SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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JUAN MENDEZ,

Plaintiff,

-against- Index No. 152189/12

BANK OF AMERICA, N.A., 219 WEST 81ST RETAIL HOLDINGS LLC, AMERICON CONSTRUCTION INC. and ATLANTIC BUILDING & CONSTRUCTION CORP.,

Defendants. Mot. Seq. No. 005

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AMERICON CONSTRUCTION, INC.,

Third-Party Plaintiff,

-against- Third-Party Index No. 590517/12

LIBERTY CONTRACTING CORP.,

Third-Party Defendant.

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HON. TANYA R. KENNEDY, J.S.C.:

In this Labor Law action, defendants Bank of America, N.A. and 219 West 81st Retail Holdings LLC and defendant/third-party plaintiff Americon Construction, Inc. (Americon) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment: (1) dismissing plaintiff's Labor Law §200 claim; (2) dismissing the cross-claims asserted against Americon for contractual indemnification; (3) dismissing the cross-claims asserted against Americon for common-law indemnification[1]; and (4) in their favor on the contractual indemnification claim asserted against third-party defendant Liberty Contracting Corp (Liberty).

[1]Although defendants' notice of motion seeks dismissal of the cross-claims asserted against Americon for indemnification, defendants fail to set forth any supporting arguments for

Third-party defendant Liberty cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint in its entirety.

BACKGROUND

On March 21, 2012, plaintiff Juan Mendez (Mendez or Plaintiff) allegedly sustained personal injuries while performing demolition work at the premises located at 2260 Broadway in Manhattan. Defendant 219 West 81st Retail Holdings LLC (219 West 81st Retail Holdings) owned the premises and Defendant Bank of America, N.A. (Bank of America) was the lessee. Americon was the general contractor and Liberty, which employed Mendez, was the demolition subcontractor.

Plaintiff's amended verified complaint asserts causes of action for violations of Labor Law §§ 200, 240(1), 240(2), 240(3), and 241(6) and common-law negligence.

Americon subsequently commenced a third-party action against Liberty, asserting causes of action for common-law indemnification; contribution; contractual indemnification; and breach of contract for failure to procure insurance.

Deposition Testimony of Juan Mendez

Plaintiff was cleaning and performing demolition work on the date of the accident, (Mendez deposition transcript, P. 40, L. 15-25; P. 41, L. 2). When he arrived at the work site, his supervisor instructed him to "clean all the garbage and put them in containers" (*id,* P. 45, L. 6-11). Immediately prior to the accident, plaintiff cleaned up broken glass on the floor with a broom and his supervisor placed an eight-foot ladder near a broken window frame and instructed him to use that ladder to remove the frame (*id.,* P. 54, L. 4-14; P. 55, L. 18-22). After plaintiff stepped onto

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dismissal of these claims. Therefore, the branches of defendants' summary judgment motion to dismiss these cross-claims are denied.

the ladder, "the ladder turned, and the ladder went to one side and [plaintiff] to another" (*id.*, P. 56, L. 9-11).

Deposition Testimony of Salvatore Biundo (Biundo)

Biundo, Liberty's foreman, traveled to the work site in Liberty's van, and transported tools and equipment, including six and eight-foot fiberglass ladders (Biundo deposition transcript, P. 17, L. 8-25; P. 18, L. 2-3; L. 12-15). Biundo provided plaintiff with a crowbar and directed him to use that instrument to pull down the top of a window frame (*id,* P. 32, L. 8-11). Although Biundo was unaware of how plaintiff's accident occurred, he did observe that while Mendez was "up on the ladder, he . . . turned around, started to perform the work, [possibly missed a step], lost balance and came down off the ladder" (*id.*, P. 32, L. 19-24).

