

Gallway v St. George Outlet Dev. LLC
2020 NY Slip Op 31162(U)
April 20, 2020
Supreme Court, Kings County
Docket Number: 512354/2018
Judge: Dawn M. Jimenez-Salta
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At an LAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of April, 2020.

P R E S E N T:

HON. DAWN JIMENEZ-SALTA,
Justice.

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MICHAEL GALLWAY,

Plaintiff,

- against -

Index No. 512354/2018
Motion Seq. 2

ST. GEORGE OUTLET DEVELOPMENT LLC D/B/A
EMPIRE OUTLETS AND BFC PARTNERS L.P.,

Defendants.

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ST. GEORGE OUTLET DEVELOPMENT LLC D/B/A
EMPIRE OUTLETS AND BFC PARTNERS L.P.,

Third-Party Plaintiffs,

- against -

CONSTRUCTION RESOURCES CORP. OF NEW YORK,

Third-Party Defendant.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of:

- 1) Third-Party Defendant Construction Resources Corp. of New York's (CRC) motion, pursuant to CPLR 3211(a)(1) and (a)(7), for an order dismissing the first, second, and third causes of action in the third-party complaint, and, pursuant to CPLR 3211(a)(4), dismissing the fourth cause of action in the third-party complaint, with accompanying affidavit, dated July 15, 2019;
- 2) St. George Outlet Development LLC d/b/a Empire Outlets and BFC Partners, L.P.'s (St. George/BFC) affirmation in opposition, dated October 21, 2019;
- 3) St. George/BFC's supplemental affirmation in opposition, dated October 30, 2019;
- 4) Plaintiff Michael Gallway's (Plaintiff) affirmation in opposition, dated December 3, 2019; and

5) CRC’s reply affirmation, dated December 4, 2019, all of which submitted December 11, 2019.

Papers Considered:

Papers Numbered:

<p>Notice of Motion, Affirmation, Affidavits and Exhibits Annexed</p> <p>Answering Affirmation, Affidavit and Exhibits Annexed</p> <p>Reply Affirmation, and Exhibits Annexed</p>	<p>CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B];</p> <p>St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; and</p> <p>CRC 6.</p>
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Upon the foregoing cited papers, the Decision/Order is as follows: Third-party defendant CRC’s motion for an order, pursuant to CPLR 3211, dismissing third-party complaint is granted to the extent that the first, second, and third causes of action are dismissed. The motion is denied with respect to the fourth cause of action (motion sequence number 2).

Background

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, Michael Gallway, (Plaintiff) on April 7, 2017 as a result of a fall that occurred at a construction site located at 55 Richmond Terrace in Staten Island, New York. Plaintiff alleges that he was working for third-party defendant Construction Resources Corp. of New York (CRC) when he was caused to slip and fall on “negligently placed debris.” In his bill of particulars, he alleges that he sustained injuries to the lumbar and thoracic regions of his spine, including multiple disc herniations and bulges. Plaintiff also affirms in his verified bill of particulars that he made a claim upon and received workers’ compensation benefits under CRC’s workers’ compensation policy in connection with this accident (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Plaintiff commenced this action against the defendants/third-party plaintiffs, St. George Outlet Development LLC (St. George), the owner of the premises, and BFC Partners, L.P. (BFC Partners), the developer of the project (collectively referred to as Defendants/Third-Party Plaintiffs), which involved the construction of multiple retail buildings and a three-story parking structure. Defendants/Third-Party Plaintiffs thereafter commenced a third-party action against CRC seeking common-law indemnification and contribution, contractual indemnification, and damages for breach of an agreement to procure insurance (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

There are two contracts pertaining to work performed at the construction site cited by the parties in their papers: a standard form agreement between St. George and non-party Empire Outlet Builders (EOB) and a subcontractor agreement between EOB and CRC (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

In the first agreement, entitled "Standard Form of Agreement Between Owner and Contractor," dated November 5, 2014 (Prime Contract), St. George retained non-party EOB as its general contractor for infrastructure work at the site. Section 4.6.1 of the Prime Contract, provides, in pertinent part, that EOB "shall indemnify and hold harmless St George Outlet Development LLC, St George Outlet Hotel Development Inc (Owners), Empire Outlet Builders LLC (General Contractor), Gilbane Building Company (Construction Manager), the list of Additional Insured's on Exhibit A [sic] and Architect, Architect's consultants, and agents and employees of any of them" for claims arising out of the work performed under the Prime Contract (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

CRC is not a party to the Prime Contract and is not identified or referenced by name in the agreement (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Thereafter, EOB entered into a subcontractor agreement, dated May 12, 2016 (CRC Subcontract), with CRC as subcontractor for concrete superstructure work and general labor. On the first page of the CRC Subcontract, there is a statement that "Contractor [EOB] . . . entered into an Agreement . . . with St. George Outlet Development LLC (the 'owner') to construct the Empire Outlets of Staten Island Project" (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George 3 [Exh. A-H]; St. George 4 [Exh. A]; Plaintiff 5; CRC 6).

The CRC Subcontract contains an indemnification clause in section 8(b), which provides, in pertinent part, the following:

"Of Contractor. To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by insurance maintained by or for the benefit of Contractor [EOB], Subcontractor [CRC] shall defend, indemnify and hold harmless Contractor, and its principals, officers, agents and employees from and against claims, damages, liabilities, losses and expenses, including but not limited to actual attorneys' fees arising out of or resulting from Subcontractor's performance of the work, provided that such claim, damage, liability, loss or expense is attributable to bodily injury, sickness, or death . . . but only to the extent caused by the negligent acts or omissions or other fault of Subcontractor" (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Paragraph 7 of the CRC Agreement requires CRC to purchase general liability insurance for not less than \$2,000,000 per occurrence and \$4,000,000 in the aggregate. The agreement also

includes a list of additional insureds and a certificate of liability insurance naming the following entities:

“Certificate Holder:

St. George Outlet Development LLC
St. George Outlet Hotel Development LLC
Empire Outlet Builders LLC
LP Ciminelli Inc.

