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| <b>Brzezicki v New York Univ.</b>  |
| 2018 NY Slip Op 30617(U)   |
| April 6, 2018  |
| Supreme Court, New York County   |
| Docket Number: 156690/2013   |
| Judge: James E. d'Auguste  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 55

X-----X

MARCIEJ BRZEZICKI,

Plaintiff,

-against-

**DECISION AND ORDER**

Index No. 156690/2013

Mot. Seq. No. 001

NEW YORK UNIVERSITY,

Defendant.

X-----X

NEW YORK UNIVERSITY,

Third-Party Plaintiff,

-against-

COLLINS BUILDING SERVICES INC.,

Third-Party Defendant.

X-----X

**Hon. James E. d'Auguste**

Defendant/Third-Party Plaintiff New York University ("NYU") moves, pursuant to CPLR 3212, for an order granting is conditional summary judgment on its claim for contractual indemnification against third-party defendant Collins Building Services Inc. ("CBS") pending a finding of liability against the respective parties herein. Third-Party Defendant CBS cross-moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor and dismissing the third-party complaint in its entirety. For the reasons stated herein, NYU's motion is denied and CBS's cross-motion is granted in part and denied in part.

**Factual and Procedural History**

Plaintiff Marciej Brzezicki commenced this action against NYU seeking damages for personal injuries allegedly sustained from an accident that occurred on NYU's premises. Plaintiff alleges that, while removing a piece of furniture from an emergency exit, he was struck by a falling object, causing injury. At the time of the alleged incident, plaintiff was employed by CBS to perform duties arising

out of a contract dated December 20, 2007 for CBS to provide “janitorial and related services” to NYU (the “contract”). NYSCEF Doc. No. 41, ¶ 1(a).

NYU served its third-party complaint on CBS on or about February 12, 2015 setting forth four causes of action for (1) contractual indemnification, (2) common law indemnification, (3) contribution, and (4) breach of contract for failure to procure insurance. NYSCEF Doc. No. 12.

### Discussion

Triable issues of material fact preclude granting summary judgment in favor of either party on NYU’s first cause action for contractual indemnification in its third-party complaint. An indemnification clause, such as the one contained in the contract, that purports to exempt the indemnitee from liability caused by its own negligence and lacks saving verbiage that would limit the clause “to the fullest extent permitted by law,” as contemplated in *Brooks v. Judlau Contracting, Inc.*, 11 N.Y.3d 204 (2008), is wholly void and unenforceable as violative of public policy. New York General Obligations Law (“GOL”) § 5-322.1. However, the Appellate Division, First Department has held that where sophisticated parties in an arm’s length negotiation have agreed to allocate the risk of liability to a third-party through the vehicle of insurance, an agreement that would otherwise offend the GOL will be enforced as a matter of public policy. *Port Parties, Ltd. v. Merch. Mart Properties, Inc.*, 102 A.D.3d 539, 540 (1st Dep’t 2013); *Great N. Ins. Co. v. Interior Constr. Corp.*, 18 A.D.3d 371, 372 (1st Dep’t 2006); *Brown v. Two Exch. Plaza Partners*, 146 A.D.2d 129, 132-33 (1st Dep’t 1989).

Here, NYU fails to submit any documentary evidence sufficient to establish that the insurance contemplated in the agreement was actually procured by CBS so as to render the indemnification provision in the contract enforceable. “In the absence of the insurance policy [CBS] was supposed to obtain, the subject indemnification provision does not have the favorable effect of allocating loss for the purpose of placing the risk on the party with insurance coverage.” *Port Parties, Ltd.*, 102

A.D.3d at 541. The only evidence of an insurance policy was submitted for the first time as an exhibit to CBS's reply papers. NYSCEF Doc. No. 60. Even if this Court were to consider such evidence, the proffered insurance policy does not salvage the indemnity agreement because the policy does not cover the alleged injuries sustained by plaintiff. Specifically, as relevant here, the "insurance does not apply to . . . '[b]odily injury' to . . . [a]n 'employee' of the insured arising out of and in the course of: (a) [e]mployment by the insured; or (b) [p]erforming duties related to the conduct of the insured's business." *Id.*, ¶ 2(e)(1)(a)-(b). Therefore, a triable issue of material fact exists as to whether or not an insurance policy was procured by CBS that would adequately allocate the risk of liability for the plaintiff's alleged injuries and bring the indemnification clause within the boundaries of public policy.

For the same reasons set forth above, that branch of CBS's cross-motion to dismiss the third-party complaint's fourth cause of action for failure to procure insurance is also denied. In failing to submit proof of the agreed upon workers' compensation insurance policy, CBS does not meet its *prima facie* burden of establishing entitlement to summary judgment on this issue. As such, NYU's motion to dismiss and the branches of CBS's cross-motion seeking summary judgment on NYU's first and fourth causes of action for contractual indemnification and breach of contract for failure to procure insurance are denied.

The branches of CBS's cross-motion seeking to dismiss NYU's second and third causes of action for common law indemnification and contribution are hereby granted. NYU concedes that "[plaintiff] was an employee of CBS, in the course of his employment for CBS at the time of the alleged injury." NYSCEF Doc. No. 57, ¶ 21 (emphasis omitted). New York Workers' Compensation Law Section 11 bars claims against an employer for common law indemnification and contribution absent a finding that the plaintiff suffered a "grave injury" within the meaning of the statute. The record supports no such finding. As CBS points out, counsel for plaintiff stipulated to the fact that, with the exception of the claimed post-concussion syndrome, the alleged injuries do not rise to the

level of a “grave injury” for the purposes of Workers’ Compensation Law Section 11. Furthermore, plaintiff has not claimed a “permanent total disability” as a result of his alleged post-concussion syndrome and it therefore does not satisfy the grave injury requirement for the purposes of Section 11. *Purcell v. Visiting Nurses Found., Inc.*, 127 A.D.3d 572, 574 (1st Dep’t 2015). Accordingly, those branches of CBS’s cross-motion for summary judgment on NYU’s second and third causes of action for common law indemnification and contribution are granted.

In accordance with the foregoing, it is hereby

ORDERED that NYU’s motion for conditional summary judgment is denied; and it is further,

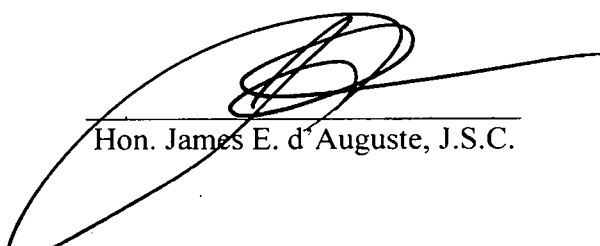
ORDERED that those branches of CBS’s cross-motion seeking summary judgment on NYU’s first and fourth causes of action for contractual indemnification and breach of contract for failure to procure insurance, respectively, are denied; and it is further,

ORDERED that those branches of CBS’s cross-motion seeking summary judgment on NYU’s second and third causes of action for common law indemnification and contribution, respectively, are granted and the same are hereby dismissed; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: April 6, 2018



Hon. James E. d'Auguste, J.S.C.