Deposition Testimony of Richard Cucci (Cucci)

Cucci, Americon's general counsel, testified that Americon, as general contractor, hired subcontractors to perform the work and that Americon did not perform any labor (Cucci July 25, 2017 deposition transcript, P. 8, L. 18-24; P. 14, L. 7-12). Cucci also testified that Americon issued a purchase order to Liberty in March of 2012 to perform demolition work at a Bank of America branch located at 2260 Broadway, which Liberty signed on April 9, 2012 (*id.*, P. 14, L. 20-25; P. 15, L. 2-10; P. 129, L. 13-25; P. 130, L. 2-12).

Cucci also testified that he signed the purchase order on behalf of Americon, and that the terms and conditions were attached to the purchase order, which also referenced insurance coverage (Cucci July 25, 2017 deposition transcript, P. 66, L. 9-23; P. 74-75; Cucci October 23, 2017 deposition transcript, P. 49, L. 23-25; P. 50, L. 2-23). According to Cucci, Americon forwarded the terms and conditions with each purchase order in accordance with its procedure (*id.*, P. 57, L. 7-23; P. 58, L. 2-15). Cucci also maintained that Liberty understood the terms and

conditions of Americon's purchase orders, including the minimum limit of insurance, since the two entities continuously worked together from 2010 through 2013 on more than two-hundred jobs (Cucci July 25, 2017 deposition transcript, P. 171, L. 12-25; P. 172, L. 2-20; Cucci October 23, 2017 deposition transcript, P. 14, L. 22-25; P. 15, L. 2-5). Further, Cucci testified that all subcontractors, including Liberty were required to obtain required insurance certificates prior to commencing any work (P. 38, L. 22-25; P. 39, L. 2-20).

Deposition Testimony of Danny Mastropierro (Mastropierro)

Mastropierro testified that he was Americon's superintendent in March 2012 (Mastropierro deposition transcript, P. 8, L. 2-8). According to Mastropierro, Liberty commenced its demolition work in "late February" or "early March" of 2012 and Liberty's foreman was present to oversee demolition operations (*id.*, P. 14, L. 18-25; P. 26, L. 19-20). Mastropierro also testified that Liberty provided A-frame ladders for the demolition work, and that no Americon laborers were present at the job site (*id.*, P. 34, L.10-25; P. 35, L. 2; P. 36, L. 9-10). Further, Mastropierro testified that Americon did not direct the work of any Liberty employee (*id*, P. 35, L. 3-24).

Deposition Testimony of Frank Cali (Cali)

Cali, Liberty's president, testified that Liberty performed demolition and recycling work (Cali deposition transcript, P. 10, L. 11-14; P.10, L. 23-25; P. 11, L. 2-10). According to Cali, Liberty and Americon commenced their working relationship in 1990 or 1991, and the two entities performed approximately 190 jobs together (*id., P.* 18, L. 22-25; P. 19, L. 2-12). Cali also testified that Liberty performed work at the location from February 17, 2012 through April 23, 2012 (*id*, P. 46, L.13-15; P. 48, L. 16-25; P. 49, L. 2-12). Cali also testified that Liberty completed 85% of the work on March 30, 2012 (id., P. 49, L. 13-17). Additionally, Cali maintained that although Liberty was required to submit proof of insurance prior to commencing its work (*id.*, P. 62, L.7-10), he did

not recall whether the purchase order included terms and conditions (*id.*, P. 64, L. 7-21). Further, Cali testified that while purchase orders on prior jobs included the terms and conditions, he never read them (*id.*, P. 64, L. 22-25; P.65, L. 2; P. 65, L. 8-16).

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact' " (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). On a motion for summary judgment, "facts must be viewed in the light most favorable to the non-moving party" (*Schmidt v One N.Y. Plaza Co. LLC*, 153 AD3d 427, 428 [1st Dept 2017] [internal quotation marks and citation omitted]).

Plaintiff's Labor Law §200 and Common-Law Negligence Claims

Defendants move for summary judgment dismissing plaintiff's Labor Law §200 claim, arguing that they did not supervise the means and methods of plaintiff's work (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). However, Plaintiff did not submit any opposition regarding dismissal of his Labor Law §200 claim. Therefore, plaintiff's Labor Law §200 claim is dismissed. Further, plaintiff's common-law negligence claim also fails and must be dismissed since Labor Law §200 is merely a codification of an owner and general

contractor's common-law duty to provide a safe work place (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

Third-Party Claims for Common-Law Indemnification and Contribution

Liberty argues that Americon's common-law indemnification and contribution claims asserted against it must be dismissed because plaintiff did not suffer a "grave injury."

> "Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, *except where the employee sustained a 'grave injury,' or the claim is 'based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered*' " (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 429-430 [2005] [emphasis added]).

There is no claim that plaintiff suffered a "grave injury" or any opposition regarding dismissal of Americon's common-law indemnification and contribution claims as asserted against Liberty. Therefore, the third-party claims for common-law indemnification and contribution claims are dismissed.

Third-Party Claim for Contractual Indemnification

Defendants contend that they are entitled to contractual indemnification from Liberty pursuant to the indemnification provision set forth under the terms and conditions of the purchase order, which provides:

> "To the fullest extent permitted by law, *Subcontractor [Liberty] shall defend, indemnify and save harmless Americon* and/or any of its parent, affiliated or subsidiary entities . . . from and against any and all claims, demands, suits, actions, proceedings, liabilities, judgments, awards, losses, damages, costs and expenses, including reasonable attorneys' fees and expenses, on account of bodily injury or personal injury . . . *directly or indirectly arising out of or in connection with or relating to the operations, attempted operations, or failure to perform operations in connection with or pursuant to this Agreement*, whether or not due or claimed to be due to in whole or in part to the active, passive or concurrent negligence or fault of Subcontractor [Liberty] or its Subcontractors or agents or anyone directly or indirectly employed by any of them or anyone else for whose acts of them may be liable . . . . *Subcontractor [Liberty] shall, immediately upon demand, reimburse*

> *Americon for all costs, expenses, legal fees*, including Americon's deductible obligation under its insurance policy, *resulting from any accident, claim, suit, action or proceeding arising out of Subcontractor's [Liberty's] work. . .*" (Cohen supporting affirmation, ¶19; exhibit C, ¶4h [emphasis added]).

The evidence which defendants submit establish that Americon issued the purchase order on March 29, 2012 and that Liberty accepted the terms and conditions on April 9, 2012, which, *inter alia*, included insurance requirements.

The evidence also established that Americon and Liberty worked together on more than nearly 200 jobs, and that past purchase orders included terms and conditions with an indemnification provision identical to the provision in this action (Cohen supporting affirmation, exhibit L).

Particularly, the purchase order states that the "Conditions printed in the Terms and Conditions section are part of this purchase order" (Cohen supporting affirmation, ¶19; exhibit C). The terms and conditions state that

> "[b]y signing and returning the attached acceptance copy of this Purchase Order, or by partial or complete performance under this Purchase Order, you, as Supplier or Subcontractor [Liberty] agree with AMERICON CONSTRUCTION INC. as follows . . . h) To the fullest extent permitted by law, Subcontractor [Liberty] shall defend, indemnify and save harmless Americon . . . from and against any and all claims . . . directly or indirectly arising out of or in connection with or relating to the operations, attempted operations, or failure to perform operations in connection with or pursuant to this Agreement . . ."
> (*id.*) [emphasis in original]).

Liberty argues in opposition and in support of the cross-motion for summary judgment that there is no admissible evidence that the terms and conditions were included in the purchase order or that any indemnification agreement existed on the accident date. Further, Liberty maintains that the indemnification provision is ambiguous and the fact that it obtained certificates of insurance is not dispositive as to whether an indemnification agreement exists.

It is well established that "[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]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

> "Workers' Compensation Law § 11 has been held to provide that '[a] term in a contract executed after a plaintiff's accident may be applied retroactively where evidence establishes as a matter of law that the agreement pertaining to the contractor's work 'was made 'as of' [a preaccident date], and that the parties intended that it apply as of that date.' "
> (*Elescano v Eighth-19th Co., LLC*, 13 AD3d 80, 81 [1st Dept 2004] [internal quotation marks and citations omitted]).

Specifically, an indemnification agreement " 'cannot be held to have a retroactive effect unless by its express words or necessary implication it clearly appears to be the parties' intention to include past obligations' " (*Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010], quoting *Kane Mfg. Corp. v Partridge*, 144 AD2d 340, 341 [2d Dept 1988] [internal citations omitted]; *accord Perez Juarez v Rye Depot Plaza, LLC*, 140 AD3d 464, 465 [1st Dept 2016]; *Temmel v 1515 Broadway Assoc., L.P.*, 18 AD3d 364, 365-366 [1st Dept 2005]).

Here, defendants demonstrated that the purchase order's indemnification provision was expressly intended to have retroactive effect (*see Mikulski v Adam R. West, Inc., supra* at 911; *see e.g. Pena v Chateau Woodmere Corp.*, 304 AD2d 442, 443-444 [1st Dept 2003] [contractual indemnification provision was retroactively applicable to date prior to accident where parties agreed to make it retroactive to a date three days before the accident]).

The evidence also demonstrates that Liberty commenced its demolition work nearly a month prior to plaintiff's accident on February 17, 2012 and provided certificates of insurance naming defendants as additional insureds prior to the accident. Although Liberty argues that there is no evidence that the terms and conditions were included in the purchase order, the purchase order indicates that Liberty accepted its terms and conditions. Therefore, Liberty has failed to raise an issue of fact.

Contrary to Liberty's contention, the terms and conditions of the purchase order are unambiguous. "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Whether an agreement is ambiguous is an issue of law for the court (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). The proper inquiry in determining ambiguity is "whether the agreement on its face is reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]).

"Partial" is defined as "[o]f, relating to, being, or affecting only a part; not total; incomplete" (American Heritage Dictionary of the English Language 1281 [4th ed 2000]). The introductory sentence of the terms and conditions and the indemnification provision, when read together, clearly and unambiguously provide that Liberty agreed to defend and indemnify Americon based upon partial or complete performance of the work under the purchase order. Even though Liberty argues that no indemnification agreement existed on the date of the accident, the terms and conditions clearly provide that they retroactively apply to partial performance of the work, i.e., to a date prior to full execution of the purchase order (*see Mikulski v Adam R. West, Inc.*, *supra* at 911).

Therefore, the branch of defendants' motion for summary judgment is granted in favor of Americon on its claim against Liberty for contractual indemnification, and the branch of Liberty's cross-motion seeking dismissal of Americon's contractual indemnification claim is denied.

Third-Party Claim for Failure to Procure Insurance

Finally, Liberty argues that it complied with its insurance procurement obligations and submits certificates of insurance naming Americon as an additional insured (Black supporting affirmation, exhibit 7) and a general liability insurance policy from Greenwich Insurance Company for the policy period of June 20, 2011 through June 20, 2012 (*id.*, exhibit 14). The policy includes an additional insured endorsement extending coverage to organizations "when required in construction agreement with you" (*id.*) (*see Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]). However, there is no opposition regarding dismissal of Americon's third-party claim against Liberty for failure to procure insurance. Therefore, this claim is dismissed.

CONCLUSION

Accordingly, it is

ORDERED that the motion of defendants Bank of America, N.A. and 219 West 81st Retail Holdings, LLC and defendant/third-party plaintiff Americon Construction, Inc. for summary judgment is granted to the extent of (1) dismissing plaintiff's Labor Law §200 and common-law negligence claims, and (2) granting in favor of defendant/third-party plaintiff Americon Construction, Inc. on its contractual indemnification claim against third-party defendant Liberty Contracting Corp., and is otherwise denied; and it is further

ORDERED that the cross-motion of third-party defendant Liberty Contracting Corp. for summary judgment is granted to the extent of dismissing the third-party claims for common-law indemnification, contribution, and failure to procure insurance, and is otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
April 5, 2019

ENTER:

Hon. Tanya R. Kennedy
J.S.C.

HON. TANYA R. KENNEDY