

McKee v Sciame Constr., LLC
2020 NY Slip Op 30308(U)
February 4, 2020
Supreme Court, New York County
Docket Number: 161486/2015
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2**

-----X
PETER MCKEE,

Plaintiff,

-against-

SCIAME CONSTRUCTION, LLC, F.J. SCIAME
CONSTRUCTION CO., INC., and 404 PARK PARTNERS, LP,

Defendants.

DECISION & ORDER

Index No. 161486/2015

Mot. Seq. Nos. 002, 003,
004 & 005

-----X
SCIAME CONSTRUCTION, LLC and 404 PARK PARTNERS,
LP.,

Third-Party Plaintiffs,

-against-

FIVE STAR ELECTRIC CORP.,

Third-Party Defendant,

-----X
SCIAME CONSTRUCTION, LLC and 404 PARK PARTNERS,
LP.,

Second Third-Party Plaintiffs,

-against-

UNITED SHEET METAL CORP. d/b/a UNITED AIR
CONDITIONING CORP, II LLC and UNIVERSAL SERVICES
GROUP, L.T.D.,

Second Third-Party Defendants.

-----X
Hon. Kathryn E. Freed, J.S.C.

Motion sequence numbers 002, 003, 004 and 005 are hereby consolidated for disposition.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

Motion Sequence 002

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION AND AFFIRMATION	59-60
EXHIBITS ANNEXED	61-69
ANSWERING AFFIRMATION	112
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REPLY AFFIRMATION	126

Motion Sequence 003

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NOTICE OF MOTION AND AFFIRMATION	74
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Motion Sequence 004

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION AND AFFIRMATION	81-83
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ANSWERING AFFIRMATION	111, 123

Motion Sequence 005

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION AND AFFIRMATION	91-92
EXHIBITS ANNEXED	93-106
ANSWERING AFFIRMATION	115
EXHIBITS ANNEXED	116-117
REPLY AFFIRMATION	124

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on August 12, 2014 when, while working at a construction site located at 404 Park Avenue South, New York, New York (the Premises), he tripped over debris on the roof, causing him to fall.

In motion sequence number 002, second third-party defendant Universal Services Group, Ltd. (Universal) moves, pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint against it.

In motion sequence number 003, defendant/third-party plaintiff/second third-party plaintiffs Sciame Construction, LLC, F.J. Sciame Construction Co., Inc (collectively Sciame) and 404 Park Partners, LP (404 Park) (together the Sciame Defendants) move, pursuant to 22 NYCRR 202.21 (e), to strike the note of issue, vacate the certificate of readiness, and strike the action from the trial calendar, and to compel discovery.

In motion sequence number 004, Universal moves, pursuant to 22 NYCRR 202.21 (e), to strike the note of issue, vacate the certificate of readiness, strike the action from the trial calendar, and to compel discovery.

In motion sequence number 005, second third-party defendant United Sheet Metal Corp. d/b/a United Air Conditioning Corp. II LLC (United) moves, pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint against it.

BACKGROUND

On the day of the accident, the Premises were owned by 404 Park. 404 Park hired Sciame as the general contractor at the Premises to convert an office building into a condominium (the Project). Sciame, in turn, subcontracted electrical work to former third-party defendant Five Star Electric Corp. (Five Star). Sciame also retained Universal for roof work and United for air conditioning installation. Plaintiff was a worker employed by United.

FACTUAL & PROCEDURAL HISTORY

The facts of this case are set forth in detail in the decision and order of this court dated November 26, 2018 (the Prior Order) (United's notice of motion [motion sequence 002], exhibit F [Doc 66]), which granted Five Star's motion for summary judgment to dismiss the Scieme Defendants' third-party complaint (the Prior Motion).¹ On January 29, 2019, the parties appeared for a compliance conference that resulted in a so-ordered stipulation (the Stipulation) (United's notice of motion [motion sequence 004], exhibit C [Doc 86]).

As relevant herein, the Stipulation provided that: (1) all third-party defendants would respond to outstanding discovery by March 1, 2019; (2) plaintiff would file the note of issue by March 8, 2019; and (3) that United and Universal reserved the right to depose all parties "within 30 days after [third-party defendants'] motion for summary judgment" (*id.*). In addition, the parties were given written notice of this Court's Part Rules which provide, *inter alia*, as follows:

"Any party having disclosure issues must contact the Part Clerk . . . to arrange for a telephone conference with Justice Freed or her Law Clerk before resorting to motion practice. Such a conference must be arranged before the last day on which discovery is due. Failure to do so before the last day for discovery will result in the waiver of all further discovery absent a showing of good cause. No discovery motion may be made with out permission of the court. The affirmation of good faith in support of any discovery motion must set forth with specificity the efforts made to resolve the discovery dispute prior to making the motion, when permission to make the discovery motion was granted, as well as the name of the person who granted such permission.

"Any provisions of all prior disclosure orders not inconsistent with this order remain in effect"

¹ Relevant facts will be addressed below.

(*id.*). On February 14, 2019, Universal moved for summary judgment dismissing the second third-party complaint. Then, on February 22, 2019, plaintiff filed the note of issue. Subsequently, 20 days later, on March 14, 2019, United and Universal both moved to strike the note of issue, seeking additional discovery.

ANALYSIS

The Motions to Strike the Note of Issue and Compel Discovery (motion sequence numbers 003 and 004)

The Sciame Defendants and Universal seek to strike the note of issue and vacate the certificate of readiness in this action on the ground that outstanding discovery remains. They then seek to compel the outstanding discovery. Specifically, the Sciame Defendants seek outstanding responses to third-party document demands while Universal seeks the same responses in addition to the depositions of unspecified “defendants” (Pomerantz’s affirmation in support, ¶ 12).

In the interests of judicial efficiency, and to streamline the flow of cases from inception, through discovery and to trial, this Court issued Part Rules (*Macias v City of Yonkers*, 65 AD3d 1298, 1299 [2d Dept 2009] [“Courts operating under the individual assignment system are authorized to establish rules for the proceedings before them”]). This Court’s rules include that, as a prerequisite to the filing of any motion related to discovery, the parties must conference with this Court regarding the issues to be raised by the motion. If, after the conference, the issues cannot be resolved and it is necessary to make a motion, the movant, in its affirmation of good faith, must set forth (1) the efforts it made to resolve the issues and (2) precisely state when and by whom it was granted leave to file the motion.

The Sciame Defendants and Universal have failed to adhere to this Court's Part Rules. As an initial matter, in their affidavits of merit, the moving parties fail to sufficiently set forth what efforts they made to obtain the outstanding discovery or hold the outstanding depositions over the nearly three years since Sciame initiated the second third-party action.² In addition, the parties fail to specifically identify who granted them leave to file these motions and when such leave was given. Further, the parties never conferenced with the court with respect to these issues.

The fact that one attorney contacted this Court's Part Clerk ex parte seeking guidance with respect to outstanding discovery does not constitute a "conference" as required by this Court's Part Rules. Nor does the fact that this Court was unavailable to conference this matter preclude the parties from scheduling and holding a conference (telephonic or otherwise) with the principal law clerk, who was available. Accordingly, the motions to strike the note of issue and seek additional discovery are denied (*see Hornsby v Cathedral Parkway Apts. Corp.*, ___ AD3d ___ [1st Dept 2020], 2020 NY Slip Op 00526 ["The motion court did not improvidently exercise its discretion" when it denied the entirety of a motion due to a violation of the part's rules]).

The Motions for Summary Judgment (motion sequence numbers 002 and 005)

Universal and United both move for summary judgment dismissing the Sciame Defendant's second third-party complaint as against them. The second third-party action alleges causes of action against Universal and United sounding in contractual indemnification, failure to procure insurance, contribution and common-law indemnification.

² In fact, it appears that, prior to the filing of the note of issue and the subsequent filing of these motions, no party ever sought leave to compel discovery.

Contribution and 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 also *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). In addition, indemnification provisions “must be strictly construed so as to avoid reading unintended duties into them” (*905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]).

Additional Facts Relevant to these Motions

United and Universal’s motions for summary judgment mirror the arguments raised by Five Star in the Prior Motion. Accordingly, a brief recitation of such arguments is necessary.

As relevant to the current motions for summary judgment, plaintiff alleged that he was a construction worker on the Project at the Premises. On the day of the accident, he was working on the roof of the Premises when he tripped on debris, causing him to fall. Plaintiff testified that he could not recall what type of debris he tripped over, specifically stating: “I’m not sure whatever I tripped on, but I fell” (Prior Order at 2) and noting that the debris could have been electrical or roofing debris, but he wasn’t sure which.

In addition, Peter Politi, Sciame’s superintendent, testified at his deposition that there was ongoing work on the roof on the day of the accident, but that he did not witness the accident, and was unaware of it until the filing of the instant action (Prior Order at 3).

Based on these depositions, Five Star, the electrical subcontractor, moved for summary judgment dismissing the third-party complaint, wherein Sciame sought, inter alia, contractual

indemnification from Five Star. The contractual indemnification provision found in the contract between Sciame and Five Star required that “Five Star indemnify and hold Sciame harmless from any injuries arising from the Project ‘but only to the extent caused by the negligent acts or omissions of [Five Star]’” (Prior Order at 4). Five Star argued that, because plaintiff did not know what he tripped over, it would be entirely speculative to find Five Star negligent (*Kane v Estia Greek Rest.*, 4 AD3d 189, 190 [1st Dept 2004] [“Absent an explication of facts explaining the accident, the verdict would rest on only speculation and guessing, warranting summary judgment”]).

To raise a question of fact as to Five Star’s negligence, Sciame submitted the affidavit of Azfal Basrudin, United’s “General Super.” In it, Basrudin stated that he did not witness the accident but, on the day of the accident, he “received a phone call from Mike Ryan, who was the United foreman” at the Project (Basrudin Aff, ¶ 2). During that telephone conversation, Ryan – who also did not witness the accident – purportedly told Basrudin that plaintiff had told him that he “had tripped over a spool of BX cable (used for electrical wiring)” and that the BX cable “belonged to . . . Five Star” (*id.*).

Ultimately, in deciding to dismiss the third-party complaint as against Five Star, this Court determined that the Basrudin affidavit was hearsay and did not raise a question of fact as to whether plaintiff, in fact, tripped over Five Star’s debris (*see* Prior Order, Doc. 66, at 8-9).

Here, with respect to the current motions for summary judgment seeking the dismissal of the contractual indemnification claims against them, United and Universal submit copies of their contracts with Sciame. Both contracts contain the same indemnification provision as the one in the Sciame/Five Star contract (Docs 68 and 93). Specifically, the indemnification provisions provide that United and Universal must defend and indemnify Sciame from any injuries arising

from the Project at the Premises, “but only to the extent caused by the negligent acts or omissions of the Subcontractor” (Doc 68, § 4.6, Doc 93, § 4.6).

Based on the evidence considered in the Prior Motion – plaintiff and Politi’s testimony and Basrudin’s affidavit – United and Universal have established their prima facie showing of entitlement to judgment as a matter of law. As noted previously, plaintiff’s statement that he was “not sure [of] whatever [he] tripped on” (plaintiff’s tr at 27-28) is “the prototypical speculation and guessing as to issues of a defendant’s negligence which our caselaw prohibits” (Prior Order, at 8). It was speculative as against Five Star and is equally speculative with respect to United and Universal.

In opposition, the Scieme Defendants fail to raise any triable issues of fact precluding summary judgment in favor of United or Universal on this claim. Initially, the Scieme Defendants argue that United and Universal had a duty, under their respective contracts with Scieme, to clean up their own waste materials and rubbish and, therefore, a question of fact remains as to whether they fulfilled such a duty.³ This argument is unpersuasive because, as discussed above, plaintiff was unable to specifically identify what he tripped over. Accordingly, it would be entirely speculative to assert that plaintiff tripped over “waste materials or rubbish caused by operations performed under” either the Scieme/Universal or Scieme/United Agreements (Doc 68, § 4.4.1; Doc 93, § 4.4.1). In fact, the cited provisions explicitly exclude

³ Specifically, section 4.4.1 of Scieme’s respective contracts with Universal and United included the following language:

“The Subcontractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations performed under this Subcontract. The Subcontractor shall not be held responsible for conditions caused by other contractors or subcontractors”

liability “for conditions caused by other contractors or subcontractors” (*id.*), which further emphasizes the necessity of establishing whose debris plaintiff tripped over before assigning contractual liability – something that cannot be done based on the evidence submitted.

Next, as to United only, the Sciamé Defendants submit, for the first time in their opposition papers, the affidavit of John Gavin, who stated that he was United’s foreman at the Project at the Premises on the day of the accident, and that he and plaintiff were the only United workers present at the Premises that day. Further, Gavin stated that he “personally witnessed plaintiff sustain an accident”, that he “observed plaintiff walking on the roof”, and that “[a]s he walked towards the exit, plaintiff stumbled on a wooden wheelbarrow ramp that was built over the steps. He fell into the wall on his left, trapping his hand” (Gavin aff, ¶ 3). Importantly, this affidavit is strikingly different from all prior evidence in this action, and it materially contradicts the Basrudin affidavit (which, notably, was also submitted by the Sciamé Defendants in connection with the Prior Motion).

Given plaintiff’s testimony that he was unaware of any witnesses, and the Sciamé Defendant’s previous position that they, too, were unaware of anyone who saw the accident (see Prior Motion and Basrudin Aff), this Court finds it incredible that Gaven was disclosed as a witness prior to the filing of the note of issue.⁴ Such a failure is a violation of CPLR 3101(a), and Sciamé and 404 Park provide no reason, explanation or valid excuse for said failure.

Accordingly, in light of the above, and considering that the Gaven affidavit, produced by the Sciamé defendants, materially conflicts with evidence previously produced and relied upon

⁴ Although discovery was stayed during the pendency of the prior summary judgment motion, there existed an approximately three-month time period between this Court’s issuance of the Prior Order and the filing of the note of issue wherein discovery could have been exchanged. However, it appears that no discovery – including Gaven’s witness information – was exchanged during that time.

by the Sciamé defendants, this Court declines to consider the affidavit (*see Gallway v Muintir, LLC*, 142 AD3d 948, 949 [2d Dept 2016] [“the Supreme Court providently exercised its discretion in refusing to consider the affidavit of plaintiff’s granddaughter The plaintiff failed to disclose the witness to the defendants . . . and did not offer a valid excuse for that failure”]).

Given the foregoing, the Sciamé defendants have failed to establish the existence of a question of fact that would preclude United or Universal’s motions for summary judgment on their contractual indemnification claims. Accordingly, United and Universal are entitled to summary judgment dismissing the same.

Similarly, United and Universal are granted summary judgment dismissing the common-law contribution and common-law indemnification claims as against them (*Martins v Little 40 Worth Assoc., Inc.*, 172 AD3D 483, 484 [1st Dept 2010] [common-law indemnification requires proof that “the proposed indemnitor’s negligence contributed to the cause of the accident” and “that the party seeking indemnity was free from negligence”]). As it cannot be established that the proposed indemnitors – United or Universal – were negligent, the common-law claims cannot survive.

Breach of Contract for Failure to Procure Insurance

United and Universal are entitled to summary judgment dismissing this claim. This cause of action, as pleaded in the second third-party complaint, is premised on Universal and United’s insurers’ refusal to defend and/or indemnify the Sciamé Defendants, and it claims damages arising from the “failure” of Universal and United’s insurers to agree to provide coverage

pursuant to their respective policies (second third-party complaint, ¶ 47). Such a cause of action lies against their insurance carriers, not against Universal and United.

Considering the foregoing, United and Universal are entitled to summary judgment dismissing the second third-party complaint as against them.

This Court has considered the parties' remaining arguments and finds them to be without merit or unnecessary to address given the findings above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendant/third-party plaintiff/second third-party plaintiffs Sciame Construction, LLC, F.J. Sciame Construction Co., Inc., and 404 Park Partners, LP's motion (motion sequence number 003), pursuant to 22 NYCRR 202.21 (e), to strike the note of issue, vacate the certificate of readiness, and strike the action from the trial calendar, is denied; and it is further

ORDERED that second-third party defendant Universal Services Group, Ltd's (Universal) motion (motion sequence number 004), pursuant to 22 NYCRR 202.21 (e), to strike the note of issue, vacate the certificate of readiness, and strike the action from the trial calendar, is denied; and it is further

ORDERED that Universal's motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint as against it is granted, and the second third-party complaint is dismissed as against Universal with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that second third-party defendant United Sheet Metal Corp. d/b/a United Air Condition Corp. II LLC's (United) motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint as against it is granted, and the second third-party complaint is dismissed as against United with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing the second third-party action against Universal and United accordingly; and it is further

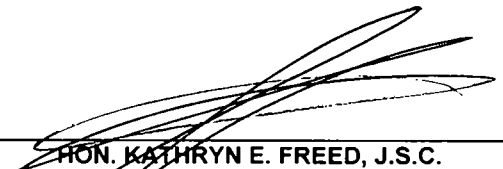
ORDERED that, within 20 days of entry of this order, counsel for defendants is directed to serve a copy of the same, with notice of entry, upon the Clerk of the Court and upon the Clerk of the General Clerk's office in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh), who are directed to amend their records to reflect the change in the caption herein; and it is further

ORDERED that, within 20 days of the entry of this order, counsel for United and Universal are directed to serve a copy of this order, with notice of entry, on counsel for all parties; and it is further

ORDERED that counsel for all remaining parties are to appear for a previously scheduled settlement conference before Mediator Miles Vigilante at 80 Centre Street, Room 103, on March 18, 2020 at 10 a.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

2/4/2020
DATE


HON. KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE