

<b>Peranzo v WFP Tower D Co. L.P.</b>
2020 NY Slip Op 31464(U)
March 20, 2020
Supreme Court, New York County
Docket Number: 154704/2016
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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AMEDEO PERANZO,  
  
Plaintiff

Index No. 154704/2016

- against -

WFP TOWER D CO. L.P., BROOKFIELD  
FINANCIAL PROPERTIES L.P., STRUCTURE  
TONE, INC., and TITANIUM SCAFFOLD  
SERVICES, LLC,

Defendants

-----X  
-----X

TITANIUM SCAFFOLD SERVICES, LLC,  
  
Third Party Plaintiff

Index No. 595094/2017

- against -

PIER HEAD ASSOCIATES, LTD., and  
COMMODORE CONSTRUCTION CORP.,

Third Party Defendants

-----X  
-----X

STRUCTURE TONE, INC.,  
  
Second Third Party Plaintiff

Index No. 595128/2017

- against -

COMMODORE CONSTRUCTION CORP.,  
  
Second Third Party Defendant

-----X

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for injuries sustained September 1, 2015, when he fell over scaffold bracing on a construction site at 250 Vesey Street, New York County, while employed by third party defendant Commodore Construction Corp. The construction manager, defendant Structure Tone, Inc., hired Commodore Construction to perform carpentry and hired defendant-third party plaintiff Titanium Scaffold Services, Inc., to erect scaffolding at the site. Co-third party defendant Pier Head Associates, Ltd., to which the scaffolding contractor Titanium Scaffold subcontracted the scaffold erection, moves for summary judgment dismissing all claims against Pier Head. C.P.L.R. § 3212(b). Titanium Scaffold cross-moves for summary judgment on Titanium Scaffold's third party claims for implied, non-contractual indemnification, for contribution, for contractual indemnification, and for breach of contract against Pier Head.

Id.

Pier Head and Titanium Scaffold dispute whether plaintiff's fall over a horizontal bar that was a component of the scaffold's bracing resulted from Pier Head's negligence or breach of its subcontract with Titanium Scaffold in Pier Head's design or erection of the scaffold bracing. Plaintiff attempted to step over the bar, which was approximately 14 inches above the floor on which he was standing, to traverse the floor, rather than walk around the perimeter of the scaffolding. The horizontal bar was attached to a vertical bar at each end of the horizontal bar.

Pier Head was never notified of any need to modify or repair the placement of the bracing. Neither Pier Head nor Titanium Scaffold played any part in directing plaintiff to traverse the floor where he was injured or to perform the task in which he was engaged when he was injured.

## II. UNDISPUTED EVIDENCE

### A. Installation of the Scaffold

Structure Tone's Project Superintendent for the construction at 250 Vesey Street, William Murphy, testified at his deposition that Structure Tone was in charge of overseeing and managing each subcontractor's work, quality control, and safety on the construction site. Structure Tone advised Titanium Scaffold and Pier Head that openings without horizontal bracing or diagonal intersecting cross-bracing were required for workers to safely traverse the construction site and then reviewed and approved the design plans for the scaffolding that Pier Head erected. Pier Head and Titanium Scaffold agree that Structure Tone determined where openings without horizontal bracing or diagonal intersecting cross-bracing were to be located in the scaffolding for workers to traverse across the floor where the scaffolding was installed.

Murphy walked through the construction site daily while Pier Head was erecting the scaffolding and found no deficiencies or dangerous conditions in it. If it needed any repairs, he contacted Titanium Scaffold to address them.

Richard Heller, Titanium Scaffold's President, confirmed at

his deposition that there were no deficiencies or dangerous conditions in the scaffolding during the period when the scaffolding was installed. He also testified that, after it was erected, Structure Tone assumed control over it. In July 2015, at Structure Tone's request, Pier Head cut out plywood from the flooring on top of the scaffold bracing, but this work did not affect the bracing itself. In August 2015, Titanium Scaffold addressed a repair of the scaffolding at Structure Tone's request and without Pier Head's involvement.

Titanium Scaffold's subcontract with Pier Head was signed by Heller and Sherri Best, Pier Head's President, February 18, 2015, authenticated by her at her deposition, B & H Florida Notes LLC v. Ashkenazi, 149 A.D.3d 401, 403 n.2 (1st Dep't 2017), and stipulated by all parties on the record March 19, 2019, as authenticated and admissible for purposes of Pier Head's motion and Titanium Scaffold's cross-motion. As there is no ambiguity in this subcontract's terms, the witnesses' testimony regarding parties' responsibilities under these terms is meaningless. The plain terms, which are not reasonably susceptible of more than one interpretation, dictate those responsibilities. Universal Am. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA, 25 N.Y.3d 675, 680 (2015); Beardslee v. Inflection Energy, LLC, 25 N.Y.3d 150, 157 (2015); Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co., 143 A.D.3d 146, 156 (1st Dep't 2016); Bank of N.Y. Mellon v. WMC Mtge., LLC, 136 A.D.3d 1, 6 (1st Dep't 2015).

The subcontract did not require Titanium Scaffold's review and approval of the design plans for the scaffolding. Pursuant to the subcontract's plain terms, once Pier Head notified Titanium Scaffold and Structure Tone that Pier Head had completed erection of the scaffolding, and Titanium Scaffold and Structure Tone accepted the scaffolding without notifying Pier Head of any necessary modification or repair, Pier Head relinquished all responsibility for the erection, maintenance, and use of the scaffolding. The subcontract provided that the scaffolding was considered acceptable unless Titanium Scaffold gave Pier Head written notification of unacceptability within three days after Pier Head notified Titanium Scaffold and Structure Tone of the completed erection.

This provision for notice within three days does not violate New York General Obligations Law § 5-323, which prohibits contracts affecting real property that exempt a contractor from liability for the contractor's own negligence in the construction, maintenance, or repair of real property or its appurtenances. Port Parties, Ltd. v. Merchandise Mart Props., Inc., 102 A.D.3d 539, 540-41 (1st Dep't 2013); 84 Lbr. Co., L.P. v. Barringer, 110 A.D.3d 1224, 1225 (3d Dep't 2013). Even if Pier Head's installation of scaffolding equipment constituted construction of an appurtenance to real property, the notice provision does not limit Pier Head's liability for any negligent design or installation. The provision merely defines when Pier Head's responsibilities end after Pier Head has completed its

responsibilities for design and installation and when Pier Head no longer may use, control, or possess the scaffolding. E.g., Figueroa v. East 168th St. Assoc., L.P., 71 A.D.3d 456, 457 (1st Dep't 2010).

Best testified that, before Pier Head notified Titanium Scaffold and Structure Tone of the completed erection, Pier Head hired an expeditor, who hired an engineer, who in turn inspected the scaffolding and approved it as conforming to Structure Tone's specifications. Upon Pier Head's notification to Titanium Scaffold and Structure Tone, Titanium Scaffold accepted the scaffolding without notifying Pier Head of any dissatisfaction with the job, and Pier Head's employees left the construction site in May 2015, more than three months before plaintiff's injury.

The subcontract further provided that, after Titanium Scaffold accepted the installation, Titanium Scaffold bore the exclusive duties to monitor the safety of all workers' activities on, underneath, or near the scaffold equipment and to inspect, maintain, adjust, or repair it. Pier Head was neither responsible nor permitted to do so, unless it received a written request from Titanium Scaffold to perform maintenance or repairs.

B. Plaintiff's Performance of His Work

Plaintiff's foreman Christopher Trager testified at his deposition that Structure Tone instructed Commodore Construction regarding the performance and completion of Commodore Construction's carpentry of drywall, acoustical ceilings, and

other interior components of the building under construction and attended meetings with all the subcontractors addressing safety. Murphy testified that Structure Tone instructed the subcontractors' foremen that all workers were to walk around the cross-bracing and not climb over it, but did not specify whether those instructions were given regarding horizontal bracing as well as the diagonal intersecting cross-bracing.

Plaintiff testified at his deposition that his foreman directed where plaintiff was to work and that he received all instructions regarding his work from his employer. Trager confirmed that he was supervising plaintiff on the day of his injury and instructed him to work on windows. Immediately before his injury he was carrying metal pieces that he had cut to a co-worker to be installed as part of window frames.

To the extent that anyone directed plaintiff to traverse the floor where he was injured or to perform the task in which he was engaged when he was injured, no party contends that Pier Head played any part. Nor does Pier Head contend that Titanium Scaffold directed plaintiff's work. Trager denied that he instructed Commodore Construction carpenters where to walk or not walk, and maintained that their practice was to use openings in the cross-bracing rather than stepping over it, but again did not distinguish between the diagonal cross-bracing and the horizontal bracing. Neither did he indicate whether any openings were in the area where plaintiff was traversing.

### III. CLAIMS AND CROSS-CLAIMS AGAINST PIER HEAD

#### A. Implied Indemnification and Contribution

Pier Head thus establishes that it relinquished all responsibility for the erection, maintenance, and use of the scaffolding and was never notified of any necessary modification or repair related to the scaffold bracing over which plaintiff fell or the route that he took to perform his assigned task. Nor does any evidence in the record of this motion and cross-motion indicate any defect or hazard in the scaffolding for which Pier Head was responsible. Plaintiff admitted at his deposition that the bracing did not move in any way when he attempted to step over it. The installation of the bracing over which plaintiff fell was a component of the scaffold's structural integrity that remained completely and continuously intact.

Plaintiff's claims focus on defendants' failure to provide a safe work site. Pier Head did not control the workers traversing the construction site, the means or area of plaintiff's work, or any part of the scaffolding when plaintiff was injured and did nothing to contribute to his injury. Therefore Titanium Scaffold is not entitled to summary judgment on Titanium Scaffold's third party claims against Pier Head for implied, non-contractual indemnification or for contribution. Instead, Pier Head is entitled to summary judgment dismissing Titanium Scaffold's third party claims and any cross-claims by Commodore Construction against Pier Head for implied, non-contractual indemnification and for contribution. Canty v. 133 E. 79th St., LLC, 167 A.D.3d

548, 549 (1st Dep't 2018); Rubino v. 330 Madison Co., LLC, 150 A.D.3d 603, 604 (1st Dep't 2017); Wilk v. Columbia Univ., 150 A.D.3d 502, 503-504 (1st Dep't 2017); Scekic v. SL Green Realty Corp., 132 A.D.3d 563, 565-66 (1st Dep't 2015).

B. Contractual Indemnification

While the subcontract includes an indemnification provision that primarily specifies Titanium Scaffold's indemnification obligation to Pier Head, Pier Head and Titanium Scaffold entered a separate Indemnification Agreement March 16, 2015, that Best executed for Pier Head and authenticated. B & H Florida Notes LLC v. Ashkenazi, 149 A.D.3d at 403 n.2. This agreement requires Pier Head to defend and indemnify Titanium Scaffold against any claims arising from or connected to Pier Head's work under the subcontract, regardless of Pier Head's fault. Pier Head does not dispute that plaintiff was injured from falling over the scaffold bracing that Pier Head installed.

The earlier subcontract, however, provides that:

If Pier Head is required to sign any contractual indemnity agreement in favor of the Customer or third parties (in the past, present or future), the following limitations shall apply, notwithstanding any terms of the contractual indemnity agreement which indicate a broader indemnity obligation by Pier Head. Pier Head's contractual indemnity obligation to the Customer and/or third parties shall be limited to cases where the finder of fact has determined Pier Head to be responsible in negligence for personal injury or property damage. There shall be no duty on the part of Pier Head to defend any indemnitee unless and until there has been such a finding, and Pier Head's indemnity obligation shall be limited to its own degree of fault as determined by the factfinder. . . . The limitations set forth in this clause shall supersede any other contractual indemnity provision or agreement signed by Pier Head Associates, Ltd. for the project at issue which are contained in documents provided by the customer, owner or

any other entity, regardless of whether that agreement precedes or post dates this contract.

Aff. of Peter C. Lucas Ex. X, at 10 (Sept. 28, 2018). Thus the subcontract's provisions specifying Pier Head's indemnification obligation to Titanium Scaffold limit the later Indemnification Agreement and obligate Pier Head to defend and indemnify Titanium Scaffold, the "Customer," only if Pier Head's negligence was responsible for plaintiff's injury. Even if the indemnification provisions were ambiguous, they would be construed against indemnification. Bradley v. Earl B. Feiden, Inc., 8 N.Y.3d 265, 274 (2007); Nicholson v. Sabey Data Ctr. Props., LLC, 160 A.D.3d 587, 687 (1st Dep't 2018); Martinez v. Benau, 103 A.D.3d 545, 546 (1st Dep't 2013); 546-552 W. 146th St. LLC v. Arfa, 99 A.D.3d 117, 122 (1st Dep't 2012). See Gregware v. City of New York, 132 A.D.3d 51, 64 (1st Dep't 2015).

The Indemnification Agreement provides that Pier Head's indemnification obligation is only to the fullest extent permitted by law, which the subcontract specifies by reducing the obligation according to the indemnitee's degree of fault. These contractual provisions respect the prohibition against indemnification for a party's own negligence. N.Y. Gen. Oblig. Law § 5-322.1; Brooks v. Judlau Contr., Inc., 11 N.Y.3d 204, 210-11 (2008); Farrugia v. 1440 Broadway Assoc., 163 A.D.3d 452, 456 (1st Dep't 2018); Radeljic v. Certified of N.Y., Inc., 161 A.D.3d 588, 590 (1st Dep't 2018); Frank v. 1100 Ave. of the Ams. Assoc., 159 A.D.3d 537, 537 (1st Dep't 2018). Any fault on the part of Titanium Scaffold therefore does not bar enforcement of

Pier Head's indemnification obligation to the extent that Titanium Scaffold's negligence, violation of law, or breach of contract did not contribute to plaintiff's injury.

Titanium Scaffold's motion asks to be awarded contractual indemnification from Pier Head "to the extent that there is a finding that the furnishing and installation of the scaffold caused or contributed to the plaintiff's alleged accident." Aff. of Daniel J. Morse ¶ 87 (Dec. 27, 2018). Titanium Scaffold thus ignores the requirement that Titanium Scaffold's own contribution to plaintiff's injury reduces any indemnification owed to Titanium Scaffold. Given Titanium Scaffold's exclusive duties after accepting the scaffolding from Pier Head, to monitor the safety of all workers' activities on, underneath, or near the scaffold and to inspect, maintain, adjust, and repair it, Titanium Scaffold fails to establish conclusively that no failure to carry out these duties contributed to plaintiff's injury. Titanium Scaffold nowhere demonstrates that it regularly monitored all workers' activities around the scaffold, inspected or maintained it, or adjusted the openings through its bracing to allow workers to traverse the floor on which the scaffolding was erected. In fact, Titanium Scaffold insists that these duties were Structure Tone's, not Titanium Scaffold's. While Structure Tone may have undertaken part of these duties, Titanium Scaffold points to no contract or other evidence that relieved Titanium Scaffold from them.

Under the Indemnification Agreement, Pier Head would owe

Titanium Scaffold indemnification to the extent that Titanium Scaffold did not contribute to plaintiff's injury, even if Pier Head's installation of the scaffold bracing and every other component of the scaffolding was faultless. Under the subcontract, however, Titanium Scaffold's request would be viable only if it sought indemnification to the extent that the fact finder determines Pier Head's negligent furnishing and installation of the scaffold contributed to plaintiff's injury, and to the extent that Titanium Scaffold did not contribute to plaintiff's injury. Since Pier Head has established that no negligence on Pier Head's part was responsible for plaintiff's injury, and no party has rebutted that showing, Pier Head is not obligated to indemnify Titanium Scaffold for its defense of and potential liability for plaintiff's claims. Rubino v. 330 Madison Co., LLC, 150 A.D.3d at 604; Hamill v. Mutual of Am. Inv. Corp., 79 A.D.3d 478, 479-80 (1st Dep't 2010); Espinoza v. Federated Dept. Stores, Inc., 73 A.D.3d 599, 600 (1st Dep't 2010). See Gell-Tejada v. Macy's Retail Holding, Inc., 116 A.D.3d 594, 595 (1st Dep't 2014); Mohammed v. Silverstein Props., Inc., 74 A.D.3d 453, 454 (1st Dep't 2010).

C. Breach of a Contract to Procure Insurance

Titanium Scaffold's subcontract with Pier Head also required Pier Head to procure general liability insurance naming Titanium Scaffold and Structure Tone as additional insureds. Titanium Scaffold admits that Pier Head maintained a general liability insurance policy that named Titanium Scaffold and Structure Tone

as additional insureds, however, and identifies nothing about this policy that fell short of the subcontract's requirements.

Moreover, the subcontract's insurance procurement provision requires that: "Any claims against Pier Head by an additional insured alleging breach of contract for failure to procure insurance must be commenced within one year of the date on which the Customer signs this contract and if not commenced within that period shall be waived, released and time-barred." Lucas Aff. Ex. X, at 10 (Sept. 28, 2018). Titanium Scaffold, the "Customer" and an additional insured, executed the subcontract February 18, 2015, but did not commence the third party action against Pier Head alleging its breach of contract for failure to procure insurance until February 3, 2017, almost a year after the limitations period.

Consequently, Titanium Scaffold is not entitled to summary judgment on Titanium Scaffold's third party claim against Pier Head for breach of a contractual obligation to procure insurance. Instead, Pier Head is entitled to summary judgment dismissing Titanium Scaffold's third party claim for breach of a contract to procure insurance. Aramburu v. Midtown W.B, LLC, 126 A.D.3d 498, 501 (1st Dep't 2015); Mathews v. Bank of Am., 107 A.D.3d 495, 496 (1st Dep't 2013).

D. Other Defendants' Claims Against Pier Head

The other defendants served cross-claims against Pier Head, but, since it is not a co-defendant, those defendants may not cross-claim against Pier Head. Only Titanium Scaffold may claim

and only Commodore Construction may cross-claim against Pier Head. Defendants other than Titanium Scaffold must commence a third party action to interpose claims against Pier Head as Titanium Scaffold did. C.P.L.R. § 1007. Pier Head's only contractual obligations to Structure Tone, moreover, are to the extent Structure Tone is a third party beneficiary under Pier Head's contracts with Titanium Scaffold, not under Titanium Scaffold's contract with Structure Tone to which Pier Head was not a party. National Union Fire Ins. Co. of Pittsburgh, Pa. v. Red Apple Group, 309 A.D.2d 657, 657 (1st Dep't 2003); Polat v. Fifty CPW Tenants Corp., 249 A.D.2d 163, 164 (1st Dep't 1998). See Benitez v. Church of St. Valentine Williamsbridge N.Y., 171 A.D.3d 593, 594 (1st Dep't 2019); Nazario v. 222 Broadway, LLC, 135 A.D.3d 506, 510 (1st Dep't 2016), modified on other grounds, 28 N.Y.3d 1054 (2016). Therefore the court dismisses any such cross-claims without prejudice to the timely commencement of third party actions. See Mutual Benefits Offshore Fund v. Zeltser, 140 A.D.3d 444, 445 (1st Dep't 2016); Cole v. Mraz, 77 A.D.3d 526, 527 (1st Dep't 2010).

#### IV. CONCLUSION

Both Titanium Scaffold and Commodore Construction, the parties claiming against Pier Head, fail to show any negligence by Pier Head or the absence of negligence or violation of law or contract by either Titanium Scaffold or Commodore Construction, to sustain their claims for implied indemnification and contribution against Pier Head. Pier Head establishes that it

does not owe contractual indemnification and did not breach its contract to procure insurance, which Titanium Scaffold fails to rebut.

For the reasons explained above, the court grants the motion by third party defendant Pier Head Associates, Ltd., for summary judgment dismissing the third party claims and cross-claims for implied indemnification, contribution, contractual indemnification, and breach of a contract to procure insurance. C.P.L.R. § 3212(b). The court denies the cross-motion by defendant-third party plaintiff Titanium Scaffold Services, LLC, for summary judgment on the third party claims for implied indemnification, contribution, contractual indemnification, and breach of a contract to procure insurance. Id.

DATED: March 20, 2020



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LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.