SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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STEVE DWYER,

Plaintiff,

Index No. 115086-2006

-against-

**DECISION/ORDER**

Motion Sequence 007

CENTRAL PARK STUDIOS, INC., GERALD J. PICASO, INC., MICHAEL SLOSBERG AND JANET COHN SLOSBERG,

Defendants.

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CENTRAL PARK STUDIOS, INC., GERARD J. PICASO, INC. S/H/A GERALD J. PICASO, INC.,

Third-Party Plaintiff,

Index No. 590503-2007

-against-

DSA BUILDERS,

Third-Party Defendant.

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MICHAEL SLOSBERG AND JANET COHN SLOSBERG,

Second Third-Party Plaintiffs,

Index No. 590895-2007

-against-

DSA BUILDERS,

Second Third-Party Defendant.

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**HON. GEORGE J. SILVER, J.S.C.**

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

| Papers | Numbered |
|---|---|
| Notice of Motion, Affirmation, Memorandum of Law & Collective Exhibits Annexed | 1, 2, 3, 4 |
| Notice of Cross-Motion, Affirmation & Collective Exhibits Annexed | 5, 6, 7 |
| Affirmation In Opposition to Cross-Motion and in Reply | 8 |

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Plaintiff Steve Dwyer (Dwyer) was employed by third-party defendant/second third-party defendant DSA Builders (DSA), a general contractor retained by defendants/second third-party plaintiffs Michael Slosberg and Janet Cohn Slosberg (the Slosbergs) to renovate and combine their two adjoining cooperative units. Dwyer was injured when he fell from ladder while installing a piece of sheetrock in the Slosbger's ceiling. By order dated September 8, 2012, the Appellate Division, First Department granted Dwyer partial summary judgment on the issue of liability on his Labor Law § 240 [1] claim holding that Dwyer's injuries were proximately caused, at least in part, by the failure to provide proper protection as required by the statute (*Dwyer v Central Park Studios, Inc.*, 2012 NY Slip Op 06184). The Slosbergs now move pursuant to CPLR § 3212 for an order granting them summary judgment on their claim for contractual indemnification against DSA. DSA opposes the motion and cross-moves for an order granting it summary judgment dismissing the Slosbergs' claim for contractual indemnification.

It is undisputed that the Slosbergs, as owner, and DSA, as contractor, did not enter into a written AIA Standard Form of Agreement Between Owner and Contractor for a Small Project agreement (AIA contract). The AIA contract dated April 1, 2005 annexed to the Slosbergs' moving papers is marked "Draft" and is not signed by either the Slosbergs or DSA. AIA Document A205, General Conditions of the Contract for Construction of a Small Project (Document A205), which is annexed to the unsigned AIA contract and is included in the definition of contract documents, contains the following indemnification agreement:

> To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner . . . for and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property . . . but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor . . . regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

It is also undisputed that the indemnification provision does not run afoul of General

Obligations Law § 5-322.1, as DSA does not raise this argument in opposition to the Slosbergs' motion or in support of its cross-motion. The question, then, is whether the Slosbergs and DSA, through their course of conduct, intended to be bound by the terms of the unsigned AIA contract. In moving for summary judgment, the Slosbergs argue that DSA evinced an intention to be bound by the unsigned AIA contract and the indemnification provision by providing the requisite contract documents required by the AIA contract, including a cost breakdown, and by signing an Alteration Agreement that was included with the AIA contract documents. The Slosbergs further argue that the advance payment set forth in the AIA contract is the same amount set forth in DSA's Application and Certificate of Payment submitted to Slosbergs and which is dated April 1, 2005, the same date on the AIA contract. The Slosbergs also contend that DSA's arrangement of and payment to various subcontractors, as well as its Cost Breakdown and Continuation Sheets, clearly show that DSA supervised and directed the work and had control over the sequence and coordination of all portions of the work as required by Document A205.

In opposition, DSA argues that the Slosbergs have failed to establish their prima facie entitlement to contractual indemnification. DSA contends the AIA contract relied upon by the Slosbergs is marked "Draft" and contains numerous redline markings indicating suggested changes to AIA contract. DSA also argues that the Slosbergs have not presented any evidence that the parties intended to sign the AIA contract prior to Dwyer's accident but failed to do so as a result of a mere oversight. DSA contends that the course of conduct between the parties establishes that neither party intended to be bound by the terms of the unsigned AIA contract. DSA contends that its President, Mitchell Dennis, testified that he had never seen the AIA contract before or any AIA documents for the Slosbergs' project and did not intend to be bound by the AIA contract. DSA also contends that Michael Slosberg could not recall at his deposition if the unsigned AIA contract was the contract between himself and DSA. Finally, DSA argues that there is no evidence that it was performing work pursuant to the AIA contract because there is no evidence that either the Slosbergs or DSA did any specific act that they would not have done in the ordinary course because it was required by the unsigned contract.

Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a "grave injury," or the claim is "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered." "[A] contract may be valid even if it is not signed by the party to be charged, provided its subject matter does not implicate a statute—such as the statute of frauds (General Obligations Law § 5-701)—that imposes such a requirement" (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 367, 828 NE2d 593, 795 NYS2d 491 [2005]) and so long as there is objective evidence establishing that the parties intended to be bound (*id.* at 369; *see Priceless Custom Homes, Inc. v O'Neill*, 104 AD3d 664, 665 [2d Dept 2013]). "[I]n many instances the issue of whether or when an indemnification agreement came into being in the absence of a signed document will present a question of fact to be resolved by the trier of fact" (*Flores*, 4 NY3d at 370; *Ruane v Allen-Stevenson School*, 82 AD3d 615 [1st Dept 2011]).

Here, a review of the course of conduct between the parties establishes that there was a meeting of minds sufficient to give rise to an enforceable contract and indemnification clause.

"'In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds'" (*Flores*, 4 NY3d at 368, *quoting Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399, 361 NE2d 999, 393 NYS2d 350 [1977]). The words and deeds of DSA as reflected in the documentary evidence objectively demonstrate that DSA intended to be bound by the terms of the unsigned AIA contract. Section 4.1 of the AIA contract states that payment to the contractor by the owner shall be "[b]ased upon the Contractor's Applications of Payment." DSA submitted to the Slosbergs a document entitled "Application and Certificate For Payment" dated March 18, 2005 which referenced a contract dated April 1, 2005 and which set forth the same contract price, $636,476.18, as is set forth in section 3.1 of the AIA contract. Section 3.1 of the AIA contract also makes reference to a Cost Breakdown dated April 1, 2005 which DSA created. The AIA contract further states in section 5.1 of Document A205 that changes in the work may be accomplished by change order or by order for a minor change in the work. The Slosbergs have annexed to their moving papers a change order in the amount of $6,130.00 dated January 8, 2006 issued by DSA to reflect changes in the contract price of the work at the Slosbergs' apartment as a result of changes in millwork, audio, lighting and stone. Pursuant to Article 1 of the AIA contract, the change order and the cost breakdown are included within the AIA contract's definition of contract documents and DSA concedes that it agreed to perform the work set forth in those documents. The Slosbergs, therefore, have established that they are entitled to contractual indemnification from DSA by demonstrating that DSA substantially complied with the terms of the unsigned AIA contract and intended to be bound by those terms.

Accordingly, it is hereby

ORDERED that defendants/second third-party plaintiffs' motion for summary judgment is granted; and it is further

ORDERED that second third-party defendant DSA Builders cross-motion for summary judgment is denied; and it is further

ORDERED that the parties are to appear in Part 10 on June 7, 2016 at 9:30 a.m. for a conference; and it is further

ORDERED that movants are to serve a copy of this order, with notice of entry, upon second third-party defendant within 20 days of entry.

George J. Silver, J.S.C.

Dated: 3/24/16
New York County

FILED
MAR 28 2016
COUNTY CLERK'S OFFICE
NEW YORK

HON. GEORGE J. SILVER