150 Myrtle Ave, Suite 2
Brooklyn, NY 11201

Additional Insureds:

St George Outlet Development LLC
St George Outlet Hotel Development LLC
Empire Outlet Builders LLC - General Contractor
LP Ciminelli Inc. - Construction Manager
BFC/St George LLC
Empire Outlet Investor LLC
BFC St George Outlet Hotel LLC
Empire Outlets Hotel LLC
GS UIG RE Member LLC

New York City Industrial Development Agency

Affiliated entities, subsidiaries, employees, officers and directors.” (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

CRC now moves to dismiss the first through third causes of action in the third-party complaint for common-law indemnification and contribution, and contractual indemnification, pursuant to CPLR 3211(a)(1) and (a)(7). CRC also seeks dismissal, or in the alternative a stay, of the fourth cause of action for breach of contract on the ground that there is a prior action pending in Supreme Court, New York County seeking the same relief (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

CRC contends that the first and second causes of action for common-law indemnification and contribution must be dismissed pursuant to CPLR 3211(a)(7) because the third-party complaint fails to allege, either directly or by reference to Plaintiff’s underlying complaint, that Plaintiff suffered a “grave injury” as defined by Workers’ Compensation Law § 11 (WCL). In support, CRC cites Plaintiff’s complaint and bill of particulars. CRC asserts that the third-party complaint similarly fails to allege that Gallway sustained any of the enumerated injuries that qualify as grave under WCL § 11 (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

In addition, CRC notes that Plaintiff's bill of particulars states that CRC was Gallway's employer at the time of his accident and that he made a claim upon CRC's workers' compensation policy maintained for its employees in connection with this accident (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Accordingly, as there is no allegation that Gallway suffered a "grave injury," CRC contends that its motion to dismiss the first and second causes of action for common-law indemnification and contribution in third-party complaint must be granted (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

CRC contends that Defendants/Third-Party Plaintiffs' claim for contractual indemnification must also be dismissed because St. George and BFC Partners are not covered by the indemnification clause in section 8(b) of the CRC Subcontract. CRC asserts that the CRC Subcontract does not identify St. George or BFC Partners, either by name or as owner and developer, as indemnitees or beneficiaries. CRC argues that the parties to the CRC Subcontract would have expressly listed or identified St. George and BFC Partners as indemnitees in section 8(b) if the parties meant to include them, as they did elsewhere in the agreement when necessary (*see Cano v Mid-Valley Oil Co., Inc.*, 151 AD3d 685, 692 [2d Dept 2017]; *Lipshultz v K & G Indus.*, 294 AD2d 338, 339 [2d Dept 2002]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

CRC asserts that dismissal of the contractual indemnification claim is also required by WCL § 11, which, in cases where the plaintiff has not sustained a "grave injury," bars third-party actions against employers for indemnification or contribution "unless the third-party action is for contractual indemnification pursuant to a written contract in which the employer 'expressly agreed' to indemnify the claimant" (*Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004], quoting WCL § 11) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

CRC contends that the fact that Defendants/Third-Party Plaintiffs were identified as additional insureds does not demonstrate that they are named or intended beneficiaries of the indemnification provision as "[a]n agreement to procure insurance is not an agreement to indemnify or hold harmless" (*Chong Fu Huang v 57-63 Greene Realty, LLC*, 174 AD3d 777, 778 [2d Dept 2019]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Finally, CRC asserts that Defendants/Third-Party Plaintiffs' fourth cause of action for breach of contract arising out of CRC's alleged failure to procure insurance coverage required by the CRC Subcontract should be dismissed because there is a prior pending action entitled *Empire Outlet Builders LLC v Construction Resources Corp. of New York, Michael Varrone and Dawn Varrone* (Sup Ct, NY County, index No. 656074/2017) (EOB action) in which EOB is allegedly seeking the same relief (*see Scottsdale Ins. Co. v Indemnity Ins. Corp. RRG*, 110 AD3d 783, 784 [2d Dept

2013)) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

According to CRC, almost two years prior to the filing of the third-party complaint in this action, on September 27, 2017, EOB commenced an against CRC in Supreme Court, New York County alleging that CRC breached the CRC Subcontract between EOB and CRC by failing to procure the requisite insurance coverage. An amended complaint in the EOB action filed on January 8, 2018 retained the same breach of contract cause of action (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

CRC contends that both actions seek the same relief and involve substantially similar parties because EOB seeks damages for the same breach of the CRC Subcontract including “the aggregate amount of future settlements and money judgments against Plaintiff *and its additional insureds*” [emphasis added]. CRC asserts that there is a palpable risk of inconsistent rulings as both actions involve the same subcontractor agreement and the breach of contract claim. CRC argues that Defendants/Third-Party Plaintiffs, as additional insureds, cannot successfully prosecute their breach of contract claim if there is a final determination on the merits in the EOB action that CRC procured the insurance required by the CRC Subcontract (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

CRC therefore argues that the fourth cause of action alleged in the later-filed third-party complaint should be dismissed, or alternatively stayed, in favor of the earlier EOB action pending in New York County (*see Seneca Speciality Ins. Co. v T.B.D. Capital, LLC*, 143 AD3d 971, 972 [2d Dept 2016]; *Lawler v TropWorld Casino & Entertainment Resort*, 238 AD2d 383, 383-384 [2d Dept 1997]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

