

**Tixi v 52-01 LLC**

2018 NY Slip Op 31457(U)

June 21, 2018

Supreme Court, Queens County

Docket Number: 13668/13

Judge: Timothy J. Dufficy

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

**ORIGINAL**

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY  
Justice

PART 35

-----X

PATRICIO TAXI,  
Plaintiff,  
-against-

Index No. 13668/13  
Mot. Date: 4/4/18  
Mot. Seq.: 5

52-01 LLC and GALAXY MANAGEMENT,  
INC. a/k/a GALAXY PROPERTIES, LLC  
and AEGEAN MANAGEMENT, INC.,

Defendants.

-----X

52-01 LLC,  
Third-Party Plaintiff,  
-against-

**FILED**  
JUL - 2 2018  
COUNTY CLERK  
QUEENS COUNTY

DURATECH CONSTRUCTION CORP.,

Third-Party Defendant,

-----X

52-01 LLC,  
Second Third-Party Plaintiff,  
-against-

DURATECH CONSTRUCTION CORP.,

Second Third-Party Defendant,

-----X

52-01 LLC,  
Third Third-Party Plaintiff,  
-against-

VALVERDE CONSTRUCTION CORP.,

Third Third-Party Defendant,

-----X

-----X  
**DURATECH CONSTRUCTION CORP.,**

**Fourth Third-Party Defendant,**

**-against-**

**VALVERDE CONSTRUCTION CORP.,**

**Fourth Third-Party Defendant,**  
-----X

The following papers were read on this motion by third third party defendant/fourth third party defendant Valverde Construction Corp. for summary judgment dismissing the third party actions against it

	<u>PAPERS NUMBERED</u>
Notice of Motion - Affidavits - Exhibits .....	1
Answering Affidavits - Exhibits .....	2-4
Reply Affidavits .....	5

Upon the foregoing papers it is ordered that the motion is denied.

Plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment to the third third-party defendant/fourth third-party defendant Valverde Construction Corp. (Valverde Construction) dismissing the third-party actions against Valverde Corp.

This action arises out of a construction site accident, that occurred on May 28, 2013, at 5201-5207 Queens Boulevard a/k/a 43-41 52nd Street, in Queens County, New York. Plaintiff Patricio Tixi was an employee of Duratech Construction Corp. (Duratech) when he fell from a ladder and allegedly sustained injuries.

I. The Depositions

A. The Deposition of Plaintiff Patricio Tixi

In May of 2013, plaintiff Patricio Tixi was an employee of Duratech Construction Corp. (Duratech) and worked as a laborer on a construction project. On the day of the accident, his regular supervisor was not present at the job site on that day, and he received his instructions from Jorge, "the boss of everyone on the site." Jorge took him up to the roof of the building under construction and showed him a piece of wood that had to be

removed. Jorge told him to remove the wood from concrete by using a ladder and a crow bar. Duratech had a long extension ladder at the job site. As the plaintiff stood on the ladder to remove the piece of wood, the ladder slipped out from under him, causing him to fall and to sustain personal injury.

#### B. The Deposition Testimony of Jorge Tsilogiannis

Jorge Tsilogiannis (Tsilogiannis) was the managing member of defendant 52-01 LLC, the owner of the property under development. The defendant owner hired third-party defendant Duratech. (Tsilogiannis' son Periklis is the president of Duratech) to act as the general contractor on the construction project. Tsilogiannis denies ever having given the plaintiff directions or instructions. Tsilogiannis had seen the piece of wood on the exterior of a bulkhead, and he knew that it had been put there when concrete was poured for the slab top of the bulkhead. The slab had to be framed before the concrete was poured. Valverde Construction Corp. (Valverde Corp.) was the contractor who poured the concrete, and he had seen the company put forms together during the course of its work. Tsilogiannis did not contact Valverde Corp. for the purpose of informing the company that there was a piece of wood that had to be removed.

