

Kennedy v Hines 1045 Ave. of the Ams. Invs. LLC

2020 NY Slip Op 32321(U)

July 17, 2020

Supreme Court, New York County

Docket Number: 156501/2016

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ

PART

IAS MOTION 47EFM

Justice

-----X

JOHN KENNEDY,

Plaintiff,

- v -

HINES 1045 AVENUE OF THE AMERICAS INVESTORS
LLC, ET AL.,

Defendants.

-----X

INDEX NO. 156501/2016

MOTION DATE

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 188-224, 231-32 were read on this motion to/for JUDGMENT – SUMMARY.

Plaintiff John Kennedy commenced this Labor Law action to recover for personal injuries he sustained on July 8, 2016 in the course of his employment for second third-party defendant Iron Horse Transport, Inc. (Iron Horse) while working on a project known as Bank of China New York at 7 Bryant Park, 28th Floor, Avenue of the Americas, Bank of China, New York, New York (project). Second third-party defendant Iron Horse now moves pursuant to CPLR § 3212 for summary judgment seeking dismissal of claims brought by defendants/second third-party plaintiffs Hines 1045 Avenue of the Americas (Hines), 7BP Owner (7BP), Pacolet Milliken Enterprises, Inc. (Pacolet), and Structure Tone Inc. (Structure Tone) for (1) contractual defense and indemnification, (2) common law contribution and indemnification (3) attorneys' fees, and (4) breach of contract for failing to procure insurance. (Second Third-Pty Compl. paras. 16-19). Second third-party plaintiffs Hines, 7BP, and Pacolet (owner defendants) collectively held an ownership interest in the location and contracted co-defendant/second third-party plaintiff Structure Tone to be the general contractor for the project. Structure Tone hired a subcontractor for the project, defendant/first third-party defendant Striano Electric (Striano). Affirmation of

Nicole M. Varisco dated November 5, 2019, Exh. V (subcontract between Structure Tone and Striano dated May 18, 2016). Striano then hired first third-party defendant Galasso Trucking and Rigging Inc. (Galasso) to be a subcontractor for the project. Varisco Aff., Exh. O (Kruser Dep. Tr. 17-19) and Exh. P. (Doran Dep. Tr. 11-16, 37). Galasso hired the movant, second third-party defendant Iron Horse, as a subcontractor for the project to provide ironworkers to erect derricks; Galasso and Iron Horse entered into a “Rigging, Hoisting, and Millwright Subcontractor Agreement” (“subcontractor agreement”) dated September 30, 2013, and an “Indemnification and Insurance Agreement” (“indemnification agreement”) dated January 28, 2014, which were in effect at the time of plaintiff’s accident. Varisco Aff., Exh. X (indemnification agreement and subcontractor agreement); Affirmation of Kevin M. Ryan dated January 28, 2020, Exh. R (Mangia Dep., pp. 18-20). Structure Tone, the general contractor for the project, did not have a contract with Galasso or Iron Horse. Varisco Aff., Exh. P (Doran Dep. Tr. 17, 19-24).

Common Law Indemnification and Contribution

With respect to the owner defendants’ second claim for common law indemnification and contribution, Iron Horse argues that these claims must be dismissed because they are barred by the Workers’ Compensation Law. “[W]here an employee is injured in the course of employment, his exclusive remedy against his employers is ordinarily a claim for workers’ compensation benefits.” *Valenzino v. Niki Trading Corp.*, 21 A.D.3d 818, 820 (1st Dep’t 2005) (citing Workers’ Compensation Law § 11). Likewise, employers cannot be held liable for common law indemnification and contribution claims asserted by third party claimants unless the employee sustained a “grave injury” as defined by Workers’ Compensation Law § 11. *Calvin v. CAP Equipment Leasing Corp.*, 156 A.D.3d 404 (1st Dep’t 2017). Grave injuries are those injuries that are listed in the statute and are determined to be permanent. *Mentesana v. Bernard Janowitz*

Const. Corp., 36 A.D.3d 769, 770 (2nd Dep't 2007). Further, the statute prohibits third-party claims for contribution or indemnification against an employer unless there is a written contract entered into prior to the accident or occurrence by which the employer expressly agreed to contribution or indemnification of the third-party claimant. *McIntosh v Ronit Realty, LLC*, 181 A.D.3d 580 (2nd Dep't 2020).

To be entitled to dismissal of the common law claims for contribution and indemnification, second third-party defendant Iron Horse, as the movant on summary judgment, has the burden of showing that plaintiff was its employee at the time of the incident and that he did not suffer a “grave injury” as defined by Workers’ Compensation Law § 11. *Altonen v. Toyota Motor Credit Corp.*, 32 A.D.3d 342, 343 (1st Dep’t, 2006). Iron Horse has met its burden. To support its position, Iron Horse submitted plaintiff’s Verified Bill of Particulars and his deposition testimony in which he states that he worked for Iron Horse as an ironworker at the time of the accident. Varisco Aff., Exh. M (paras. 9 and 10) and Exh. N (Plaintiff Dep. Tr. 40). Iron Horse also submitted evidence that plaintiff applied for and received workers’ compensation benefits as a result of this incident, and that the trauma he suffered—including lower back herniations and injuries to the left knee and left hip—did not constitute a “grave injury” as detailed by the Workers’ Compensation Law. Varisco Aff., Exh. M (paras. 16, 24). Additionally, plaintiff did not allege any direct claims against his employer, Iron Horse. *Id.*

In opposition, second third-party plaintiffs do not oppose Iron Horse’s request to dismiss the common law contribution and common law indemnity claims against Iron Horse. Affirmation of Mark Collesano dated November 22, 2019, p. 2. Accordingly, the claim for common law contribution and indemnification in the second third-party complaint will be dismissed.

**Contractual Indemnification, Breach of Contract for Failure to Procure Insurance,
and Attorneys' Fees**

Next, Iron Horse argues that second third-party plaintiffs' first, third, and fourth claims—for contractual indemnification, attorneys' fees, and breach of contract for failure to procure insurance—should be dismissed because the owner defendants were not parties to any contractual agreement with Iron Horse for the project at the time of plaintiff's accident. Iron Horse avers that the terms of the indemnification agreement between itself and Galasso limits Iron Horse's indemnification obligations solely "to Galasso and its respective principals, officers, directors and other listed parties and to designated owners, principals, financial institutions, agents, and consultants" and argues that second third-party plaintiffs were not designated as indemnitees when this agreement was executed or at any time prior to the accident. Varisco Aff., Exh. X, p. 1, 4 (indemnification agreement and subcontractor agreement). The indemnification agreement governed Iron Horse's work on the project and was in effect at the time of plaintiff's accident. Varisco Aff., Exh. R (Mangia Dep. Tr. 2, 5-7, 18-25, 43-44); Exh. P (Structure Tone Dep. Tr. 3-7, 68-70); Exh. X, pp. 1, 4 (indemnification agreement and subcontractor agreement).

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." *Campos v. 68 East 86th Street Owners*, 117 A.D.3d 593, 595 (1st Dep't 2014). When a party is not under a legal duty to indemnify, a contract which assumes that obligation must be construed strictly to avoid reading duties into the contract that the parties did not intend to be assumed. *Id.* Further, "[c]ourts will construe a contract to provide indemnity to a party for its own negligence only where the contractual language evinces an

‘unmistakable intent’ to indemnify.” *Great Northern Ins. Co. v. Interior Const. Corp.*, 7 N.Y.3d 412, 417 (2006).

Here, Iron Horse submits its subcontractor and indemnification agreement with Galasso; it is undisputed that second third-party plaintiffs were not parties to either of these contracts. Varisco Aff., Exh. X, pp. 1, 4 (indemnification agreement and subcontractor agreement). Iron Horse avers that owner defendants were not listed as designated owners to be indemnified under its indemnification agreement with Galasso and submits the testimony of Louis Mangia—the president of Iron Horse—who states that Galasso did not designate any owners to be included under the indemnification agreement and that the delivery request submitted by Galasso to Iron Horse did not divulge the identity of the owners, general contractor, or any subcontractors for the project. Varisco Aff., Exh. Y (Affidavit of Louis Mangia dated October 17, 2019, p. 2; Exh. R (Mangia Dep. Tr. 13-25, 29, 31, 33)).

Iron Horse’s argument is further supported by the fact that Galasso retained Iron Horse two years prior to the time that Galasso, Striano, and Structure Tone—the general contractor—were retained to work on the project. This is evidenced by the dates of the relevant agreements. Galasso and Iron Horse executed the indemnification agreement on January 28, 2014 (Exh. X [indemnification agreement between Galasso and Iron Horse]), prior to (1) the owner defendants’ May 2016 contract with Structure Tone establishing the latter as the general contractor for the subject project (Varisco Aff., Exh. U [contract between owner defendants and Structure Tone]); (2) Structure Tone’s May 18, 2016 contract with Striano to be a subcontractor for the project (Varisco Aff., Exh. V [subcontract between Structure Tone and Striano]); and (3) Striano’s April 26, 2016 purchase order to Galasso subcontracting work for Structure Tone at the project (Varisco Aff., Exh. W [purchase order from Galasso to Striano]. Although the owner

defendants' May 2016 contract with Structure Tone notes that the "[c]ontractor provided certain pre-construction services in connection with the project under a separate letter of intent effective as of the 15th day of December, 2015," the indemnification agreement and the subcontract between Galasso and Iron Horse predates this letter of intent. Varisco Aff., Exh. U (contract between owner defendants and co-defendant Structure Tone, p.1). The fact that Galasso retained Iron Horse well prior to work on the project beginning further supports Iron Horse's position that the parties never designated any of the owner defendants as parties to the indemnification agreement and that Iron Horse was unaware of the identity of second third-party plaintiffs prior to plaintiff's accident; the agreements between the owner defendants and Structure Tone and subsequent agreements between Structure Tone and its subcontractors were executed after Iron Horse and Galasso entered into their indemnification agreement. Varisco Aff., Exh. X, pp. 1, 4 (indemnification agreement and subcontractor agreement); Exh. Y (Mangia Aff., p. 2). These facts are sufficient to show that second third-party plaintiffs are not entitled to contractual indemnification from Iron Horse since they were not party to any indemnification agreement with Iron Horse nor were they ever designated as owners indemnitees under Iron Horse's indemnification agreement with Galasso.

In response, second third-party plaintiffs attempt to raise an issue of fact by arguing that a purchase order between Striano Electric and Galasso, dated April 26, 2016—which identifies Structure Tone as the general contractor for the project—serves as a notice of second third-party plaintiffs' designation as qualifying indemnitees under the indemnification agreement between Galasso and Iron Horse. Affirmation of Mark A. Collesano, paras. 21-23; Varisco Aff., Exh. W (purchase order dated April 26, 2016). However, Iron Horse is not a party to the purchase order between Striano and Galasso and there is no evidence that Iron Horse ever received or even saw

this document. Further, there is no language in the indemnification agreement which supports, explicitly or implicitly, second third-party plaintiffs' contention that Galasso and Iron Horse intended to indemnify or procure insurance for any owners for any project on which Iron Horse was hired to provide ironworking services. Varsico Aff., Exh. X (indemnification agreement); Collesano Aff., paras. 21-23. Finally, other than the purchase order, second third-party plaintiffs have not submitted any evidence to show that they were designated as owners under Iron Horse's indemnification agreement with Galasso. *Id.* Accordingly, the second third-party claims for contractual indemnification and breach of contract for failure to procure insurance will be dismissed.

Regarding second third-party plaintiffs' claim for attorneys' fees, New York follows the "American Rule" that attorneys' fees are "merely incidents of litigation," and are not recoverable absent a specific contractual provision or statutory authority that provides for an award of attorneys' fees to a prevailing party. *214 Wall St. Assoc., LLC v Med. Arts-Huntington Realty*, 99 A.D.3d 988, 990 (1st Dept. 2012). Here, second-third-party plaintiffs did not plead any specific statute authorizing recovery of attorneys' fees and there is no dispute that there is no contract between Iron Horse and second-third-party plaintiffs. Therefore, there is no basis for a claim for contractual recovery of attorneys' fees. Accordingly, the second third-party claim for attorneys' fees will be dismissed. Accordingly, it is

ORDERED that second third-party defendant Iron Horse's motion for summary judgment is granted and the second third-party complaint is dismissed, with costs and disbursements awarded to the movant, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the caption shall be amended to reflect the dismissal of the second third-party complaint; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)).

7/17/20
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE