

**Council on Foreign Relations, Inc. v ABC Interiors
Unlimited, Inc.**

2017 NY Slip Op 32259(U)

October 11, 2017

Supreme Court, Kings County

Docket Number: 510773/14

Judge: Larry D. Martin

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 11th day of October, 2017.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

COUNCIL ON FOREIGN RELATIONS, INC.,

PLAINTIFF,

-VS-

INDEX No. 510773/14

ABC INTERIORS UNLIMITED, INC., et al,
DEFENDANTS.

The following papers numbered 1 to 6 read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed _____	_____ 1-3 _____
Answering Affidavit (Affirmation) _____	_____ 4 _____
Reply Affidavit (Affirmation) _____	_____ 5 _____
Other Papers _____	_____ 6 _____

Upon the foregoing papers, defendant ABC Interiors Interiors Unlimited, Inc. (“ABC”) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the third-party complaint as asserted against it.

On or about September 6, 2012, plaintiff Faby Emmanuel Del Orbe (the “underlying plaintiff”) commenced the underlying personal injury main action entitled *Faby Emmanuel Del Orbe and Liliana Polanco Del Orbe v Council on Foreign Relations, Inc.*, Index No. 18101/12 (the “underlying action”) sounding in Labor Law §§ 200, 202, 240 (1), 241-a and/or 241 (6) and common-law negligence. The underlying plaintiff sought compensatory damages for personal injuries he sustained when he fell from a fourth floor window while washing the exterior windows of the premises (the “subject premises”) owned by plaintiff Council on Foreign Relations, Inc. (the “Council”) and located at 58 East 68th Street in New York, New York (Notice of Motion, exhibit A, the underlying complaint, ¶ 28). The underlying plaintiff alleged that he fell when the window anchor, to which his safety belt was attached, on the exterior wall of the subject premises became dislodged (Notice of Motion, exhibit E, Deposition of the underlying plaintiff, 93: 16-22). On or

about April 9, 2013, the Council commenced the instant third-party action against ABC, Apple Window Cleaning, Inc. and Apple Cleaning Services. Several months prior to the underlying plaintiff's accident, the Council hired ABC to install plexiglass covers on the windows of the subject premises. Subsequently, the Council hired Apple Window Cleaning, Inc. and Apple Cleaning Services (collectively, "Apple"), the underlying plaintiff's employer, to wash the windows of the subject premises.

By order (Bayne, J. [ret]) dated July 30, 2014, the underlying plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim was granted and ABC's time to move for summary judgment to dismiss the third-party complaint was extended for 60 days after the completion of the deposition of an outstanding witness Gilbert Falcone ("Falcone")¹. By order (Kurtz, J.) dated October 20, 2014, the underlying action was severed from the instant action and it was discontinued on or about December 11, 2014. Thereafter, by order (Bayne, J. [ret]) dated February 18, 2015, ABC's motion for summary judgment was granted to the extent of dismissing the Council's claims against it for contractual indemnification, contribution and failure to procure insurance. However, the February 18, 2015 order denied summary judgment to ABC on the Council's claims against it for common-law indemnification. By order (Bayne, J. [ret]) dated March 25, 2015, the Council's motion for summary judgment on its claim for common-law indemnification as against Apple and Apple's cross-motion for summary judgment seeking dismissal of the Council's claims against it were both denied. By order (Bayne, J. [ret]) dated May 13, 2015, an open commission for the deposition of Juan Loja ("Loja") was issued. Loja, a former ABC employee, installed plexiglass on the windows at the subject premises several months prior to the underlying plaintiff's accident. Subsequently, on August 13, 2015, Loja's deposition was held. The note of issue was filed herein on September 29, 2016. ABC then moved for the relief requested herein on November 28, 2016.

"Although multiple summary judgment motions in the same action should be discouraged in the absence of a showing of newly discovered evidence or other sufficient cause, a subsequent summary judgment motion may be properly entertained when it is substantively valid and when the granting of the motion will further the ends of justice while eliminating an unnecessary burden on the resources of the courts" (*Valley Nat. Bank v INI Holding, LLC*, 95 AD3d 1108, 1108 [2d Dept 2012]; see *Landmark Capital Investments, Inc v Li-Shan Wang*, 94 AD3d 418, 419 [2d Dept 2012]).

¹Falcone is the Council's Facilities Assistant.

Here, the February 18, 2015 order did not deny ABC's prior motion for summary judgment with prejudice. Notably, the Council's opposition to ABC's prior motion for summary judgment was based, among other things, on the arguments that the prior motion summary judgment was premature because of outstanding discovery, namely the deposition of Loja, and also that the Council has a valid claim for common-law indemnification as against ABC. Here, at the time ABC made its prior motion for summary judgment, Loja was already its former employee. In light of Loja's subsequent deposition, directed by open commission, and the substantive validity of the instant motion, the court will entertain it.

"While an owner who establishes that its liability pursuant to Labor Law § 240 (1) is purely statutory and vicarious may obtain common-law indemnification, such owner must also prove that the proposed indemnitor was guilty of some negligence that caused or contributed to the accident or, in the absence of any negligence, that the proposed indemnitor had the authority to direct, supervise, and control the work giving rise to the injury" (*Mid-Valley Oil Co., Inc. v Hughes Network Systems, Inc.*, 54 AD3d 394, 395 [2d Dept 2008], internal citations omitted; *see generally McCarthy v Turner Constr., Inc.*, 17 NY3d 369 [2011]). "A party can establish its prima facie entitlement to judgment as a matter of law dismissing a claim for common-law indemnification and contribution asserted against it by establishing that it was not negligent, and that it did not have the authority to direct, supervise, or control the work giving rise to the injury" (*State of New York v Defoe Corp.*, 149 AD3d 889, 889 [2d Dept 2017]).

In the underlying action, the Council was held liable, pursuant to Labor Law § 240 (1), under a statutory and vicarious liability standard. However, based upon a review of the record submitted by the parties and the relevant law, the court finds that ABC has established prima facie that it was not negligent in cutting the window anchors when Loja installed the plexiglass on the subject window, and that it lacked exclusive supervision and control of the underlying plaintiff's work giving rise to his injury, or that it had the authority to do the same (*see Mid-Valley Oil Co., Inc.*, 54 AD3d at 395-396). At his deposition, Frank Alvarez ("Alvarez"), the Council's Director of Facility Event and Security Operations testified that Falcone, Council's Facilities Assistant, removed the plexiglass from the subject window prior to the underlying plaintiff's accident (Deposition of Alvarez, 84: 8-9; 122: 20). At his deposition, Falcone testified that plaintiff's work was supervised by his employer and that he did not provide any ABC employees with saws to provide their work (Deposition of Falcone, 62: 15). Falcone further testified that he had seen ABC employees using saws and other

equipment but he could not recall when he saw them doing so or they did so on the date of plaintiff's accident (Deposition of Falcone, 62: 25; 63: 4-6). At his deposition, Paul Diaz ("Diaz"), Loja's former supervisor at ABC, testified that he provided Loja with the plexiglass, caulk, a caulking gun and a piece of weather-stripping to perform his work of installing the plexiglass on the windows at the subject premises (Deposition of Diaz, 43: 23-25). At his deposition, Loja denied using a saw or any other tools to cut metal while installing plexiglass on the windows of the subject premises or that he cut off the window bar (Deposition of Loja, 53; 61: 15-19). In his affidavit, submitted in support of the prior motion for summary judgment, Loja avers that he "did not cut ... any bolts, anchors or other metal objects in order to install the plexi-glass over the window" (aff of Loja, ¶ 3). Loja further avers that he used caulk to install the plexiglass (aff of Loja, ¶ 3). The court notes that, at his deposition, Loja testified that he used weatherstripping and not caulk to install the plexiglass (Deposition of Loja, 48: 6-25). However, this discrepancy is insufficient to create a material issue of fact regarding whether Loja cut off the window bolt or anchor for the subject window (*see Zuckerman v City of New York*, 49 NY2d 57 [1980]). In this regard, the court finds that ABC has demonstrated that it was not negligent in creating the allegedly dangerous condition which gave rise to the underlying injured plaintiff's injury.

In opposition, the Council has failed to submit sufficient evidence in admissible form to raise a triable issue of fact (*see* CPLR 3212).

Accordingly, ABC's motion for summary judgment dismissing the Council's common-law indemnification claims as asserted against it is granted.

The foregoing constitutes the decision and order of the court.

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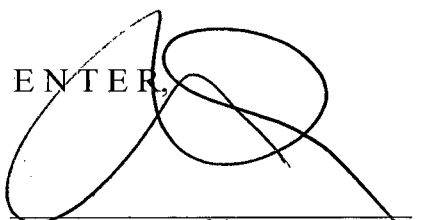
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Motion Seq. #

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ENTER

 HON. LARRY D. MARTIN
 J.S.C.

HON. LARRY MARTIN
 JUSTICE OF THE SUPREME COURT