#### C. The Deposition Testimony of Periklis Tsilogiannis

In May, 2013, Duratech, the company of which he is president, acted as the general contractor on the construction project. Duratech subcontracted work to Valverde Corp. which involved excavation, shoring, and the pouring of concrete for foundations and building structure. Duratech employed plaintiff Tixi as a laborer, and his typical job duties included sweeping floors and removing garbage. Mark Skowronski, another employee of Duratech, served as the job superintendent for Duratech. The wood that the plaintiff was attempting to remove at the time of his accident was a piece of a form that should have been removed by Valverde Corp. No one had called Valverde Corp. to ask the company to remove the wood, which would have been the proper procedure to follow.

#### D. The Deposition Testimony of Javier Valverde

By the time that Javier Valverde, the owner of Valverde Corp., learned of the injury sustained by plaintiff Tixi, the company had already left the job site. Valverde

Corp. had built wood forms to be used in the pouring of the concrete for the bulkhead, but no one had called the company to inform it that some wood had not been removed from the construction site. The company had the responsibility of removing the forms from the bulkhead after the concrete had dried. He denied leaving any forms behind, but he never checked after the accident to see if the relevant piece of wood was part of the forms built by his company. He had inspected the bulkhead after his workers had removed the forms from the bulkhead.

## II. Discussion

### A. The Fourth Third-Party Complaint

Duratech brought the fourth third-party complaint against Valverde Corp. Duratech alleges that Valverde Corp. was negligent in “failing to complete [its] contractually obligated work including removal of all wooden formwork from its completed concrete work; causing and/or permitting an unsafe ladder to be present on the subject work site; failing to properly inspect its work to ensure that there were no hazardous or dangerous conditions present on same; and failing to inspect in the vicinity its work to ensure that all portions of the contractually obligated work were completed fully.”

Summary judgment is not warranted where there is an issue of fact which must be tried. ( *See Alvarez v Prospect Hospital*, 68 NY2d 320.)

The first cause of action is for contribution and common law indemnity. “A defendant may seek contribution from a third party based upon the breach of some duty owed by that party either to the plaintiff or to the defendant . . .” (*First Bible Baptist Church, Inc. v Gates-Chili Cent. School Dist.*, 172 AD2d 1057, 1057.) In other words, “[a] party seeking contribution must show that the third-party defendant from whom contribution is sought owes a duty either to him or to the injured party and that a breach of this duty has contributed to the alleged injuries . . .” (*Nassau Roofing & Sheet Metal Co., Inc. v Facilities Development Corp.*, 125 AD2d 754, 756, *affd* 71 NY2d 599; *Sutherland v Hallen Const. Co., Inc.*, 183 AD2d 887.) In the case at bar, there are issues of fact concerning whether Valverde Corp. breached a duty owed to Duratech to complete its contractually obligated work with care by failing to remove a piece of concrete form-

work and concerning whether a breach of that duty contributed to the injuries sustained by plaintiff Tixi.

“Where one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent.” (*Eisman v Vill. of E. Hills*, 149 AD3d 806, 808 [ internal citations and quotation marks omitted].) [T]he key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is ‘a separate duty owed the indemnitee by the indemnitor’ \*\*\*.” (*Raquet v Braun*, 90 NY2d 177, 183, quoting *Mas v Two Bridges Assocs.*, 75 NY2d 680, 690.) “The duty that forms the basis for the liability arises from the principle that ‘every one is responsible for the consequences of his own negligence, and if another person has been compelled \* \* \* to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him’ \*\*\*.” (*Raquet v Braun, supra*, 183, quoting *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 NY 461, 468.) Common law indemnification is available to a party that was itself free of negligence. (*See Lewis-Moore v Cloverleaf Tower Hous. Dev. Fund Corp.*, 26 AD3d 292.)

The attempt by Valverde Corp. to obtain summary judgment dismissing the cause of action for common law indemnification is premature since on the present state of the record there are issues of fact concerning the negligence, if any, of the parties to this action. (*See Trinajstic v St. Owner, LP*, 149 AD3d 631.)

The second cause of action is for contractual indemnification. The Duratech/Valverde Corp. subcontract contains several broad indemnification clauses in favor of the general contractor. One of these, Exhibit G to the rider, provides in relevant part: “Indemnity. In consideration of the Contract Agreement, and to the fullest extent permitted by law, the Subcontractor shall defend and shall indemnify and hold harmless \*\*\* the Contractor \*\*\* from and against all liability or claimed liability for bodily injury or death to any persons \*\*\* arising out of or resulting from the Work covered by this contract agreement to the extent such Work was performed or contracted through the Subcontractor \*\*\* excluding only liability created by the sole and exclusive negligence of the Indemnified Parties. This indemnity agreement shall survive the completion of the Work specified in the Contract Agreement.” (Emphasis added.)

“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, quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153.) A party's right to contractual indemnification depends upon the specific language of the relevant contract. (*Sellitti v TJX Companies, Inc.*, 127 AD3d 724; *Sawicki v GameStop Corp.*, 106 AD3d 979; *Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255.)

In the case at bar, the language of Exhibit G, which obligates Valverde Corp. to indemnify Duratech for bodily injuries "arising out of or resulting from the Work covered by this contract agreement," is broad enough to include within its scope the injury to plaintiff Tixi. The Court of Appeals has stated: "The phrase 'arising out of' has been interpreted by this Court to mean originating from, incident to, or having connection with \*\*\*, and requires only that there be some causal relationship between the injury and the risk for which coverage is provided \*\*\*." (*Worth Const. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415; *Regal Const. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34.) Under the circumstances of this case, there is an issue of fact concerning whether there was a causal connection to the work done by the subcontractor, Valverde Corp., in arguing that the indemnification clause does not apply because the plaintiff fell from a ladder not provided by the company while doing work not supervised by the company, overlooks the possibility that the plaintiff's accident was also caused by the company's failure to remove a part of the wooden formwork. While the Valverde Corp. has no duty under Exhibit G to indemnify for "liability created by the sole and exclusive negligence of the Indemnified Parties," there is an issue of fact concerning whether the accident also arose from Valverde Corp's own negligence. Valverde Corp. did not show here that as a matter of law "ladder failure was the sole proximate cause of the accident."

The third cause of action is for breach of the contract to procure insurance. The Court notes that a cause of action for breach of contract to procure insurance differs from causes of action for contractual and common law indemnification. (*See Kinney v. G. W. Lisk Co., Inc.*, 76 NY2d 215; *Becarie v Union Bank of Switzerland*, 272 AD2d 162.) In regard to the third cause of action, Valverde Corp. did not attempt to carry the initial burden on a motion for summary judgment which required it to show prima facie that it is entitled to judgment as a matter of law dismissing the third cause of action. (*See Alvarez v Prospect Hospital, supra.*)

B. The Third Third Party Complaint

The defendant owner, 52-01 LLC, brought the third third-party complaint against Valverde Corp.

The first cause of action is for common law indemnification, and Valverde Corp. is not entitled to summary judgment dismissing it. The attempt by Valverde Corp. to obtain summary judgment dismissing the cause of action for common law indemnification is premature since on the present state of the record there are issues of fact concerning the negligence, if any, of the parties to this action. (*See Trinajstic v. St. Owner, LP*, 149 AD3d1.)

The second cause of action is for common law contribution. Under CPLR 1401, “two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them \*\*\*.” (*See Staten Island New York CVS, Inc. v Gordon Retail Dev., LLC*, 57 AD3d 760.) In the case at bar, there are issues of fact pertaining to the liability, if any, of the parties for the plaintiff’s injury.

The third cause of action is for contractual indemnification. Exhibit G to the rider to the contract includes “the Owner of the property” among the parties that Valverde Corp. is required to indemnify according to its terms. As discussed above, the language of Exhibit G, which obligates Valverde Corp. to indemnify “the Owner of the property” for bodily injuries “arising out of or resulting from the Work covered by this contract agreement,” is broad enough to include within its scope the injury to plaintiff Tixi.

The fourth cause of action is for breach of contract to procure insurance. In regard to this cause of action, Valverde Corp. did not attempt to carry the initial burden on a motion for summary judgment which required it to show *prima facie* that it is entitled to judgment as a matter of law. (*See Alvarez v Prospect Hospital, supra.*)

Accordingly, it is

**ORDERED**, that the motion is denied.

**Dated: June 21, 2018**

  
\_\_\_\_\_  
TIMOTHY J. DUFFICY, J.S.C.