

<b>LBW Enters., LLC v CEMD EI. Corp.</b>
2018 NY Slip Op 30543(U)
March 28, 2018
Supreme Court, New York County
Docket Number: 653912/2013
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 57

-----x  
LBW ENTERPRISES, LLC and KAM CHEUNG  
CONSTRUCTION, INC.,

Index No.: 653912/2013

Plaintiffs,

-against-

CEMD ELEVATOR CORP. d/b/a THE CITY  
ELEVATOR CO.,

Defendant.

-----x  
Schechter, J.:

In motion sequence number 005, defendant CEMD Elevator Corp. d/b/a The City Elevator Co. (CEMD) moves for summary judgment dismissing the complaint.

In motion sequence number 006, plaintiffs LBW Enterprises, LLC (LBW) and Kam Cheung Construction, Inc. (Kam) move for summary judgment on their claims for contractual and common-law indemnification.

Both motions are denied.

Background

William Flagler, a CEMD employee, commenced a personal-injury action (Flagler Action) against LBW and Kam after he was injured while working on a construction project. LBW owned the construction site (Premises) and Kam was the general contractor on the project (Affirmation in Support of Motion Sequence 005 [Sup 05], Ex A). Flagler was injured when a steel elevator platform--or plate--fell on him while he and

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his co-workers were transporting it into the Premises (Affirmation in Support 006 [Sup 06], Ex A at ¶¶ 23-24). LBW and Kam settled with Flagler for \$400,000 in April 2013.

LBW and Kam commenced this action seeking contractual and common-law indemnification in connection with the Flagler Action.

#### Deposition of William Flagler

On the date of the accident, William Flagler arrived at work and met with Chris Libroya (Libroya), his foreman. Libroya informed him that the day's assignment would be building a car lift requiring four steel plates (Reply 05, Ex A [Flagler Tr] at 46-47). All instructions on how to perform his work came from CEMD (*id.* at 122). It was his first day at the Premises and, although he had seen it done before, it was his first time moving large six by 20 steel plates (*id.* at 30, 35).

A tractor trailer with a flat bed delivered the steel plates to the Premises (Flagler Tr at 54-56). The first two plates were each taken off the flat bed by a steel arm on the truck (*id.* at 55-56). For each plate, Libroya and another CEMD employee "strapped the metal" with canvas straps and hooked onto the straps a chain, which was connected to and operated by the truck (*id.* at 56-58). There was a locking

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device attached to the canvas straps (*id.* at 58). All the truck driver did was press the button to operate the winch (*id.* at 58). Each steel plate was lifted, rested on its long edge and lifted off the flatbed with part of it resting on the sidewalk and the other part resting on the street (*id.* at 59). When the steel plate was placed on the sidewalk, the winch from the truck was disconnected (*id.* at 63). CEMD employees then put rollers beneath the plate and pushed it into the building with a five-foot metal wedge\* (*id.* at 59-60). During this process, Flagler was just "steadying" the plate with his co-workers (*id.* at 61). Once in the building, the plate was propped on a pillar or beam, tied off by a rope to the beam and then the rollers were removed (*id.* at 64-65).

The third steel plate was moved differently than the first two (Flagler Tr at 68). The movement from the truck to the sidewalk was the same. Libroya, however, then hooked up a cable from the garage of the Premises to the plate (*id.* at 68-70). The cable was about 40 feet inside the building (*id.* at 145). This "winch like device" was set up by Libroya and the building's foreman and was operated by Libroya (*id.* at 70,

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\*A wedge is a bar on two wheels with a hook placed underneath the object that needs to be lifted.

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73). The cable pulled the plate and rollers into the building as opposed to being pushed by CEMD employees with a wedge (*id.* at 70).

Flagler testified that he was injured when the cable attached to the fourth plate snapped about 10-15 feet inside the building (Flagler Tr at 75, 81-83, 148). He explained that the plate "came off the truck. It was standing upright, the rollers were applied, the cable for the pulley [from the building] was applied [to the canvas straps]" (*id.* at 80-81). The cable began pulling the platform into the building when the "the cable snapped on the pulley" (*id.* at 81). The platform then fell on Flagler's leg (*id.* at 83). Before the incident, he observed the cable and it was not rusted or frayed and did not exhibit any problems when used (*id.* at 86-87). After the incident, Flagler observed the cable and saw frayed metal close to the hook (*id.* at 85).

When asked who provided the metal wedge, Flagler stated that it belonged to CEMD (Flagler Tr at 60). When asked who provided the rollers, Flagler explained that it was "stuff that was on the job" (*id.* at 61). When asked who provided the straps, Flagler testified "I'm not sure if we had them or the truck driver had them" (*id.* at 56, 79). When asked about

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the cable, Flagler responded to the questions. He was not asked who owned the cable or associated devices.

#### Deposition of Philip Rudnick

Philip Rudnick testified on behalf LBW. Though not an officer or employee of LBW, he does consulting work for it (Supp 06, Ex J [Rudnick Tr] at 7-8). He stated that Kam was the only general contractor on the project (*id.* at 22). Rudnick and Ben Wong, LBW's owner, would visit the Premises periodically and deal with Tommy Tsang, who was Kam's president (*id.* at 22-24). LBW did not have any employees at the site and would not provide any direction for the work (*id.* at 26-27). He did not know who Kam's foreman was on the date of the incident (*id.* at 30-31). He only knew about Flagler's accident from the accident report (*id.* at 35).

#### Deposition of Tommy Tsang

Tsang would visit the site about once a week (Supp 06, Ex K [Tsang Tr] at 10, 14-15). Kam was responsible for the general progress of the project (*id.* at 17). Each subcontractor had its own foreman at the Premises who would report to Kam's foreman, Saleh (*id.* at 16-17). Other than Saleh, Kam had five or six employees cleaning the Premises and providing safety lines (closing off areas where there was a

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safety concern) (*id.* at 19-20). Saleh would make safety observations and "take care of them" (*id.* at 23). In addition, every two or three weeks an outside safety consultant visited the Premises (*id.* at 20-21).

The subcontractors' foremen were responsible for safety during delivery of materials (Tsang Tr at 23). Kam would coordinate with the subcontractors to determine where materials could be delivered and stored (*id.* at 25). Tsang testified that it was the subcontractors' responsibility to provide the equipment and to transport materials from the curb to the designated storage area and then the install site (*id.* at 32, 43). Kam was only responsible for general supervision - to ensure that nothing was obstructed and that people were able to pass through areas while materials were being transported (*id.* at 33, 43). If Saleh saw work being performed in an unsafe manner, he had the authority to stop it (*id.* at 58).

Tsang testified that CEMD arranged for the elevator materials to be delivered to the job site (Tsang Tr at 41). He was unaware of how the plates would be offloaded from the delivery vehicle to the curb (*id.*). Kam did not provide any equipment, including rollers or straps, for movement of the

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plates (*id.* at 44-45). He explained that during the delivery, CEMD should have been there and that Saleh should have been there too (*id.* at 41).

Tsang heard about Flagler's accident from Saleh. Saleh told him that someone from CEMD was injured but that it was not serious (Tsang Tr at 38-39).

#### Deposition of Mitchell Hellman

Mitchell Hellman is CEMD's president (Sup 06, Ex M [Hellman Tr] at 9). In 2007, Edward Maziarz was CEMD's vice president and was primarily responsible for its work at the Premises. Maziarz he passed away in 2012 (*id.* at 11, 27, 36, 50, 81).

CEMD employees were trained to install elevators. They had a supervisor, but the employees were mostly "self-directed on the day-to-day activities" (Hellman Tr at 48). Workers at the Premises would receive their direction from either a CEMD foreman or Maziarz (*id.* at 50). A Kam employee would provide coordination instructions like an "air traffic controller" (*id.* at 51). CEMD provided its own machinery, tools and equipment for its work (*id.* at 52-53). The building's super was "kind of in charge of things coming in and out and provided the equipment to bring things in and out" such as the

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rollers to transport the equipment (*id.* at 59). Based on third-party information, he would think that the straps were also supplied by Kam (*id.* at 60).

Hellman's understanding of the Flagler incident was that while transporting "a piece of equipment from the loading area to the elevator shaft, a piece of equipment broke" (Hellman Tr at 55). He believed the piece of equipment to be a strap "they were using to pull [a plate]" (*id.* at 56, 69).

#### Deposition of Carl Alongis

When Carl Alongis, a CEMD employee, was asked about transporting steel plates, he explained that there were multiple methods such as using an A-frame or a "skate" and that CEMD would provide such materials (Sup 06, Ex L [Alongis Tr] at 24-27). The method of transporting large plates would depend upon the work-site conditions and the supervisor at the particular job site would decide which method was used (*id.* at 32-33). CEMD employees were responsible for offloading materials at the Premises, but he was not sure what equipment was available there (*id.* at 48-49). He testified that a winch would not be used to transport plates because it is not safe as the plates would be too heavy for the winch (*id.* at 56-58). Alongis believed that each CEMD employee was responsible for

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safety on the site because of the training they received (*id.* at 44).

Contracts

LBW and Kam entered into an agreement for the Premises (LBW/Kam Agreement) (Sup 05, Ex F). The agreement provides:

"3.3.1 [Kam] shall supervise and direct the Work . . . [Kam] shall be solely responsible for and have control over construction means [and] methods . . . [Kam] shall . . . be fully and solely responsible for the job site safety of such means [and] methods . . .

Exhibit A

6. . . . the General Contractor shall provide at his own expense, all tools . . . . hoisting facilities for materials . . . . and save [LBW] harmless . . . .

11. The General Contractor shall take all necessary precautions for safety . . . ."

(Supp 05, Ex F).

The A201-1997 agreement entered into between Kam and CEMD mirrors many of the terms in the LBW/Kam Agreement and provides in relevant part:

"3.3.1 [CEMD] shall supervise and direct the Work . . . [CEMD] shall be solely responsible for and have control over construction means [and] methods . . . . [CEMD] shall . . . be fully and solely responsible for the job site safety of such means [and] methods . . . .

3.3.2 [CEMD] shall be responsible to [Kam] for acts and omissions of [CEMD's] employees . . .

3.4.1 . . . [CEMD] shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery . . . transportation . . . necessary for proper execution and completion of the Work . . .

3.18.1 To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by [CEMD] . . . [CEMD] shall indemnify and hold harmless [Kam] . . . from and against claims, damages, losses and expenses including but not limited to attorneys' fees arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury . . . but only to the extent caused by the negligent acts or omissions of [CEMD] . . .

10.1.1 [CEMD] shall be responsible for initiating, maintaining and supervising all safety precautions . . . in connection with the performance of the Contract"

(Supp 06 at 13-17, Ex E).

CEMD moves for summary judgment dismissing LBW and Kam's indemnification claims. LBW and Kam move for summary judgment on their indemnification claims.

Analysis

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of

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law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1<sup>st</sup> Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1<sup>st</sup> Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1<sup>st</sup> Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1<sup>st</sup> Dept 2002]).

#### Contractual Indemnification

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; see *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486,

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490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401,  
403 [1<sup>st</sup> Dept 2005]).

The indemnification agreement between CEMD and Kam is clear and unambiguous and provides for indemnification upon a finding of negligence by CEMD (Supp 06, Ex E at 3.18.1 [CEMD to provide indemnification to the "extent caused by the negligent acts or omissions" of CEMD]).

The only first-hand testimony in the record established that Flagler's accident was caused by a cable snapping and causing a large steel plate to fall on his leg (Flagler Tr at 68-70, 81-83). This "winch like device" was allegedly set up by a CEMD employee and a Kam employee and was operated by CEMD (*id.* at 70, 73). Flagler explained that before the incident he observed the cable and it was not rusted or frayed and that it did not exhibit any problems when used (*id.* at 86-87). The record does not establish who provided the cable and whether it was operated properly. The testimony does not indicate that the cable was defective or in disrepair, only that such a cable would generally not be used to move such large plates (Flagler Tr at 86-87; Alongis Tr at 56-58). Additionally, the decision to use the "winch-like device" for the transport of the third and fourth plates was not explained.

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Because, on this motion, movants failed to meet the "heavy burden" of proof that CEMD was negligent, their motion is denied. Likewise, CEMD's motion is denied because it did not establish that it was free from negligence.

Common-law indemnification

LBW and Kam's motion for summary judgment on the common-law indemnification claim is also denied. A party held vicariously liable may seek full indemnification from the party wholly responsible for the accident (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). Significantly, the one seeking indemnification "must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

LBW and Kam's motion for summary judgment ultimately must be denied because in addition to requiring proof of its freedom from negligence, they must prove some negligence that contributed to Flagler's accident on the part of CEMD, the proposed indemnitor (*Priestly v Montefiore Med. Ctr./Einstein*

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Med. Ctr., 10 AD3d 493, 495 [1st Dept 2004]). The record evidence on this motion fails to sufficiently establish that CEMD was negligent.

Accordingly it is

ORDERED that CEMD Elevator Corp. d/b/a The City Elevator Co.'s motion (motion sequence 005) is denied; and it is further

ORDERED that LBW Enterprises, LLC and Kam Cheung Construction, Inc.'s motion (motion sequence 006) is denied.

Dated: March 28, 2018

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HON. JENNIFER G. SCHECTER