In opposition, Defendants/Third-Party Plaintiffs argue that CRC’s motion to dismiss is untimely and therefore should be denied. They note that CRC was served with the third-party summons and complaint via Secretary of State on June 14, 2019. CRC thereafter appeared in the third-party action by filing of the instant motion to dismiss on July 15, 2019, thirty-one days after being served. They argue that CRC was required to appear by serving an answer or by making a motion within thirty days after service (*see CPLR 320[a]*). They claim that CRC failed to request an extension of time within which to serve and file the instant motion dismiss or show good cause for the delay in making the motion (*see U.S. Bank N.A. v Gonzalez*, 99 AD3d 694, 695 [2d Dept 2012]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Even if the court deems the motion timely, Defendants/Third-Party Plaintiffs assert that it should be denied because the third-party complaint adequately states a cause of action for the contractual indemnification of St. George and BFC Partners, as the third-party complaint alleges that they are “named beneficiaries” or intended beneficiaries of the CRC Subcontract between EOB and CRC. Though Defendants/Third-Party Plaintiffs acknowledge that St. George and BFC Partners are not “principals, officers, agents [or] employees” of EOB, they argue that it is “almost inconceivable”

that CRC, as a subcontractor, would not contemplate that performance of its contractual obligations would ultimately benefit the owner and developer of project (*Beasock v Canisius Coll.*, 126 AD3d 1403, 1404 [4th Dept 2015]; *see also Baginski v Queen Grand Realty, LLC*, 68 AD3d 905, 907-908 [2d Dept 2009]; *Gap, Inc. v Fisher Dev., Inc.*, 27 AD3d 209, 211 [1st Dept 2006]). They argue that the insurance provisions of the CRC Subcontract further demonstrate that the parties intended that St. George and BFC Partners would be covered by the indemnification provision. In particular, they cite the “Additional Insured List,” which includes “St. George Outlet Development LLC,” “BFC/St George LLC,” “BFC St. George Outlet Hotel LLC,” as well as “[a]ffiliated entities, subsidiaries, employees, officers and directors.” They also note that the certificate of liability insurance issued to CRC expressly names “St. George Outlet Development LLC” as a certificate holder (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Defendants/Third-Party Defendants also argue that the CRC Subcontract incorporates the duty to indemnify St. George detailed in the Prime Contract (*see Spiegler v Gerken Bldg. Corp.*, 35 AD3d 715, 717 [2d Dept 2006]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Defendants/Third-Party Defendants assert that the portion of CRC’s motion seeking to dismiss the fourth cause of action for breach of contract must also be denied because there is no substantial identity of parties in the two actions (*see Jaber v Elayyan*, 168 AD3d 693, 694 [2d Dept 2019] [while complete identity of parties is not necessary for dismissal under CPLR 3211(a)(4), there must be at least a “substantial” identity of parties, “which generally is present when at least one plaintiff and one defendant is common in each action”]). Defendants/Third-Party Plaintiffs contend that there is no substantial identity of parties because neither St. George nor BFC Partners are parties in the EOB action (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

They also argue that the relief sought in each action is different because there are several causes of action in addition to breach of contract alleged in the EOB action against CRC, Michael Varrone, and Dawn Varrone including fraud in the inducement, conspiracy to defraud, and unjust enrichment. They allege that a resolution of the breach of contract claim in the EOB action would not resolve their breach of contract claim in this action (*see Jaber v Elayyan*, 168 AD3d at 694; *Sprecher v Thibodeau*, 148 AD3d 654, 656 [1st Dept 2017]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Finally, Defendants/Third-Party Plaintiffs assert that the motion to dismiss is premature because discovery is incomplete CRC (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

In his opposition to CRC’s motion to dismiss, Plaintiff Gallway adopts Defendants/Third-Party Plaintiffs’ arguments to the extent that CRC’s motion is untimely and premature, and on the additional ground that there is insufficient evidence to demonstrate that Gallway did not sustain a

“grave injury” (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

In reply, CRC first argues that the instant motion was timely served on Monday, July 15, 2019, the thirty-first day after service of the third-party summons and complaint, pursuant to New York General Construction Law § 25-a, which provides that “[w]hen any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day.” As the thirtieth day after service fell on Sunday, July 14, 2019, CRC argues that its deadline to serve the motion to dismiss was extended to the following business day (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

CRC also reiterates its arguments that Defendants/Third-Party Plaintiffs’ claims for common-law indemnification, contribution, and any claims for negligence are barred by WCL § 11 (*see Cassese v SVJ Joralemon, LLC*, 168 AD3d 667, 669 [2d Dept 2019]). CRC contends that Plaintiff’s arguments that “further medical evaluations, which have yet to be conducted” might reveal additional injuries is mere speculation and insufficient to deny the instant motion where no grave injury is alleged (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

CRC further argues that the documentary evidence submitted with their motion to dismiss, including the CRC Subcontract, negates essential factual allegations in the third-party complaint, necessitating dismissal (*see Cassese v SVJ Joralemon, LLC*, 168 AD3d at 669). Citing case law stating that indemnification provisions are to be “strictly construed” to achieve the purpose of the parties to the contract (*Cano v Mid-Valley Oil Co., Inc.*, 151 AD3d at 690), CRC asserts that the indemnification clause in section 8(b) does not expressly include St. George, the owner, BFC Partners, or the developer, and thus should not be interpreted as to impose an implied duty to indemnify either entity. CRC also rejects Defendants/Third-Party Plaintiffs’ claims that they are intended beneficiaries on the ground that there is no language in the CRC Subcontract recognizing them as such (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

