose out of, resulted from or related to an act of Shepard, Titanium's subcontractor. Gagliano has provided the written agreement between Shepard and Titanium pursuant to which Shepard performed power washing work at the subject premises establishing that Shepard was indeed Titanium's subcontractor. Further, Gagliano has established that he is "free from negligence" in the instant action as the common law negligence claim asserted against him by plaintiff has been dismissed.

To the extent Titanium asserts that Gagliano's motion for summary judgment should be denied on the ground that although it entered into the agreement with Shepard to perform power washing work at the subject premises, it did so only as the "paymaster" for LCOR and Gagliano and thus, Shepard was not its subcontractor, such assertion is without merit. All that is relevant is that there is an agreement between Titanium and Shepard pursuant to which plaintiff performed the work at issue in this case as a result of which Shepard is Titanium's subcontractor. The fact that Titanium may have only been the "paymaster" for LCOR and Gagliano is immaterial as the basis for Titanium entering into the agreement with Shepard is not relevant to a finding of whether Shepard was Titanium's subcontractor. Furthermore, the fact that the accident may have occurred while plaintiff was performing work that was outside the scope of the work Titanium was hired to perform is irrelevant as Titanium still entered into an agreement with Shepard to perform such work. Indeed, Titanium could have declined to enter into such an agreement with Shepard and demanded that either LCOR or Gagliano enter into the agreement with Shepard directly but it did not do so. The court has reviewed Titanium's remaining arguments and finds them to be unavailing.

However, Gagliano's motion for summary judgment on his third-party claim for breach of contract for failure to procure insurance is denied as Gagliano has failed to make a *prima facie* showing establishing that Titanium failed to procure insurance coverage as required under the Contract. The only evidence submitted in support of Gagliano's contention that Titanium failed to procure insurance naming Gagliano as an additional insured is Gagliano's insurer's tender of his defense and indemnification to Titanium and that there has been no formal response. However, this evidence is not dispositive as to the issue of whether Titanium failed to procure

