SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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JOAQUIN ESCOBAR CAMACHO,

Plaintiff,

DECISION AND ORDER

- v - Index No. 161948/2014

IRONCLAD ARTISTS, INC., BEGGARS CAPITAL LLC, MOT SEQ 005

Defendant.

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IRONCLAD ARTISTS, INC.

Plaintiff,

-against- Third-Party Index No. 595760/2015

BEGGARS CAPITAL LLC, THE PALOMBO GROUP, INC.

Defendants.

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BEGGARS CAPITAL LLC

Plaintiff, Third-Party Index No. 595079/2016

-against-

THE PALOMBO GROUP, INC.

Defendants.

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NANCY M. BANNON, J.:

I. BACKGROUND

In this personal injury action arising from a construction site accident, the plaintiff, Joaquin Escobar Camacho, alleges that while working as employee of Palombo Group LLC (Palombo), he sustained injuries falling from a scaffold while installing a

sheetrock ceiling on September 15, 2014 in the sub-basement at the premises at 134 Grand Street, in Manhattan.

The complaint pleads causes of action pursuant to Labor Law §§200, 240(1) and 241(6). Each defendant, Beggars Capital Inc. (Beggars) and Ironclad Artists, Inc. (Ironclad), thereafter commenced a third-party action impleading Palombo.

By this court's order, dated September 14, 2018, the plaintiff was awarded partial summary judgment on the issue of liability as against defendants Beggars and Ironclad for violations Labor Law § 240. On July 9, 2019, the Appellate Division, First Department affirmed the decision. Escobar Camacho v Ironclad Artists Inc., 174 AD3d 426 (1st Dept. 2019).

Defendant Beggars moves pursuant to CPLR 3212 for summary judgment on its third-party complaint defendant Palombo, which pleads claims against Palombo for contractual indemnification and breach of contract for failure to procure insurance. Beggars also seeks summary judgment dismissing the cross-claims against it by defendant Ironclad, which are for contractual indemnification, common-law indemnification, and contribution. Palombo and Ironclad oppose the motion. The motion is granted.

II. DISCUSSION

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra; Zuckerman, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

Beggars contends that because it was only vicariously liable under Labor Law § 240 as it merely hired Palombo to perform the renovation, Palombo must indemnify Beggars pursuant to its subcontract agreement. For the same reason, Beggars contends that Ironclad's cross-claims for contractual indemnification, common-law indemnification, and contribution must be dismissed. Beggars further claims that, despite its obligations under the subcontract, Palombo failed to procure insurance, *inter alia*, naming Beggars as an additional insured. In support of its motion, Beggars establishes its *prima facie* burden for summary judgment by submitting, *inter alia*, its subcontracts with Palombo, all containing identical indemnification and insurance provisions, its hold harmless agreement with Palombo, and the deposition testimony of Palombo's owner, Robert Palombo.

The subcontracts all provide in relevant part:

"F. INDEMNIFICATION

All work performed by subcontractor [Palombo] pursuant to this agreement shall be done at the sole risk of the subcontractor. Subcontractor (and his agents) shall at all times indemnify, protect, defend, and hold harmless owner and construction manager from all loss and damage, and against all lawsuits, arbitrations, mechanic's liens, legal actions, legal or administrative proceedings, claims, debts, demands, awards, fines, judgments, damages, interest, attomey's fees, and any costs and expenses which are directly or indirectly caused or contributed to, or claimed to because vou contributed to by any act or omission, fault or negligence, whether passive or active,

of subcontractor or his agents or employees, in connection with or incidental to the work under this agreement.

G. SUBCONTRACTOR'S INSURANCE

Before commencing work on the project, subcontractor [Palombo] and its subcontractors of every tier will supply to owner and construction manager duly issued certificates of insurance, naming owner and construction manager as the certificate holder showing enforce the following insurance for comprehensive general liability, automobile liability and workers compensation [including]: - comprehensive general liability with limits of not less than $2,000,000.00 million per occurrence;

B. INSURANCE

Subcontractor [Palombo] hereby agrees that it will obtain and keep in full force an insurance policy/policies to cover its liability hereunder and to defend and save harmless Construction Manager and Owner in the Minimum amounts of $2,000,000 per occurrence (or other appropriate agreed upon amount) for personal injury, bodily injury and property damage. - Said liability policies shall name Construction Manager and Owner as additional insureds and shall be primary to any other insurance policies."

