

Shah v 20 E. 64th St. LLC
2020 NY Slip Op 31002(U)
April 20, 2020
Supreme Court, New York County
Docket Number: 156305/2015
Judge: Joel M. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. JOEL M. COHEN</u>	PART	IAS MOTION 3EFM
	<i>Justice</i>		
	_____X	INDEX NO.	<u>156305/2015</u>
HEMANT SHAH, VARSHA SHAH,		MOTION DATE	<u>09/16/2019</u>
Plaintiffs,		MOTION SEQ. NO.	<u>026</u>

- v -

20 EAST 64TH STREET LLC, TRI STAR CONSTRUCTION
CORP., URBAN FOUNDATION/ENGINEERING, LLC,
ABELOW SHERMAN ARCHITECTS LLC, RA
CONSULTANTS LLC

**DECISION + ORDER ON
MOTION**

Defendants.

_____X

The following e-filed documents, listed by NYSCEF document number (Motion 026) 1127, 1128, 1129, 1130, 1148, 1150, 1151, 1154, 1156, 1157

were read on this motion for COMMON LAW INDEMNIFICATION.

This case arises out of a construction project undertaken at the request of Defendant 20 East 64th Street LLC ("20 East"). 20 East retained Defendant Tri-Star Contracting Corp. ("Tri-Star") to be the construction manager for the project. Tri-Star, in turn, retained Defendant Urban Foundation/Engineering, LLC ("Urban") to be the excavation contractor. As described in greater detail in an earlier order of the Court (NYSCEF 838), the construction caused substantial damage to Plaintiffs' adjoining home at 22 East 64th Street. Plaintiffs brought an array of tort claims against all defendants as well as a breach of contract and contractual indemnification claim against 20 East.

In this post-trial motion, 20 East seeks common law indemnification from Tri-Star and Urban for the strict liability and contract claims for which 20 East was found liable to Plaintiffs.

For the reasons set forth below, the Court finds that 20 East is entitled to common law indemnification with respect to strict liability claims, but not with respect to the contract claims.¹

Separately, 20 East seeks an order declaring that it is not obligated to reimburse Plaintiffs for attorneys' fees incurred after judgment was entered in Plaintiffs' favor. This request is premature. It will be considered if and when Plaintiffs seek such fees.

Accordingly, 20 East's motion is granted in part and denied and part.

Procedural Background

Summary Judgment

On September 26, 2017, the Court (Kotler, J.) issued an omnibus summary judgment decision that resolved a number of issues and left others for trial. (NYSCEF 359) ("*SJ Op.*"). As relevant here, the Court found that Defendants 20 East and Urban (but not Tri-Star) were strictly liable for damage to Plaintiffs' property caused by the construction because the physical impact on the property exceeded applicable regulatory standards. *Id.* at 13-17. The Court denied 20 East's motion to dismiss Plaintiffs' negligence claims because, although 20 East was not "actively" negligent, it could be found vicariously liable for damage resulting from negligence by Tri-Star and/or Urban. The Court left for trial whether and to what extent 20 East would also be liable for breach of contract. All questions regarding damage to Plaintiffs' home, and the cost to repair such damage, also were left for trial.

¹ This decision does not address 20 East's entitlement, if any, to *contractual* indemnification from Tri-Star or Urban, which is beyond the scope of 20 East's motion. (See Reply Br., NYSCEF 1156, at 7.) 20 East made a motion with respect to contractual indemnification from Urban prior to the Phase II trial. It was denied with leave to renew in light of the jury verdict in that trial. (NYSCEF 1119.)

The Court also grappled with various cross-claims asserted by and among 20 East, Tri-Star, and Urban. First, the Court granted 20 East's motion for summary judgment against both Tri-Star and Urban for "conditional" common law indemnification, dependent on a finding at trial that Tri-Star and/or Urban were negligent. *Id.* at 24 ("A party may seek a conditional indemnification order prior to resolving the main action, so long as there are no issues of fact as to that party's active negligence."). The Court found 20 East was entitled to such common law indemnification because there was no evidence that 20 East was actively negligent and therefore "20 East will only be liable vicariously for negligence, and thus may see conditional indemnification." *Id.* at 24-25. Second, the Court held that 20 East was entitled to conditional *contractual* indemnification from Urban, pursuant to the terms of the subcontract between Urban and Tri-Star. Again, the Court found that such indemnification was permissible because 20 East was not actively negligent and thus it could only be "potential[ly] liable for negligence." *Id.* at 25. Finally, the Court denied Tri-Star's motion to dismiss 20 East's claims against it for contractual indemnification, common law indemnification, contribution, and failure to procure insurance. *Id.* at 27-28.²

Trial

In view of the complex web of claims and cross-claims, the parties stipulated to (and the Court ordered) a bifurcated trial.

Phase I of the trial was divided into two parts. First, a jury was to determine the damages to which Plaintiffs were entitled on their strict liability claims (as to which liability had been determined against 20 East and Urban – but not Tri-Star – on summary judgment) and

² The Court also denied Tri-Star's motion for summary judgment dismissing Urban's claim against it for common law and contractual indemnification. *Id.* at 28-29. Those rulings are irrelevant to the present motion, which relates solely to 20 East's claims for indemnification.

negligence claims (as to which liability would be determined in Phase 2). Second, the Court was to determine liability and damages on Plaintiffs' claims *solely against 20 East* for breach of contract and contractual indemnification. The Court heard evidence that was relevant only to the contract claims outside the presence of the jury.

In advance of the Phase I trial, it was understood that the claims before the Court and the jury were independent. They could have been tried in separate proceedings, but were not. Accordingly, the assessment of damages by the Court and the jury might not be the same. (NYSCEF 836 at 40-43).

Phase II of the trial was to determine liability and relative fault with respect to negligence claims against 20 East, Tri-Star and Urban, Plaintiffs' claim for punitive damages with respect to those claims, and cross-claims among the defendants.

Phase I

1. The Jury Verdict

After an eight-day trial, on December 19, 2018, the jury determined that Plaintiffs suffered damages proximately caused by the construction in the amount of \$5 million (for repairs) and \$500,000 for alternative living expenses.

2. The Bench Decision

On March 7, 2019, the Court issued a decision with respect to the breach of contract and contractual indemnification claims asserted solely against 20 East. (NYSCEF 838.) Urban and Tri-Star were not parties to the contract and therefore they were not subject to or bound by the Court's decision.

With respect to liability, the Court found that 20 East breached both paragraphs 3 and 19 of the parties' License Agreement and was required to indemnify Plaintiffs as a result of such breaches. (*Id.* at 19-24).

As to paragraph 3, the Court found that: "[T]he evidence established that 20 East breached the terms of paragraph 3 of the Agreement, which required that '[t]he Work ... pursuant to this Agreement shall be performed in a good and workmanlike manner and in compliance with all applicable laws, codes, rules and regulations.'" Consistent with Judge Kotler's decision and her finding of strict liability against 20 East and Urban, the Court found that 20 East breached paragraph 3 because "the Work" was not done in compliance with New York City Building Code, Sections 3309.1 and 3309.3, and the Department of Buildings' Technical Procedure Notice # 10/88. (*Id.* at 19- 20).

As to Paragraph 19, the Court found that 20 East breached this obligation by failing to "cause its contractors to promptly repair" the Plaintiffs' property or otherwise compensate the Shahs' for the damage sustained so they could make repairs to their own home. While "the breach of Paragraph 19 did not by itself cause the underlying damage to the Shahs' home." (NYSCEF 838 at 24), the Court determined that it "provides an alternative ground for requiring 20 East to compensate the Shahs for the expense of repairing the home," and "an independent basis for an award of the costs of litigation." *Id.*

As a result of those breaches of contract, the Court found that Plaintiffs were entitled to \$6,255,007 in damages for the cost of repairing their home (\$1,255,007 more than found by the jury); \$1,152,000 for alternative living expenses (\$652,000 more than found by the jury); reasonable attorneys' fees as provided in the parties' contract (later determined by a JHO to be \$1,850,000); statutory interest from November 21, 2014 to the date of judgment (later

determined by the Clerk to be \$3,040,931.50); plus costs and disbursements taxed by the Clerk of \$1,235, for a total of \$12,299,173.50. See NYSCEF 838 at 1-2; NYSCEF 934 (judgment).

Phase II

Following a seven-day trial, on July 24, 2019 the jury found that Tri-Star and Urban were negligent and that this negligence caused Plaintiffs' property damage. The jury assigned Tri-Star 60% of the fault and Urban 40% of the fault. No fault was ascribed to Plaintiffs or 20 East (which had been found by Justice Kotler not to have been negligent).

Based on this finding, 20 East argues it has satisfied the conditional element of its 2017 award of summary judgment and, therefore, is now entitled to complete common-law indemnification. Specifically, it seeks common law indemnification not only with respect to strict liability claims, as to which there is no dispute, but also with respect to the *additional* amounts for which 20 East was found liable for breach of contract.

Analysis

Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious. *Chatham Towers, Inc. v Castle Restoration & Const., Inc.*, 151 A.D.3d 419 (1st Dept 2017). Since the predicate of common law indemnification is purely vicarious liability (that is, without actual fault on the part of the proposed indemnitee), it follows that a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine. *Trustees of Columbia University v. Mitchell/Giurgola Assocs.*, 109 A.D. 2d 449, 453 (1st Dept 1985).

20 East is Entitled to Common Law Indemnification for Strict Liability

Tri-Star and Urban do not dispute that, under Judge Kotler's summary judgment decision, 20 East is entitled to common law indemnification for its liability on Plaintiffs' claim based on a

theory of strict liability. Accordingly, 20 East is granted judgment on its cross-claim for indemnification with respect to amounts paid by 20 East in satisfaction of its liability to Plaintiffs claim based on strict liability, to be apportioned 60% to Tri-Star and 40% to Urban.

20 East is Not Entitled to Common Law Indemnification for Contractual Liability

By contrast, 20 East is not entitled to common law indemnification for its liability to Plaintiffs based on 20 East's breach of contract. Judge Kotler's grant of conditional common law indemnification was based on her conclusion that 20 East could only be found liable for *negligence* based on a theory of vicarious liability. *SJ Op.* at 24. She made no such finding with respect to 20 East's potential liability for breach of contract.

20 East is correct that although common law indemnification typically is applied in the tort realm, there is no per se rule against applying it in the context of a breach of contract. *See 17 Vista Fee Assoc. v. Teachers Ins. & Annuity Assn. of Am.*, 259 A.D.2d 75, 80-81 (1st Dep't 1999). However, such indemnification is not available when the would-be indemnitee has participated "to some degree" in the wrongdoing. *Id.* at 81 (citation omitted). Here, although 20 East delegated responsibility for the "Work" to Tri-Star and Urban, it retained independent obligations under the Agreement, including the obligation under Paragraph 19 to "cause its contractors to promptly repair or, if agreed by [Plaintiffs] in lieu of making a repair, compensate [Plaintiffs]." Although 20 East argues that Tri-Star undertook a contractual obligation to 20 East to undertake repairs, that does not absolve 20 East of its obligation *vis-à-vis the Plaintiffs* to "cause" or authorize that such repairs be undertaken, which in this case it did not.

In sum, the law does not impose an obligation upon Tri-Star and/or Urban to backstop 20 East's contractual liability to Plaintiffs. Any right to such indemnification would have to be contractual. *See SJ Op.* at 25 (granting 20 East's motion for summary judgment against Urban

for conditional contractual indemnification); *id.* at 27-28 (denying Tri-Star’s motion to dismiss 20 East’s cross-claims for contractual and common law indemnification).

20 East Is Not Entitled to an Order Limiting Attorneys’ Fees

Finally, 20 East seeks an Order that Plaintiffs cannot recover for attorneys’ fees incurred after a certain date. As noted above, this request is premature. The Court will not give an advisory opinion as to the reasonableness of a fee request that has not yet been made.

Therefore, it is:

ORDERED that the branch of Defendant 20 East’s motion seeking common law indemnification from Tri-Star and Urban is granted with respect to Plaintiffs’ strict liability claim but denied with respect to Plaintiffs’ contract claims; it is further

ORDERED that the branch of Defendant 20 East’s motion seeking an order that Plaintiffs are not entitled to recover post-judgment attorneys’ fees is denied as premature.

This constitutes the Decision and Order of the Court.

4/20/2020
DATE


JOEL M. COHEN, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: