SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 38

JUAN GARCIA,	:	Index No. 162400/2014
Plaintiff,	:	DECISION & ORDER
-against-	:	
SMJ 210 WEST 18 LLC, *et al.*,	:	
Defendants.	:	
SMJ 210 WEST 18 LLC, *et al.*,	:	Index No. 595335/2015
Third-Party Plaintiffs,	:	
-against-	:	
S&E BRIDGE & SCAFFOLD LLC,	:	
Third-Party Defendant.	:	
S&E BRIDGE & SCAFFOLD LLC,	:	Index No. 595215/2017
Second Third-Party Plaintiff,	:	
-against-	:	
JM3 CONSTRUCTION LLC,	:	
Second Third-Party Defendant.	:	

LOUIS L. NOCK, J.

The matter comes before the court at this time on the parties' submissions, in the nature of motion *in limine* practice prior to trial. Specifically, third-party-defendant/second-third-party-plaintiff S&E Bridge & Scaffold LLC ("S&E") moves to include at trial evidence regarding any lack of negligence on its part involving the matters underlying this lawsuit, in the face of judicial

determinations heretofore made in this action involving its liability under a theory of contractual indemnification.

INTRODUCTION

This matter, originally assigned to Hon. Robert D. Kalish of this court, was assigned for pre-trial conferencing to the undersigned. Said conferencing was conducted on April 28, May 6, and May 12, 2020, during which efforts were made toward possible resolution of the matter, followed by discussions geared toward the narrowing of triable issues – specifically, whether the particular issue of contractual indemnification on the part of S&E remains to be tried in the face of language set forth in the decision and order of Justice Kalish herein, dated November 17, 2018 (NYSCEF Doc. No. 264); to wit, that portion thereof reading as follows:

> Here, the indemnification provision requires S&E to indemnify and defend the SMJ 210 West 18 defendants "against all claims or causes of action, damages, losses and expenses, including but not limited to attorneys' fees . . . arising out of or resulting from the acts or omissions of [S&E]" . . . . Despite S&E's arguments to the contrary, S&E is not entitled to dismissal of the MJ 210 West 18 defendants' contractual indemnification claim. Even if S&E was not negligent, this indemnification provision is triggered because plaintiff, an employee of S&E, was injured while performing work under S&E's contract . . . . Therefore, S&E is not entitled to dismissal of the third-party claim for contractual indemnification against it.

(NYSCEF Doc. No. 264 at 21 [brackets in original].)

Although, on appeal, the Appellate Division reversed portions of Justice Kalish's decision that dismissed plaintiff's claims under Labor Law sections 240 and 241,[1] S&E did not appeal the above-quoted holding by Justice Kalish pertaining to the triggering of the indemnification provision that binds S&E; nor did the Appellate Division address that holding, let alone reverse it. Thus, by all reasonable accounts derived from a plain reading of both the

[1] finding that the record showed "that a piece of the exterior façade of the building still under construction fell on [plaintiff], that workers were performing patch work . . . on the floors above plaintiff, and that the exterior façade was not complete" (NYSCEF Doc. No. 275 at 2).

Appellate Division's limited reversal, and Justice Kalish's unreversed holding quoted above, that holding remains intact for purposes of moving forward to trial in this action, and, concomitantly, identifying what need not be tried.

But despite what presents as clear and unambiguous language set forth in Justice Kalish's above-quoted decision, S&E now asserts, on *in limine* motion practice before the undersigned, that an issue of fact for trial – indeed, for *jury* trial – remains with regard to its liability for contractual indemnification.

PERTINENT PROCEDURAL HISTORY

As noted above, Justice Kalish reasoned that S&E's contractual indemnification obligation to defendants/third-party-plaintiffs SMJ 210 West 18LLC and 210 West 18th LLC (the "Ownership Entities") was triggered by virtue of the fact that plaintiff, who was S&E's employee, was injured in the course of performing work in furtherance of S&E's trade contract. Inasmuch as Justice Kalish had dismissed plaintiff's claims against the Ownership Entities prior to appeal, there was obviously no need for his Honor to address the Ownership Entitles' right to indemnification for any verdict or judgment on plaintiff's substantive claims. On the other hand, Justice Kalish observed that the Ownership Entitles' right to recover attorneys' fees and costs was not moot. His Honor, thus, denied S&E's motion to dismiss the indemnification claim against it which, prior to appeal, related only to attorneys' fees. As Justice Kalish stated: "[E]ven though the court is dismissing the main complaint against the SMJ 210 West 18 defendants, their contractual claim against S&E for attorneys' fees and costs in defending the action is not moot." (NYSCEF Doc. No. 264 at 21.)

As further noted, plaintiff appealed Justice Kalish's dismissal of his Labor Law section 240 and 241 claims. On December 10, 2019, the Appellate Division, First Department, reversed

that dismissal, granting summary judgment to plaintiff on his Labor Law 240 (1) claim against the Ownership Entities, and restoring plaintiff's Labor Law 241 (6) claim (*see*, NYSCEF Doc. No. 275). S&E never appealed Justice Kalish's holding that the contractual indemnification provision under which it was bound was actually triggered for the reasons stated by his Honor in his decision, as to which other portions were successfully appealed by the plaintiff.

THE PRIOR DECISION AS TO INDEMNIFICATION IS BINDING

Not having taken any appeal from Justice Kalish's decision, S&E is now barred from challenging the Ownership Entities' right to contractual indemnification under the doctrine of law of the case (*e.g., Martin v City of Cohoes*, 37 NY2d 162, 165 ["The doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy hat, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned"], *rearg denied* 37 NY2d 817 [1975]).

By any reasonable construction, the only reason why Justice Kalish's decision did not direct S&E to indemnify the Ownership Entities for plaintiff's substantive claims, focusing only on claims for attorneys' fees, is because, prior to appeal, Justice Kalish's dismissal of plaintiff's substantive claims rendered the question of indemnification for those claims moot. That is obviously why the triggering of S&E's indemnification obligation articulated in the decision related, at that pre-appeal point in time, only to claims for attorneys' fees. But as of the Appellate Division's restoration of plaintiff's substantive claims, that triggering of indemnification has applied, and continues to apply, to those restored claims. In sum, there is no triable issue as to S&E's duty to indemnify in this case, as Justice Kalish has already found it to exist, and no reversal of that finding has ever ensued. The time for any appeal has long expired.

The doctrine of law of the case applies to "legal determinations that were necessarily resolved on the merits in the prior decision," "and to the same questions presented in the same case" (*RPG Consulting, Inc. v Zormati*, 82 AD3d 739, 740 [2d Dept 2011]). It bars reconsideration of issues which were raised and determined against a party, such as S&E's present attempt to challenge the Ownership Entities' entitlement to contractual indemnification, which was previously resolved against S&E and from which it took no appeal.

Under the law of the case doctrine, a court of coordinate jurisdiction, such as the undersigned, cannot sit in review of Justice Kalish's decision (*see*, *Martin v City of Cohoes*, 37 NY2d 162 [1975]). The doctrine applies to determinations that were necessarily resolved on the merits in a prior decision and to the same questions presented in the same case. Here, S&E already had a full and fair opportunity to adjudicate the Ownership Entities' right to contractual indemnity. Justice Kalish's decision was on the merits and, thus, it is the law of the case, precluding S&E from re-litigating the issue.

S&E has submitted arguments which tend to re-litigate the matter already submitted to Justice Kalish for decision, and ruled upon by his Honor, tendering its own analysis of the contractual language in this case: "arising out of or resulting from the acts or omissions of Contractor." S&E had the right to proffer those arguments to the Appellate Division. It did not. Its current analysis – right or wrong – comes too late, as Justice Kalish's unambiguous finding of a triggering of indemnification is now, and has been, the law of the case.

S&E casts Justice Kalish's finding as "non-binding dicta" (S&E Memorandum, dated May 20, 2020, at 5). But it clearly is not. Justice Kalish unambiguously held, in terms as plain as they could possibly be, that: "Even if S&E was not negligent, this indemnification provision is triggered because plaintiff, an employee of S&E, was injured while performing work under

S&E's contract . . . ." (NYSCEF Doc. No. 264 at 21.) That determination was an express, affirmative, and essential holding directly responsive to S&E's motion to have the indemnification claim against it dismissed. This court is not authorized to review that determination, and S&E's time to appeal it is long expired. It is the law of the case.

Consequently, the jury trial that is to occur in the future life of this action will not include the issue thus far determined by Justice Kalish herein; to wit, S&E's contractual liability to indemnify the Ownership Entities with regard to the matters involving this lawsuit, as hereinabove discussed.

Accordingly, it is

ORDERED that the motion *in limine* of third-party-defendant/second-third-party-plaintiff S&E Bridge & Scaffold LLC to include at trial evidence regarding any lack of negligence on its part involving the matters underlying this lawsuit, is denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
May 22, 2020

ENTER:

Hon. Louis L. Nock, J.S.C.