CRC also rejects Defendants/Third-Party Plaintiffs’ claim that the indemnification clause in the Prime Contract between St. George and EOB was incorporated by reference into the CRC Subcontract. CRC asserts that the mere mention of the fact that St. George and EOB entered into an agreement does not establish that the provisions of the Prime Contract were incorporated into the CRC Subcontract. Even assuming that the Prime Contract was incorporated by reference, CRC asserts that incorporation clauses in construction subcontracts bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontract (*Persaud v Bovis Lend Lease, Inc.*, 93 AD3d 831, 833 [2d Dept 2012]; *Navillus Tile Inc. v Bovis Lend Lease LMB, Inc.*, 74 AD3d 1299, 1302 [2d Dept 2010]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Discussion

Timeliness

CRC's motion to dismiss is timely. Service was effected upon CRC by delivery of the third-party summons and complaint to the Secretary of State on June 14, 2019. CPLR 320(a) provides, *inter alia*, where the summons was served on the defendant by delivering it to the Secretary of State, the appearance shall be made, by motion or by the serving of an answer, within thirty days after service is complete. Pursuant to General Construction Law § 25-a (1), when a period of time within which an act is required to be performed "ends on a Saturday, Sunday, or public holiday, such act may be done on the next succeeding business day." Here, the thirtieth day after the service of the third-party summons and complaint on June 14, 2019 was July 14, 2019, a Sunday. Because July 14, 2019 fell on a Sunday, CRC was entitled to the benefit of General Construction Law § 25-a and had until the following business day, Monday, July 15, 2019, to serve the instant motion to dismiss, which CRC did in fact do (*see* NYSCEF Doc. No. 35) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Defendants/Third-Party Defendants erroneously argue that CRC is not permitted to utilize General Construction Law § 25-a (1) because this is an e-filed case subject to the rules regarding e-filed actions, claiming that the instant motion was required to have been electronically filed on Sunday, July 14, 2019. According to CPLR 2211, a motion is made when it is served; an e-filed document is deemed served upon the parties upon the electronic transmission of the notification from the NYSCEF system that the document was uploaded and received (*see* 22 NYCRR § 202.5-b[f][2][ii]; *see also* Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, Supreme Court, Kings County, available at ww2.nycourts.gov/courts/2jd/kings/civil/efile.shtml (last revised August, 5, 2019) ["The NYSCEF system does not change the rules applicable to civil litigation. As such, the protocols promulgated herein, as well as any additions or amendments thereto, do not change applicable rules or statutes with respect to civil practice as defined by the [CPLR] and the IAS Part Rules as they apply to action types being filed in the NYSCEF system."] (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Here, the motion was served on Monday, July 15, 2019, and thus, pursuant to General Construction Law § 25-a (1), it is timely (*see Marei v Haque*, 2018 NY Slip Op 31815[U], *2-3 [Sup Ct, Kings County 2018] [motion for summary judgment in e-filed case was timely served on December 26, 2017, the sixty-first day after the filing of the note of issue, pursuant to General Construction Law § 25-a; "the date of service is what is counted, not the date of filing"]; *see also Vazquez v The City of New York*, 2019 NY Slip Op 33168[U], *4 [Sup Ct, New York County 2019] [motion to dismiss timely pursuant to General Construction Law § 25-a when it was e-filed on the twenty-first day after service of the amended pleadings because the twentieth day fell on a Sunday]; *Vionito v Jaks Realty Enterprise Corp.*, 2019 NY Slip Op 33300[U], *12-13 [Sup Ct, New York County 2019]; *TD Bank, N.A. v JLS Industries Inc.*, 2018 NY Slip Op 31377[U], *24-25 [Sup Ct, New York County 2018] ["The note of issue in this case was filed on March 29, 2017. Sixty days from the filing of the note of issue was Sunday, May 28, 2017. The following Monday, May 29,

2017, was Memorial Day. On the following Tuesday, May 30, 2017, Plaintiff filed the instant motion. As such, pursuant to General Construction Law § 25-a, the motion was timely (See also NYSCEF Doc No. 135)”) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Common-Law Indemnification and Contribution

A motion pursuant to CPLR 3211(a)(1) to dismiss the complaint on the basis of documentary evidence may be appropriately granted where the documentary evidence utterly refutes the plaintiff's allegations, conclusively establishing a defense as a matter of law (*see Cassese v SVJ Joralemon, LLC*, 168 AD3d at 668; *Xia-Ping Wang v Diamond Hill Realty, LLC*, 116 AD3d 767, 767-768 [2d Dept 2014], citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Schiller v Bender, Burrows and Rosenthal LLP*, 116 AD3d 756, 757 [2d Dept 2014]). Materials that qualify as documentary evidence include judicial records and “documents reflecting out-of-court transactions such as mortgages, deeds [and] contracts” (*S & J Serv. Ctr., Inc. v Commerce Commercial Group, Inc.*, 178 AD3d 977, 978 [2d Dept 2019]; *Fontanetta v John Doe 1*, 73 AD3d 78, 84-85 [2d Dept 2010]; *Xia-Ping Wang v Diamond Hill Realty, LLC*, at 768).

In considering a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, “the pleadings must be liberally construed” and “[t]he sole criterion is whether from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Bank of N.Y. Mellon Trust Co., N.A. v Universal Dev., LLC*, 136 AD3d 850, 850 [2d Dept 2016], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Lee Dodge, Inc. v Sovereign Bank, N.A.*, 148 AD3d 1007, 1008 [2d Dept 2017]). Nevertheless, “bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true” (*Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 683 [2d Dept 2017], quoting *Gershner v Eljamal*, 111 AD3d 664, 665 [2d Dept 2013] [internal quotation marks omitted]).

WCL § 11 prohibits third-party claims for common-law indemnification and contribution against an employer unless the employee has sustained a “grave injury” (*Cassese v SVJ Joralemon, LLC*, 168 AD3d at 668; *Chong Fu Huang v 57-63 Greene Realty, LLC*, 174 AD3d at 777-778; *Cano v Mid-Valley Oil Co., Inc.*, 151 AD3d at 690). The categories of grave injuries listed in WCL § 11 “are deliberately both narrowly and completely described; the list, both exhaustive and not illustrative, is not intended to be extended absent further legislative action” (*Fleming v Graham*, 10 NY3d 296, 300 [2008] [internal quotation marks and citations omitted]). A party may establish its entitlement to dismissal of a third-party cause of action for common-law contribution or indemnification pursuant to CPLR 3211(a)(7) by “demonstrating that the third-party complaint failed to allege, either directly or by reference to [the plaintiff's underlying complaint], that the injured plaintiff suffered a ‘grave injury’ as defined by [WCL § 11]” (*Cassese v SVJ Joralemon, LLC*, at 669; *see also New York Hosp. Med. Ctr. of Queens v Microtech Contr. Corp.*, 98 AD3d 1096, 1101 [2d Dept 2012]; *Cueto v Hamilton Plaza Co., Inc.*, 67 AD3d 722, 724 [2d Dept 2009]).

Here, CRC established its entitlement to dismissal of the Defendants/Third-Party Plaintiffs' claim for common-law indemnification and contribution pursuant to CPLR 3211(a)(7) (*see Cassese v SVJ Joralemon, LLC*, 168 AD3d at 669; *New York Hosp. Med. Ctr. of Queens v Microtech Contr.*

Corp., 98 AD3d at 1101). The third-party complaint failed to allege, either directly or by reference to the underlying pleadings, that Gallway suffered a “grave injury” as defined by WCL § 11 (*see Cassese v SVJ Joralemon, LLC*, 168 AD3d at 669; *see also Ortiz v Rainbow Associates, LLC*, 2019 NY Slip Op 32709[U], *3 [Sup Ct, Kings County 2019] [third-party complaint dismissed pursuant to CPLR 3211(a)(7) where there were no allegations that plaintiff sustained a “grave injury” in the underlying complaint or third-party complaint]; *Zhao v B&J Management Group, LLC*, 2018 WL 4335193, *2 [Sup Ct, Queens County 2018]; *McCann v HLT N.Y. Hilton LLC*, 2017 NY Slip Op 30610[U], *3-4 [Sup Ct, New York County 2017] [third-party complaint seeking common-law contribution and indemnification dismissed because no “grave injury” alleged in the underlying complaint, third-party complaint, or bill of particulars]); *Smith v The City of New York*, 2016 NY Slip Op 30918[U], *3-4 [Sup Ct, Queens County 2016]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

CRC also established that it secured Workers’ Compensation benefits for Plaintiff by submission of a copy of CRC’s workers’ compensation policy with the affidavit of Dawn Varrone, CRC’s president, and by reference to Plaintiff’s verified bill of particulars in which he affirms that he was an employee of CRC and that he made a claim upon and received workers’ compensation benefits under CRC’s workers’ compensation policy in connection with this accident (*see Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 672 [2d Dept 2018]; *see also Novakovic v Adco*, 2019 WL 1423002, *1 (Sup Ct, New York County 2019); *cf. Sibrian v 244 Madison Realty Corp.*, 2019 NY Slip Op 33726[U], *3 [Sup Ct, Queens County 2019] [motion to dismiss third-party complaint denied because movants failed to establish that they secured workers’ compensation benefits for plaintiff]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

In addition, although Defendants/Third-Party Plaintiffs did not withdraw their first and second causes of action for common-law indemnification and contribution against CRC, these causes of action are deemed abandoned by their failure to oppose CRC’s arguments in their opposition papers (*see Elam v Ryder Systems, Inc.*, 176 AD3d 675, 676 [2d Dept 2019]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Contractual Indemnification

Pursuant to WCL § 11, “where the plaintiff has not sustained a ‘grave injury,’ section 11 of the Workers’ Compensation Law bars third-party actions against employers for indemnification or contribution unless the third-party action is for contractual indemnification pursuant to a written contract in which the employer ‘expressly agreed’ to indemnify the claimant” (*Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d at 490, quoting WCL § 11).

The right to contractual indemnification depends upon the specific language of the contract (*see Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d at 490; *McCoy v Medford Landing, L.P.*, 164 AD3d 1436, 1440 [2d Dept 2018]; *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1096 [2d Dept 2018]; *Zalewski v MH Residential 1, LLC*, 163 AD3d 900, 902-903 [2d Dept 2018]; *Poalacin v Mall Props., Inc.*, 155 AD3d 900, 909 [2d Dept 2017]). A contractual indemnification provision

must be strictly construed to avoid imposing a duty which the parties did not intend (*see Chong Fu Huang v 57-63 Greene Realty, LLC*, 174 AD3d at 778; *McDonnell v Sandaro Realty, Inc.*, at 1096; *Shaughnessy v Huntington Hosp. Ass'n*, 147 AD3d 994, 999-1000 [2d Dept 2017]; *Cano v Mid-Valley Oil Co., Inc.*, 151 AD3d at 690; *De Souza v Empire Transit Mix, Inc.*, 155 AD3d 605, 606 [2d Dept 2017]). “Requiring the indemnification contract to be clear and express furthers the spirit of the legislation” (*Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d at 490).

While executing an agreement providing for the indemnification of a contractor, a subcontractor may also agree, within the terms of the same agreement, to indemnify the owner (*see Chong Fu Huang v 57-63 Greene Realty, LLC*, 174 AD3d at 777; *McDonnell v Sandaro Realty, Inc.*, 165 AD3d at 1096). A finding that the owner is entitled to contractual indemnification pursuant to such agreement is not appropriate where there is no contractual relationship or provision expressly providing for the owner’s indemnification and no showing that the parties intended the owner to be a beneficiary of the indemnification provision (*see Chong Fu Huang v 57-63 Greene Realty, LLC*, at 777-778; *Pantaleo v Bellerose Senior Hous. Dev. Fund Co., Inc.*, 147 AD3d 777, 778 [2d Dept 2017]; *Baginski v Queen Grand Realty, LLC*, 68 AD3d at 908). This analysis “turns on the language of the contract and whether [the contracting parties] intended the indemnification clause to benefit [the owner]” (*Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d at 490).

Here, CRC established its entitlement to dismissal of the third-party claim for contractual indemnification. First, the CRC Subcontract and the Prime Contract relied upon by the Defendants/Third-Party Plaintiffs in the third-party complaint and submitted by CRC in support of its motion conclusively disposes of the claim for contractual indemnification by demonstrating that CRC did not enter into a contract with St. George or BFC Partners and that there was no express written provision or clause providing for their indemnification by CRC (*see Chong Fu Huang v 57-63 Greene Realty, LLC*, 174 AD3d at 778; *Cassese v SVJ Joralemon, LLC*, 168 AD3d at 669; *Cano v Mid-Valley Oil Co., Inc.*, 151 AD3d at 690-691; *Baillargeon v Kings County Waterproofing Corp.*, 91 AD3d 686, 688 [2d Dept 2012]; *Lipshultz v K & G Indus.*, 294 AD2d at 338-339) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Section 8(b) of the CRC Subcontract unambiguously requires CRC to indemnify EOB, but it does not refer to either St. George or BFC Partners. Elsewhere in the CRC Subcontract, where the parties needed to refer to St. George or BFC Partners, they specifically did so (*see, e.g., Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d at 490 [“while the contract between the Authority and [subcontractor] refers to the ‘construction manager’ more than 130 times, the indemnification clause contains no reference to the construction manager or to Bovis by name;” had the parties intended to include the construction manager, they would have done so]; *Cano v Mid-Valley Oil Co., Inc.*, at 692 [“the only parties to the agreement were Adventura, listed as the ‘Contractor,’ and Warex, listed as the ‘Owner.’ Had Drake [the actual owner of the property], which was affiliated with Warex [a sister company], wanted to be included under the agreement as the owner, it could easily have substituted its name for Warex’s at the time Adventura and Warex reached their agreement”]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Defendants/Third-Party Plaintiffs concede in their opposition that St. George and BFC Partners are not “principals, officers, agents [or] employees” of EOB (*see* Defendants/Third-Party Plaintiffs’ affirmation in opposition at 15, ¶ 40; *see also* *Tonking v Port Auth. of N.Y. and N.J.*, 2 AD3d 213, 214 [1st Dept 2003], *affd* 3 NY3d 486 [2004] [third-party claim for indemnification properly dismissed as use of term “agent” did not clearly manifest intention to impose obligation to indemnify construction manager; parties could have used term “construction manager” rather than “general, often referentially treacherous term ‘agent’”]; *Lipshultz v K & G Indus.*, 294 AD2d at 339 [indemnification claim dismissed as contract referenced only owner, one particular contractor, and agents; other general contractor was not entitled to indemnity as parties could have, but did not, include it; that general contractor could be entitled to indemnification based on status as owner’s statutory agent insufficient]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

The CRC Subcontract does not expressly incorporate the indemnification clause contained in the Prime Contract. The general statement or reference to the fact that “Contractor [EOB] entered into an Agreement (‘the Agreement’) with St. George Outlet Development, LLC (‘Owner’) to construct the Empire Outlets of Staten Island” does not establish that the provisions of the Prime Contract were incorporated into the CRC Subcontract (*see Navillus Tile, Inc. v Bovis Lend Lease LMB, Inc.*, 74 AD3d at 1302; *350 East Houston Street, LLC, Travelers Indem. Co. of America*, 2018 NY Slip Op 32588[U], *9 [Sup Ct, New York County 2018] [“the purported incorporation clause does not contain any express language specifically incorporating, let alone referring to, the indemnification and insurance provisions of the [prime agreement] into the Peterson Subcontract. Thus, Peterson and Axis are not contractually obligated to indemnify plaintiffs for any actions that arise out of Peterson’s work . . . the relevant inquiry is whether clear and specific language in the Peterson Subcontract incorporates the insurance and indemnification provisions from the [prime agreement]. There is no such language contained in the Peterson Subcontract”]; *cf. HTRF Ventures, LLC v Permasteelisa North America Corp.*, 2019 NY Slip Op 32095[U], *4 [Sup Ct, New York County 2019] [subcontract incorporated prime contract between construction manager and owner, stating that “this Agreement incorporates by reference Turner’s Construction Management Agreement with the Owner . . . the Subcontractor agrees to be bound by each and all of the terms and provisions of the Construction Manager’s agreement and the other Contract Documents, and to assume toward Turner all of the duties, obligations and responsibilities that Turner by those Contract Documents assumes toward the Owner”]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Even if the CRC Subcontract incorporated the Prime Contract by reference, “[u]nder New York law, incorporation clauses in a construction subcontract . . . bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor” (*Persaud v Bovis Lend Lease, Inc.*, 93 AD3d 831, 833 [2d Dept 2012] [despite the fact that the construction subcontract incorporated the main agreement by reference, the provisions in the prime agreement related to contractual indemnification for employee’s injuries did not bind subcontractor] [internal quotation marks omitted]; *see also Navillus*

Tile, Inc. v Bovis Lend Lease LMB, Inc., 74 AD3d at 1302; *Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260, 261 [2d Dept 2008]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

There is also no basis for finding that St. George or BFC Partners were intended beneficiaries of the indemnification provision in the CRC Subcontract. The recent Second Department case, *Chong Fu Huang v 57-63 Greene Realty, LLC*, decided in 2019, discussing whether an owner and tenant were intended beneficiaries of an indemnification clause contained in a construction subcontract, is instructive (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

In *Chong Fu Huang*, the plaintiff was injured when he fell from a scaffold at a construction site during the course of his employment with the third-party defendant subcontractor (174 AD3d at 777). The injured plaintiff sued the owner of the premises and its tenant and they, in turn, commenced a third-party action seeking contractual indemnification from the subcontractor (*id.*). There was no dispute that the plaintiff was in the course of his employment with the subcontractor when he was injured (*id.*). As in this case, the owner and tenant, citing a certificate of liability insurance provided by the general contractor in which they were named as additional insureds, argued that they were entitled to contractual indemnification as intended beneficiaries of the subcontract between the general contractor and subcontractor (*id.*). The subcontractor argued that their contractual indemnification claim was barred by WCL § 11 because there was no contract between them and the indemnification provision in the subcontract did not include the owner and tenant (*id.*).

Affirming the trial court, the Second Department held that the subcontractor established its entitlement to dismissal of the owner and tenant's third-party claim for contractual indemnification by submission of, *inter alia*, the pertinent contracts and plaintiff's verified bill of particulars (*id.* at 778). The Second Department found that the subcontractor established that it did not enter into any contracts with the owner and tenants and that the indemnification provision in the subcontract between the general contractor and subcontractor did not "unambiguously and expressly" require the subcontractor to indemnify the owner and tenant as required by WCL § 11 (*id.*). The court also found that the owner and tenant were not intended beneficiaries of the indemnification provision in the agreement between general contractor and subcontractor (*id.*). In so holding, the Second Department noted that the existence of a certificate of insurance from the subcontractor's insurer failed to raise a triable issue of fact as to their status as intended beneficiaries because "[a]n agreement to procure insurance is not an agreement to indemnify or hold harmless" (*id.*, quoting *Kinney v G.W. Lisk Co., Inc.*, 76 NY2d 215, 218 [1990]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6)

Here, as in *Chong Fu Huang*, there is no contract between CRC and St. George or BFC Partners and no provision in the CRC Subcontract expressly or unambiguously requiring CRC to indemnify St. George or BFC Partners. Furthermore, the CRC Subcontract expressly provides in section 11(b) that the agreement "and all of the provisions hereof shall be binding upon and inure

to the benefit of the parties and their respective successors and assigns,” indicating that the indemnification clause was not intended to benefit the non-parties to the agreement (*see Town of Huntington v Long Is. Power Auth.*, 130 AD3d 1013, 1015 [2d Dept 2015], citing *Nepco Forged Products, Inc. v Consolidated Edison Co. of N.Y.*, 99 AD2d 508, 508 [2d Dept 1984]; *see also Town of Huntington v Long Island Power Auth.*, 2018 NY Slip Op 51206[U], *12 [Sup Ct, Suffolk County 2018] [where a provision in the contract stated that it would “bind and inure to the benefit of the parties hereto and any successor or assignee acquiring an interest hereunder” there was no intent to benefit third-party]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Defendants/Third-Party Plaintiffs’ reliance upon the certificate of liability insurance is misplaced, as the certificate expressly states the following:

“This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below. This certificate of insurance does not constitute a contract between the authorized representative or producer, and the certificate holder” (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6)

In any event, as stated above, an agreement to indemnify is “separate and distinct” from an agreement to procure insurance (*Mt. Hawley Ins. Co. v American States Inc. Co.*, 139 AD3d 497, 498 [1st Dept 2016], citing *Kinney v G.W. Lisk Co., Inc.*, 76 NY2d at 218; *see also Chong Fu Huang v 57-63 Greene Realty, LLC*, 174 AD3d at 778).

The mere fact that St. George, as owner, was one of multiple entities that would ultimately benefit from performance of the CRC Subcontract entailing construction work at the site does not demonstrate that St. George or BFC Partners are intended beneficiaries of the indemnification clause (*see Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 710 [2018] [though parties were aware that laboratory was being built on the property for the City’s use, it was not an intended beneficiary of the contract between DASNY, the entity responsible for management of the construction project, and architect; “[t]his rule reflects the particular nature of construction contracts and the fact that . . . there are often several contracts between various entities, with performance ultimately benefitting all of the entities involved”]; *350 East Houston Street, LLC v Travelers Indem. Co. of America*, 2018 NY Slip Op 32588 [U], *12 [Sup Ct, New York County 2018] (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6)

The cases cited by Defendants/Third-Party Plaintiffs in support of their argument that they are intended beneficiaries of the indemnification clause contained in the CRC Subcontract are distinguishable (*see, e.g., Beasock v Canisius Coll.*, 126 AD3d 1403, 1404 [4th Dept 2015] [owner entitled to contractual indemnification where the indemnification clause in subcontract provided that “[the subcontractor] shall indemnify, defend and hold harmless the Contractor and the Owner, and

the Architect-Engineer”]; *Baginski v Queen Grand Realty, LLC*, 68 AD3d 905, 907 [2d Dept 2009] [where the indemnification clause in subcontract expressly required subcontractor to “indemnify, and hold harmless, and defend the Owner, Contractor, Architect”]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Defendants/Third-Party Plaintiffs’ argument that the instant motion to dismiss should be denied because discovery is incomplete is unavailing because the documentary evidence attached to CRC’s motion conclusively refutes St. George and BFC Partners’ claim that they are entitled to contractual indemnification pursuant to the CRC Subcontract (*see Cassese v SVJ Joralemon, LLC*, 168 AD3d at 668-669; *Board of Educ. of Northport-E. Northport Union Free School Dist. v Long Island Power Auth.*, 130 AD3d 953, 956 [2d Dept 2015]). Though Defendants/Third-Party Plaintiffs claim in the third-party complaint that they are “named beneficiaries,” the CRC Subcontract itself refutes this argument, as they are not identified as such in the agreement. Defendants/Third-Party Plaintiffs’ arguments that they are intended beneficiaries of the indemnification provision by virtue of their status as additional insureds or by the incorporation of the indemnification clause in the Prime Contract are similarly disposed of as a matter of law based upon the aforementioned case law (*see Chong Fu Huang v 57-63 Greene Realty, LLC*, 174 AD3d at 778; *Persaud v Bovis Lend Lease, Inc.*, 93 AD3d at 833) and the pertinent language of the agreements and certificate of insurance (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Accordingly, as the indemnification provision “does not unambiguously and expressly require [CRC] to indemnify [St. George and BFC Partners]” as required by WCL §11 or otherwise provide for the indemnification of St. George and BFC Partners as intended beneficiaries, the third-party claim for contractual indemnification is dismissed (*see Chong Fu Huang v 57-63 Greene Realty, LLC*, 174 AD3d at 778) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Breach of Contract

Under CPLR 3211(a)(4), a court has ““broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same. It is not necessary that the precise legal theories presented in the first action also be presented in the second action as long as the relief . . . is the same or substantially the same”” (*Jaber v Elayyan*, 168 AD3d at 694, quoting *Dec v BFM Realty, LLC*, 153 AD3d 497, 497 [2d Dept 2017]; *see also JPMorgan Chase Bank, Nat’l Ass’n v. Luxama*, 172 A.D.3d 1341, 1341–42 [2d Dept 2019]). While a complete identity of parties is not necessary for dismissal, there must at least be a “substantial” identity of parties, “which is generally present when at least one plaintiff and one defendant is common in each action” (*Mason ESC, LLC v Michael Anthony Contr. Corp.*, 172 AD3d 1195, 1196 [2d Dept 2019], quoting *Jaber Elayyan*, at 694; *State Farm Fire & Cas. Co. v Jewsbury*, 169 AD3d 949, 950 [2d Dept 2019]).



In the instant case, CRC, a defendant in the EOB action pending in Supreme Court, New York County arising out of its alleged failure to procure insurance required by the CRC Subcontract, is the sole party common to both actions. CRC failed to demonstrate that EOB and St. George or BFC Partners are the same parties for the purposes of a CPLR 3211(a)(4) motion. That EOB is seeking damages arising out of the same alleged breach of the CRC Subcontract or obligation to procure insurance is insufficient to demonstrate substantial identity of parties (*see Nakazawa v Horowitz*, 50 AD3d 985, 986 [2d Dept 2008]; *Proietto v Donohue*, 189 AD2d 807, 807 [2d Dept 1993]; *see also* Siegel, N.Y. Prac. § 262 (6th ed.); *cf. City v Aspen Ins. UK Limited*, 2015 NY Slip Op 31469[U], *4-5 [Sup Ct, New York County 2015] [two actions alleging breach of contract for failure to procure insurance under construction contract consolidated where general contractor and subcontractor were involved in both underlying personal injury action and insurance coverage action]; *Admiral Indem. Co. v Travelers Cas. Ins. Co. of America*, 2015 NY Slip Op 31136[U], *7-8 [Sup Ct, New York County 2015]) (CRC 1 [Exh. A-E]; CRC 2 [Exh. A-B]; St. George/BFC 3 [Exh. A-H]; St. George/BFC 4 [Exh. A]; Plaintiff 5; CRC 6).

Accordingly, it is

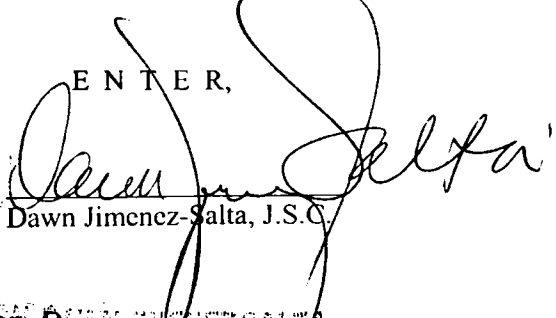
ORDERED that the third-party defendant CRC's motion to dismiss the third-party complaint (motion sequence number 2) is granted to the extent that the first, second, and third causes of action are dismissed, and it is further

ORDERED that CRC is directed to serve and file an answer to the third-party complaint within 20 days of receipt of a copy of this order with notice of entry.

The foregoing constitutes the decision and order of this court.

Dated: April 20, 2020
Brooklyn, New York

Michael Gallway v St. George Outlet Development LLC d/b/a Empire Outlets et ano.
Index No. 512354/2018

ENTER,

Dawn Jimenez-Salta, J.S.C.
Hon. Dawn JIMENEZ-SALTA
Justice of the Supreme Court