The hold-harmless agreement, signed contemporaneously with the subcontract further states in relevant part:

"INDEMNIFICATION AND HOLD HARMLESS

To the Fullest extent permitted by law, The Palombo Group Inc. ("Subcontractor") Agrees to defend, indemnify and hold harmless The Palombo Group, Inc., ("Construction Manager") and Beggars Capital LLC ("Owner"), (if any), its officers, directors, agents and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses including reasonable legal fees and costs arising in whole or in part and in any manner from acts. omissions, breach or default of Subcontractor, in connection with performance of any work by Subcontractor, its officers, directors, agents, employees and subcontractors."

The deposition testimony of Robert Palombo establishes that Beggars was only held vicariously liable pursuant to Labor Law § 240 because Robert Palombo testified that Beggars hired Palombo as the construction manager for the project. Robert Palombo testified that Palombo's scope of work as a construction manager included researching, vetting, and recommending subcontractors, coordinating and scheduling the work of subcontractors, and managing and controlling the renovation project. Robert Palombo also testified that Palombo, unilaterally and without direction from Beggars took on various subcontracts for trade work at the project, prepared all of the subcontracts which included identical indemnification and insurance language, employed the plaintiff, supervised his work, and provided him equipment. As it is well settled that upon a showing that an owner is solely liable under Labor Law § 240 for vicarious liability, the owner is entitled to summary judgment on a cause of action seeking indemnification under the provisions of an applicable agreement. See Correia v Prof'l Data Mgmt., Inc., 259 AD2d 60 (1st Dept. 1999); see also Naughton v City of New York, 94 AD3d 1 (1st Dept. 2012); Velez v Tishman Foley Partners, 245 AD2d 155 (1st Dept. 1997).

In opposition, Palombo attempts to raise two issues of fact, each of which is without merit. First, Palombo argues that it was working for Beggars under multiple subcontracts and

Beggars fails to identify which subcontract between Palombo and Beggars the plaintiff was working under when he was injured. This argument is belied by Robert Palombo's deposition testimony, which states that all subcontracts prepared by Palombo contain identical indemnification language. As such, any failure by Beggars to identify the precise subcontract that it seeks indemnity under is merely a feigned attempt to raise a triable issue of fact, as Palombo concedes that all of the subcontracts with Beggars contained the same language.

Nor is there merit to Palombo's second argument in opposition to the motion, that the indemnification provisions of the subcontracts he admits to drafting are in violation of New York General Obligation Law § 5-322.1, which prohibits indemnification for conduct solely caused by the indemnitee's own negligence. It is well settled that indemnification provisions such as those contained in the subcontracts satisfy the requirements of New York General Obligation Law § 5-322.1, as the indemnification language in Palombo's agreements in the subcontracts and the indemnification and hold harmless agreement between Beggars and Palombo only seeks indemnification arising from actions caused or contributed to by Palombo's negligence. See Velez v Tishman Foley Partners, supra; Brown v Two Exch. Plaza Partners, 146 AD2d 129 (1st Dept. 1989). Furthermore, as Beggars also correctly argues, even if the language of the

indemnification agreement could be construed as potentially violative of New York General Obligation Law § 5-322.1, Palumbo cannot escape the provisions of the indemnification agreement it drafted. See 327 Realty, LLC v Nextel of New York, Inc., 150 AD3d 581 (1st Dept. 2017).

Turning to Beggars' motion for summary judgment on its breach of contract claim against Palombo for failure to procure insurance, here too, Beggars demonstrates, *prima facie,* the absence of any triable issue of fact. Beggars submits correspondence from Family Farm Insurance Company declining Beggars' claim for coverage for the accident, on the grounds it was not a named additional insured on Palombo's policy. It is well settled that "[a] party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with." DiBuono v Abbey, LLC, 83 AD3d 650, 652 (2nd Dept. 2011) *citing* Rodriguez v. Savoy Boro Park Assoc. Ltd. Partnership, 304 AD2d 738, 738 (2nd Dept. 2003). Here, Beggars has done so.

In opposition, Palombo incorrectly argues that Beggars' motion should be denied because it fails to establish that it had another source of insurance in this action. Palombo

contends that the only proof that Beggars had other insurance is in an attorney affirmation from an individual without knowledge of the underlying facts. Even were the court to conclude that Beggars' has submitted insufficient evidence to demonstrate that it is not otherwise insured for this injury, Palombo has failed to demonstrate how this would raise a triable issue of fact as to its own breach of its obligation procure insurance. See DiBuono v Abbey, LLC, supra.

Beggars has also established *prima facie*, its entitlement to summary judgment dismissing Ironclad's cross-claims for contractual indemnification, common-law indemnification, and contribution. To establish a claim for common law indemnification, a party must show that (1) it has been held vicariously liable without proof of any negligence or actual supervision on its part, and (2) the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work. See Naughton v City of New York, 94 AD3d 1 (1st Dept. 2012). Contribution is only available where two or more tortfeasors combined to cause an injury and is determined in accordance with the relative culpability of each such person. See Children's Corner Learning Ctr. v A. Miranda Contracting Corp., 64 AD3d 318 (1st Dept. 2009). As discussed herein, Beggars has established, through Robert Palombo's deposition testimony, that it was only held vicariously liable

under Labor Law § 240. Thus, Ironclad cannot establish that Beggars was either negligent or exercised actual supervision or control over the injury-producing work.

Moreover, Beggars submits the provision in the alteration agreement between Beggars and Ironclad under which Ironclad seeks contractual indemnification. That provision states in relevant part:

> I [Beggars] undertake to indemnify you [Ironclad], your architect or engineer, managing agent, and unit owners or residents of the building for any damages suffered to person or property as a results of the work performed hereunder, caused by my negligence, and for any and all liabilities arising therefrom or incurred in connection there with…and I agreed to reimburse you, your architect or engineer, managing agent, and unit owners are residents of the building for any losses, costs, fines, fees and expenses (including, without limitation, attorneys fees and disbursements) incurred as a result of the work, including, without limitation, asbestos abatement work, caused by my negligence, up to the insurance coverage that IU am required to procure under paragraph 4(b) THIS INDEMNIFICATION OBLIGATION SHALL NOT APPLY IF SUCH INJURY, LOSS OF LIFE, OR DAMAGE IS CAUSED BY ANY negligence of the party indemnified hereunder." (emphasis in original).

On its face, this indemnification obligation only applies if Beggars is found negligent. As Beggars was not found negligent, but held vicariously liable under Labor Law 240, summary judgment is warranted.

In opposition, Ironclad argues that summary judgment should be denied on this cross-claim for contractual indemnification

because Beggars agreed to procure general commercial liability insurance for Ironclad and failed to do so. However, Ironclad's argument is misplaced, as Ironclad is not alleging a cause of action against Beggars for failure to procure insurance. The fact that Beggars may have breached a contract to provide insurance does not create a triable issue of fact as to whether Beggars can be held liable for breaching any indemnification obligations under their contract. Thus, summary judgment dismissing the cross-claim for contractual indemnification is granted.

III. CONCLUSION

Accordingly, it is,

ORDERED that the motion of defendant/third-party plaintiff Beggars Capital Inc. pursuant to CPLR 3212 for summary judgment on its third-party claims against third-party defendant Palombo Group LLC for contractual indemnification and breach of contract for failure to procure insurance and for summary judgment dismissing the cross-claims asserted against it by defendant Ironclad Artists, Inc. for contractual indemnification, common-law indemnification, and contribution is granted in its entirety; and it is further,

ORDERED that the parties are to contact chambers on or before June 30, 2020 to schedule a status/settlement conference.

This constitutes the Decision and Order of the court.

Dated: May 14, 2020

ENTER:

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

J.S.C.