

Maraio v L&M 2180, LLC
2016 NY Slip Op 31052(U)
March 29, 2016
Supreme Court, New York County
Docket Number: 158486/12
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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FRANK and DONNA MARAIO,

Plaintiffs,

Index No. 158486/12

-against-

DECISION/ORDER

L&M 2180, LLC, ROSE ASSOCIATE, INC. and
PLAZA CONSTRUCTION CORP.,

Defendants.

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L&M 2180, LLC, ROSE ASSOCIATE, INC. and
PLAZA CONSTRUCTION CORP.,

Third-Party Plaintiffs,

-against-

TSC 2012, LLC and B&R REBAR CONSULTANTS,

Third-Party Defendants.

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HON. CYNTHIA KERN, J.S.C.

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

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affidavit in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiffs commenced the instant action to recover damages for injuries allegedly sustained by plaintiff Frank Maraio on September 21, 2012, while performing foundation waterproofing at a construction site. Third party plaintiffs have brought the present motion for reargument of this court's decision granting TSC summary judgment dismissing third party

plaintiffs' claims for common law contribution and indemnification and contractual indemnification. The court grants reargument, and upon reargument, adheres to its original determination granting TSC summary judgment.

Initially, this court adheres to its original decision granting TSC's motion for summary judgment dismissing third party plaintiffs' common-law contribution and indemnification claims. As this court noted in its original decision, the First Department clearly held in *Martinez v. 342 Prop., LLC*, 89 A.D.3d 468 (1st Dept 2011) that a site safety manager, like TSC, is entitled to summary judgment dismissing all claims for common law contribution and indemnification when it lacks control over the conduct of work at the project necessary to impose liability upon it under Labor Law section 200 or common law negligence. While third party plaintiffs do not dispute that TSC lacked sufficient control over the work necessary to impose liability under Labor Law section 200 or common law negligence, they argue that they still have a viable claim for common law contribution and indemnification based on their claim that TSC negligently failed to perform under the contract. This argument is without basis. To the extent third-party plaintiffs are seeking to assert a contractual claim against TSC for failure to properly perform under the contract as opposed to a negligence claim, they are not entitled to contribution and indemnification pursuant to that contractual claim as contribution and common-law indemnification are only available where the movant is taking the position that the other party was negligent in causing the plaintiff's injuries. To the extent that they are asserting a common-law negligence claim based on TSC's failure to properly perform the contract, such claim is barred by the First Department's decision in *Martinez*, where the court clearly held that there is no viable negligence claim against a safety site supervisor who did not control the work at the project.

This court also adheres to its original decision granting TSC summary judgment dismissing the third-party complaint for contractual indemnification. Third party plaintiffs argue that the court erred in its original decision granting TSC summary judgment dismissing the contractual indemnification claim as TSC has failed to make a prima facie showing that it was not negligent in its performance of its obligations under the contract based on its failure to report to third-party plaintiffs the lack of a vertical lifeline at the worksite and that even if it has made a prima facie showing, there is a disputed issue of fact as to this issue. In this court's initial decision, the court granted summary judgment dismissing third party plaintiffs' claim for contractual indemnification based on the First Department's decision in *Martinez*. In *Martinez*, and in the present case, the contract between the parties provides that the site safety manager will only indemnify plaintiff for losses caused by the negligence of the site safety manager. *Id.* Since the site safety manager lacked control over plaintiff's work, it was entitled to summary judgment dismissing the contractual indemnification claim. *Id.* The court in *Martinez* rejected the plaintiff's argument that it was entitled to contractual indemnification because it relied on the site safety manager to correct unsafe work practices. *Id.* at 469-470. The court noted that this argument was not supported by the contract between the parties which made no mention of plaintiff's intention to rely on the site safety manager to correct unsafe work practices. *Id.* The court specifically noted that there was no basis to look outside of the contract to discern plaintiff's alleged intention to rely on the site safety manager to correct unsafe work practices as the contract unambiguously limited that site safety manager's indemnification duty to instances of negligence by the site safety supervisor. *Id.*

In the present case, just as in *Martinez*, TSC is entitled to summary judgment dismissing the contractual indemnification claim as the court has already determined as a matter of law that

