

**Allen v Leon D. DeMatteis Constr. Corp.**

2018 NY Slip Op 32217(U)

September 10, 2018

Supreme Court, Suffolk County

Docket Number: 10-10335

Judge: Joseph A. Santorelli

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.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. JOSEPH A. SANTORELLI  
Justice Supreme Court

MOTION DATE 8-31-17 (022)  
MOTION DATE 12-14-17 (023)  
MOTION DATE 1-25-18 (024)  
ADJ. DATE 2-15-18  
Mot. Seq. # 022 - MD  
          # 023 - MD  
          # 024 - MD

-----X  
EDWARD W. ALLEN and MARIA ALLEN,

Plaintiffs,

-against-

LEON D. DEMATTEIS CONSTRUCTION  
CORP., COSENTINI ASSOCIATES, INC., RJR  
MECHANICAL, INC., COASTAL ELECTRIC  
CONSTRUCTION, GWATHMEY, SIEGEL &  
ASSOCIATES ARCHITECTS, LLC, JACOBS  
ENGINEERING NEW YORK, INC.,

Defendants.  
-----X

STEVEN F. GOLDSTEIN, LLP  
Attorney for Plaintiffs  
One Old Country Road, Suite 318  
Carle Place, New York 11514

WESTERMANN SHEEHY KEENAN SAMAAN  
& AYDELOTT LLP  
Attorney for Defendant/Third-Party Plaintiff  
DeMatteis Construction  
The Omni Building, Suite 702  
333 Earle Ovington Boulevard  
Uniondale, New York 11553

LEON D. DEMATTEIS CONSTRUCTION  
CORP.,

Third-Party Plaintiff,

- against -

RJR MECHANICAL, INC., INTERSTATE FIRE  
& CASUALTY COMPANY and ANRON  
SHEET METAL CORP., COASTAL ELECTRIC  
CONSTRUCTION CORP., and JACOB  
ENGINEERING, NEW YORK, INC.,

Third-Party Defendants.  
-----X

WILSON, ELSER, MOSKOWITZ, EDELMAN &  
DICKER, LLP  
Attorney for Defendant Cosentini Associates  
150 East 42nd Street  
New York, New York 10017

L'ABBATE & BALKAN  
Attorney for Defendant Gwathmey, Siegel &  
Assoc. Architects  
1001 Franklin Avenue, Room 300  
Garden City, New York 11530

RJR MECHANICAL, INC.,  
  
Second Third-Party Plaintiff,  
  
- against -

BELLO & LARKIN  
Attorney for Defendant Jacobs Engineering  
150 Motor Parkway, Suite 405  
Hauppauge, New York 11788

ANRON SHEET METAL CORP.,  
FIREMAN'S FUND INSURANCE  
COMPANY/ INTERSTATE FIRE  
INSURANCE CO., and LIBERTY  
MUTUAL/PEERLESS INSURANCE  
COMPANY,

SACKS & MUCCINI LLC  
Attorney for Defendant/Third-Party Plaintiff  
RJP Mechanical  
410 Park Avenue, 15th Floor  
New York, New York 10022

Second Third-Party Defendants.

X

-----  
Upon the following papers numbered 1 to 56 read on these motions for summary judgment : Notice of Motion/  
Order to Show Cause and supporting papers 1 - 15, 16 - 21, 22 - 27 ; Notice of Cross Motion and supporting papers      ;  
Answering Affidavits and supporting papers 28 - 35, 36 - 48, 49 - 50 ; Replying Affidavits and supporting papers 51- 54,  
55 - 56 ; Other Memoranda of Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (022) by third-party defendant/third-party plaintiff Leon DeMatteis Construction Corp., the motion (023) by defendant/third-party defendant Jacobs Engineering New York Inc., and the motion (024) by defendant/third-party defendant Coastal Electric Construction Corp. are consolidated for the purposes of this determination; and it is

**ORDERED** that the motion by third-party defendant/third-party plaintiff Leon DeMatteis Construction Corp. for, inter alia, summary judgment in its favor on the issue of liability with respect to its third-party claims against Coastal Electric Construction Corp. is denied; and it is

**ORDERED** that the motion by defendant/third-party defendant Jacobs Engineering New York Inc. for summary judgment dismissing the complaint in the main action against it is denied; and it is

**ORDERED** that the motion by defendant/third-party defendant Coastal Electric Construction Corp. for summary judgment dismissing the complaint in the main action against it is denied.

Plaintiff Edward Allen commenced this action to recover damages for personal injuries allegedly sustained on January 5, 2009, when he fell into an open shaft from a crawl space located in the basement mechanical equipment room of a building housing the United States Mission to the UN, located at 799 1<sup>st</sup> Avenue, Manhattan, New York. At the time of the accident, plaintiff was responding to a change order issued by the project engineers which required the moving of a piece of HVAC equipment known as a VAV box. The accident occurred after plaintiff climbed into the crawl space. Once inside, plaintiff took several steps towards the edge of the floor and then fell sideways into an open shaft. The building is

owned by the federal government and managed by the General Services Administration (the "GSA"). The GAS hired defendant/third-party plaintiff Leon DeMatteis Construction Corp. ("DeMatteis") as the general contractor for the project. DeMatteis hired defendant/third-party defendant RJR Mechanical Inc. ("RJR") to perform the HVAC and mechanical work for the project. RJR subcontracted a portion of its work to plaintiff's employer, defendant/third-party defendant Anron Sheet Metal ("Anron"). Other defendants to this action include the electrical contractor for the project, Coastal Electric Construction Corp. ("Coastal"); the project engineers, Cosentini Associates, Inc., and Jacobs Engineering New York Inc. ("Jacobs"); and the architect, Gwathmey, Siegel & Associates Architects, LLC.

DeMatteis joined issue denying plaintiffs' claim and asserting cross claims against RJR only. After issue was joined, DeMatteis brought a third-party action against several of its subcontractors seeking contractual indemnification and defense of plaintiffs' underlying claims. A note of issue has not been filed in the action. By order of this court dated on October 17, 2015, DeMatteis was granted leave to amend its third-party complaint to include identical claims against Coastal. On December 1, 2015, plaintiffs and DeMatteis entered a settlement agreement whereby plaintiffs discontinued their claims against DeMatteis and assigned it all of its "rights and remedies" against the remaining defendants. Thereafter, this court, by order dated November 29, 2016, granted Jacobs leave to amend its answer to the complaint to include an affirmative defense based on General Obligations Law §15-108, and granted DeMatteis leave to amend its third-party complaint to include a claim for implied contractual indemnification against Jacobs. The court's order further directed that the newly amended third-party complaint shall be deemed served upon parties to the action.

DeMatteis now moves for an order granting a default against Coastal. DeMatteis argues that Coastal has failed to respond to the newly amended third-party complaint despite its continued participation in the underlying action, and that such failure constitutes an admission as to the allegations contained therein. Alternatively, DeMatteis seeks summary judgment on its third-party claims against Coastal on the grounds Coastal is contractually required to insure, defend, and indemnify it against the underlying claims, and that DeMatteis is, in any event, entitled to common law indemnification since plaintiff's accident was caused by Coastal's failure to provide appropriate temporary lighting in the area of the mechanical room where the accident occurred. Coastal opposes DeMatteis' motion, arguing that its failure to answer the October 17, 2015 amended third-party complaint was due to inadvertent law office failure, that DeMatteis was not prejudiced by such failure since Coastal continued to fully participate in the underlying action, and that DeMatteis' motion, made more than 2½ years later, is untimely as a matter of law. Coastal further asserts that DeMatteis should be precluded from "re-setting the clock" to bring its motion for default against it by relying on the court's order permitting DeMatteis to amend the third-party complaint for a third time on November 29, 2016, as the amendments permitted therein in no way implicated Coastal's conduct. Coastal submits with its moving papers a copy of its proposed answer to DeMatteis' amended third-party complaint.

As to the branch of DeMatteis' motion for summary judgment on its third-party claims against Coastal based on its alleged failure to defend and indemnify DeMatteis, Coastal argues that language in the subcontract requiring it to indemnify DeMatteis, regardless of DeMatteis' own negligence, invalidates the indemnity provision of the parties' agreement. Coastal also argues that DeMatteis is not entitled to

common law indemnification, since triable issues exist as to whether it was DeMatteis' failure to erect railings and barricades before the opening where plaintiff fell, rather than the alleged inadequacy or inappropriateness of the temporary lighting, which proximately caused the accident. By way of a separate motion, Coastal moves for, inter alia, summary dismissal of the underlying claims against it on the grounds plaintiffs relinquished their rights to assert such claims by way of their settlement agreement with DeMatteis, and that DeMatteis is precluded from pursuing such claims since the settlement agreement improperly seeks to assign the claims to DeMatteis in violation of General Obligation's Law § 13-101. Jacobs moves for similar relief, arguing that plaintiffs' voluntarily relinquished their personal injury claims pursuant to the settlement agreement, and that DeMatteis is statutorily prohibited from pursuing such claims. Jacobs asserts that the personal injury claims should, therefore, be dismissed against it, leaving only the remaining third-party claims asserted by DeMatteis to be determined by the court.

DeMatteis opposes Jacobs' motion on the grounds it is impermissibly duplicative since Jacobs previously sought, and was denied, identical relief, that its settlement with plaintiffs do not preclude it from seeking indemnification for the damages it incurred in relation to the underlying claim, and that plaintiffs' assignment of the proceeds of any future recovery they are due under the action to DeMatteis does not run afoul of the General Obligations Law. DeMatteis further contends that Jacobs' motion should not, in any event, be considered because Jacobs' new counsel has failed to file a notice of appearance in the action. DeMatteis opposes Coastal's motion on similar grounds, arguing that the mere settlement of a claim does not extinguish the action against other defendants, that the assignment of any proceeds plaintiffs obtain in the underlying personal injury claim are freely permissible, and that it should not, as the settling party, be precluded from seeking indemnification for damages it incurs as a result of such claim.

Parties seeking summary judgment have the affirmative burden of demonstrating their entitlement thereto as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Where a moving party fails to carry its burden, its motion should be denied without regard to the adequacy of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*; *Cincotta v City of New York*, 292 AD2d 558, 559, 739 NYS2d 594 [2d Dept 2002]). Most significantly, as a general rule, a party does not meet its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense (*see Ranno v Cantor*, 129 AD3d 699, 9 NYS3d 586 [2d Dept 2015]; *Doe v Orange-Ulster Bd. of Coop. Educ. Servs.*, 4 AD3d 387, 388-389, 771 NYS2d 389 [2d Dept 2004]). Furthermore, when determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Initially, that branch of DeMatteis' motion seeking an order granting a default against Coastal is denied, as the entry of a default judgment on a third-party complaint must generally await a determination of liability against the third-party plaintiff in the main action, whereupon a cause of action for indemnity will have accrued (*see Slovik v Wang*, 110 AD2d 630, 487 NYS2d 119 [2d Dept 1985]; *Multari v Gtalin*

*Arms Corp.*, 28 AD2d 122, 282 NYS2d 782 [2d Dept 1967]). In any event, Coastal established that its failure to submit an answer in a timely manner was due to law office failure, that a potentially meritorious defense to the third-party claims against it exists, and that DeMatteis has not been prejudiced by the delay because Coastal continued to participate in ongoing discovery in the main action (see *Josovich v Ceylan*, 133 AD3d 570, 19 NYS3d 554 [2d Dept 2015]; *Thompson v County of Suffolk*, 61 AD3d 962, 878 NYS2d 181 [2d Dept 2009]). The court grants the branch of Coastal's motion seeking leave to submit its proposed answer to the amended third-party complaint included in its opposition papers, and deems such answer served on all parties to the action.

As to that branch of DeMatteis' motion for summary judgment on its third-party claims against Coastal for indemnification, the agreement between the parties designates Coastal as the prime electrical subcontractor for the project, and requires, among other things, that it "[f]urnish & [i]nstall temporary light & power per OSHA and NYC" for the duration of the project. The agreement further provides that "[Coastal] is responsible to perform and include as part of their work all things which is and/or as can be reasonably and normally inferred and interpreted [as] a part of [the] work . . . hereinafter . . . defined." Additionally, the agreement contains an indemnification provision which states, in pertinent part, as follows:

[Coastal] shall protect, indemnify, hold harmless and defend DeMatteis . . . from and against all liabilities, obligations, claims, demands, damages, penalties, causes of action, judgment, costs, losses and expenses (including without limitation, attorneys' fees and expenses) based upon or in any way arising out of injury or death of any person(s) . . . in any manner connected with or growing out of the performance by [Coastal] of its obligation under the [Subcontract], imposed upon or incurred by or asserted against DeMatteis . . . by reason of the acts or omissions of [Coastal] or anyone directly or indirectly employed by [Coastal] in connection with the Work regardless of whether said acts or omissions are caused in part by a party or parties indemnified hereunder.

The agreement further requires that Coastal obtain comprehensive general liability insurance which names Dematteis as an additional insured for the purposes of providing it coverage against, among other things, personal injury claims which accrue during the project.

"The right to contractual indemnification depends upon the specific language of the contract" (*Roldan v New York Univ.*, 81 AD3d 625, 628, 916 NYS2d 162 [2d Dept 2011]). Although indemnification clauses which fail to include the necessary savings language to prevent a party from indemnifying itself against its own negligence may be held void and unenforceable (see *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795, 658 NYS2d 903 [1997]), even clauses which fail to include such language may be enforced where the party to be indemnified is found to be free of any negligence (see *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179, 556 NYS2d 991 [1990]; *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408, 892 NYS2d 94 [1st Dept 2010]). "A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the

extent to which he or she may expect to be reimbursed provided there are no issues of fact concerning the indemnitee's active negligence" (see *George v Marshalls of MA, Inc.*, 61 AD3d 931, 932, 878 NYS2d 164 [2d Dept 2009]; *O'Brien v Key Bank*, 223 AD2d 830, 831, 636 NYS2d 182 [3d Dept 1996]). "[T]he one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of ... statutory [or vicarious] liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; see *Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 934 NYS2d 437 [2d Dept 2011]). Similarly, for a party to obtain common-law indemnification, it "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 Mgmt., Inc.*, *supra* at 65; see *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]; *Priestly v Montefiore Med. Ctr., Einstein Med. Ctr.*, 10 AD3d 493, 495, 781 NYS2d 506 [1st Dept 2004]).

Although DeMatteis established that its liability under Labor Law § 241(6), if any, is vicarious only, it failed to establish its freedom from liability with respect to plaintiff's common law negligence and Labor Law § 200 claims. Significantly, DeMatteis' moving papers do not demonstrate that it neither possessed the authority to supervise plaintiff's work or possessed any constructive or actual notice of the purported dangerous condition which caused the accident (see *Kuffour v Whitestone Const. Corp.*, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; *Nasuro v PI Assoc., LLC*, 49 AD3d 829, 831, 858 NYS2d 175 [2d Dept 2008]; *Van Salisbury v Elliott-Lewis*, 55 AD3d 725, 867 NYS2d 454 [2d Dept 2008]). Since DeMatteis failed to eliminate such triable issues, that branch of its motion for conditional summary judgment on its third-party claims for contractual and/or common law indemnification must be denied (see *Biscup v E.W. Howell, Co.*, 131 AD3d 996, 16 NYS3d 266 [2d Dept 2015]; *Arriola v City of New York*, 128 AD3d 747, 9 NYS3d 344 [2d Dept 2015]; *Nenadovic v P.T. Tenants Corp.*, 94 AD3d 534, 942 NYS2d 474 [1st Dept 2102]; *Callan v Structure Tone, Inc.*, 52 AD3d 334, 860 NYS2d 62 [1st Dept 2008]; *Barraco v First Lenox Terrace Assoc.*, 25 AD3d 427, 810 NYS2d 8 [1st Dept 2006]).

The branch of DeMatteis' motion for summary judgment on its third-party claims that Coastal failed to procure insurance naming it as an additional insured also is denied. DeMatteis failed to submit any evidence substantiating the claim that Coastal failed to obtain general liability insurance naming it an additional insured (see *Karanikolas v Elias Taverna, LLC*, 120 AD3d 522, 992 NYS2d 31 [2d Dept 2014]; *Mathey v Metropolitan Transp. Authority*, 95 AD3d 842, 943 NYS2d 578 [2d Dept 2012]; *DiBuono v Abbey, LLC*, 83 AD3d 650, 922 NYS2d 101 [2d Dept 2011]). Furthermore, the motion is denied to the extent that Dematteis seeks summary judgment on its claim that Coastal has denied it a defense in the main action, as the proper remedy for such a claim is a declaratory judgment action against Coastal's insurer to determine coverage (see *Hunt v Ciminelli-Cowper Co., Inc.*, 66 AD3d 1506, 887 NYS2d 395 [4th Dept 2009]; *Callan v Structure Tone, Inc.*, 52 AD3d 334, 860 NYS2d 62 [1st Dept 2008]; *Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401, 647 NYS2d 2 [1st Dept 1996]).

With respect to the motions by Coastal and Jacobs for summary judgment dismissing the complaint in the main action on the basis the settlement agreement executed by plaintiffs and DeMatteis

extinguished the main action against them, the court notes that the execution of a settlement and release between a plaintiff and an alleged tortfeasor generally does not release or extinguish claims against other potential tortfeasors named as defendants in an action unless the terms of the release expressly so state (see GOL §15-108; *Boeke v Our Lady of Pompei School*, 73 AD3d 825, 901 NYS2d 336 [2d Dept 2010]; *Neenan v Kamalian*, 292 AD2d 433, 738 NYS2d 889 [2d Dept 2002]; *Tufail v Hionas*, 156 AD2d 670, 549 NYS2d 436 [2d Dept 1989]; *Utter v South Brookhaven Obstetric & Gynecologic Assoc.*, 135 AD2d 811, 522 NYS2d 915 [2d Dept 1987]). Moreover, a plaintiff may freely assign a settling party the right to receive the proceeds of a personal injury action at the time of the entry of a final judgment in the action (see *Silinsky v State-Wide Ins. Co.*, 30 AD2d 1, 289 NYS2d 541 [2d Dept 1968]; *Grossman v Schlosser*, 19 AD2d 893, 244 NYS2d 749 [2d Dept 1963]). Where a settlement seeks to assign the right to receive the proceeds of a personal injury action as well as “all rights and remedies against all the parties” in such action, courts will disregard, as void, the portion of the purported assignment which may be read to transfer the settling party the right to prosecute the personal injury claim against the remaining defendants (see GOL §13-101; *Barry v New York City Transit Authority*, 121 AD2d 586, 503 NYS2d 634 [2d Dept 1986]; compare *Sierra v Garcia*, 168 AD2d 277, 562 NYS2d 624 [1st Dept 1990]).

Here, both Coastal and Jacobs failed to meet their burden on the motion by establishing, as a matter of law, that the settlement between plaintiffs and DeMatteis extinguished the main action against them or released them of liability for plaintiff’s injuries (see *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Significantly, as discussed above, unless specifically provided in the agreement, the execution of the release between plaintiff and DeMatteis neither releases the remaining defendants from plaintiffs’ claims nor extinguishes the underlying action against them (see GOL §15-108; *Boeke v Our Lady of Pompei School*, *supra*; *Neenan v Kamalian*, *supra*). Furthermore, an examination of the agreement reveals no intention by plaintiffs or DeMatteis to release the remaining defendants from the underlying claims. The court notes that the agreement specifically states that “[t]he parties desire to . . . discharge all causes of action which are the subject of the complaint . . . against DeMatteis only.” Indeed, the “Release, Discharge and Assignment” paragraph of the agreement further evinces the intention of the parties that the settlement agreement not impair the “separate and continuing litigation” actions against the remaining defendants. Moreover, the contention that the language in the agreement purporting to assign DeMatteis “all of plaintiffs’ rights and remedies at law against each and every defendant in the [main] [a]ction,” expresses an intention that the main action be somehow extinguished against the remaining defendants is rejected. Not only is the court unable to glean such an intention, but as noted above such language is generally regarded as void and ineffectual (see *Bernstein on behalf of Commissioner of Banking & Ins. v Greater New York Mut. Ins. Co.*, 706 F. Supp. 287 [S.D.N.Y. 1989]; *Barry v New York City Transit Authority*, *supra*). Accordingly, the motions by Jacobs and Coastal seeking summary judgment dismissing the complaint in the main action against them are denied.

Dated SEP 10 2018

  
 HON. JOSEPH A. SANTORELLI  
 J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION

Allen v DeMatteis  
Index No. 10-10335  
Page 8

TO:  
O'CONNOR, O'CONNOR, HINTZ, & DEVENY, LLP  
Attorney for Third-Party Defendant Anron Sheet Metal Corp.  
One Huntington Quadrangle, Suite 3C01  
Melville, New York 11747

ROBINSON & COLE LLP  
Attorney for Third-Party Defendant Interstate Fire  
280 Trumbull Street  
Hartford, Connecticut 06103

GOLDBERG & SEGALLA LLP  
Attorney for Second Third-Party Defendant  
Liberty Mutual/Peerless Insurance  
665 Main Street  
Buffalo, New York 14203

ARRONSON RAPPAPORT FEINSTEIN  
Attorney for Defendant Jacobs  
600 Third Avenue, 5th Floor  
New York, New York 10016