

**Zangara v Total Safety Consulting, LLC**

2020 NY Slip Op 33651(U)

September 8, 2020

Supreme Court, Queens County

Docket Number: 711429/19

Judge: Robert I. Caloras

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This opinion is uncorrected and not selected for official publication.

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9/9/2020  
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**Short Form Order  
NEW YORK SUPREME COURT - QUEENS COUNTY  
PRESENT: HON. ROBERT I. CALORAS PART 36  
Justice**

-----X  
**FIONA ZANGARA,**  
**Plaintiff,**

**Index No. 711429/19  
Seq. No. 1**

**-against-  
TOTAL SAFETY CONSULTING, LLC,  
JOHN CONCIECAO, and PLAZA  
CONSTRUCTION CORPORATION  
Defendants.**

-----X  
**PLAZA CONSTRUCTION LLC,**  
**Third Party Plaintiff,**

**-against-  
CROSS COUNTRY COSTRUCTION LLC,  
Third Party Defendant.**

-----X  
The following papers numbered E25-E49 read on this motion by the Third Party Defendant, Cross Country Construction LLC, for an order pursuant to 3211(a)(7) dismissing Third Party Plaintiff's Complaint against it for failing to state a cause of action.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affirmation-Exhibits-Memo of Law-RJI.....	E25-E33
Stipulations.....	E34-E36
Memo of Law-Affirmation in Opposition-Exhibits.....	E37-E44
Affirmation in Opposition-Exhibits-Memo of Law.....	E45-E47
Reply Affirmation-Memo of Law.....	E48-E49

Upon the foregoing papers, it is ordered that Third Party Defendant's motion is determined as follows:

On July 1, 2019, Plaintiff commenced this action by filing a Summons and Verified Complaint against Defendants alleging violations of the New York State Human Rights Law, New York State Executive Law 296, et. seq. ("NYSHRL"), the New York City Human Rights Law, New York City Administrative Code § 8-107, et seq. ("NYCHRL"), as well as common law, negligence, intentional infliction of emotional distress, and intentional infliction of emotional distress. Plaintiff further alleged she was employed as a Concrete Safety Manager by Cross Country Construction LLC (hereinafter "CCC"), whom is a subcontractor of Plaza Construction Corporation (hereinafter "PC") at a jobsite located at 110 Charlton Street, New York, New York (hereinafter the "Jobsite"). Total Safety Consulting, LLC (hereinafter "TSC") was engaged by PC as the "Site Safety Management" company, and John Conciecao (hereinafter

“Conciecao”), was employed by TSC at the Jobsite. Plaintiff also alleged Defendants maintained a joint employment relationship regarding her. The complaint also alleges:

In the fall of 2018, Defendant CONCEICAO made inappropriate comments directed at Plaintiff FIONA ZANGARA, including inquiring about Plaintiff FIONA ZANGARA whereabouts on the job-site, making unwarranted trips to her office (shanty) and engaging in highly inappropriate and explicit conversation directed at Plaintiff FIONA ZANGARA, including discussions concerning male genitalia, all in the presence of non-parties.

Plaintiff FIONA ZANGARA expressed to Defendant CONCEICAO that this behavior and language made her uncomfortable and he should therefore cease using such language, discussing such subjects and acting in such a manner.

On November 5, 2018, while in the course of her employment, Plaintiff FIONA ZANGARA approached Defendant CONCEICAO regarding a request for a 'Hot Work Permit'. Defendant CONCEICAO began to scream and curse at Plaintiff FIONA ZANGARA, while accusing her of causing his flat tire a week earlier as a result of some imagined vengeance. This tirade, which occurred in front of several non-parties and is captured on surveillance video, includes Defendant CONCEICAO shouting "Fuck You Fiona! You know what I'm talking about! My fucking flat tire!" When Plaintiff FIONA ZANGARA replied that she did not in fact know what he was talking about, Defendant CONCEICAO shouted "Fiona, you can suck my dick!", while gesturing in a sexually degrading manner.

This incident, taken together with Defendant CONCEICAO'S prior actions, prompted Plaintiff FIONA ZANGARA to file a complaint with her supervisor, who reported Defendant CONCEICAO'S behavior to the General Contractor (PLAZA).

Upon information and belief, Defendant PLAZA's Regional Safety Director investigated these incidents and recommended that Defendant CONCEICAO ultimately be removed from the job site.

On October 7, 2019, TSC and Conciecao filed their Verified Answer. On November 20, 2019, PC filed its Verified Answer, which alleged, among other things, cross claims against TSC and Conciecao for indemnification and contribution. On November 20, 2019, PC filed a Summons and Third Party Complaint against CCC, asserting causes of action for contractual and common law indemnification, and contribution. In the Third Party Complaint, PC alleged it and CCC entered into a “Trade Subcontract for Superstructure Concrete Work (the “Subcontract”) in or around October 6, 2017. PC alleged, pursuant to “Article 9” of the Subcontract, CCC agreed

to “indemnify, defend, save and hold [PC] harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with, or are claimed to arise out of or be connected with, the performance of work by [CCC], or any of its sub-subcontractors”. PC further alleged “[a]s [Zangara] alleges violation of employment statues [sic] and asserts other claims, and attempts to hold [PC] liable for such violations, as an employer of [CC’s] employee, [CC’s] obligations under the Subcontract are triggered”. On January 6, 2020, TSC and Conciecao filed their Verified Answer to PC’s cross claims, and also asserted therein, cross claims against CCC for common law indemnification and contribution.

CCC now moves, in this pre-answer motion, to dismiss the Third-Party Complaint, and TSC and Conciecao’s cross claims, as asserted against them, because they violate New York’s public policy prohibiting indemnification of intentional torts. CCC claims Plaintiff alleged causes of action alleging Defendants intentionally caused her injuries. Consequently, CCC argues its obligations under the subcontract with PC were not triggered, and any claims for common law indemnification by PC, TSC and Conciecao must also be dismissed. As to the claims for contribution, CCC claims the Third Party Complaint did not allege it participated in, or aided and abetted in, the alleged discriminatory conduct. CCC further asserts Plaintiff did not allege any allegations of wrongdoing on the part of CCC in her Complaint. CCC denies any part in the alleged injuries claimed by Plaintiff. Consequently, CCC argues Defendants have failed to plead factual allegation sufficient to demonstrate, let alone prove, it somehow caused or exacerbated or otherwise led to Plaintiff’s injuries.

In opposition, PC argues the motion should be denied because it has stated actionable claims for contractual and common law indemnification, and contribution against CCC. PC further argues, as Plaintiff’s employer, CCC is a necessary party because it had a statutory duty to provide Plaintiff with a safe work environment that was free of discrimination and harassment pursuant to N.Y. Exec. Law §§ 292(5), 296(1)(a); N.Y.C. Admin. Code §§ 8-102, 8-107(1)(a). PC further argues its subcontract with CCC broadly requires CCC to indemnify, defend, save and hold it harmless from any and all liability that arises out of CCC’s work on the Jobsite or that arises out of any acts or omissions of CCC. PC claims that CCC was aware of, but failed to prevent or resolve, any of Plaintiff’s negligence and discrimination claims. When Plaintiff or CCC’s management went to PC regarding these allegations, PC claims it immediately resolved these issues. As such, PC claims that CCC was directly involved in the facts of this controversy. Consequently, PC argues discovery from CCC is necessary to obtain Plaintiff’s employment information, CCC’s knowledge of Plaintiff’s complaints, CCC’s actions or inactions in response to those complaints, the facts surrounding CCC’s interactions with TSC and Conciecao, and facts relative to the alleged joint employer relationship between CCC and PC. PC further argues that based upon Plaintiff’s claims in the Complaint regarding Conciecao’s allegations concerning CCC’s employees’ conduct, it is improper to dismiss the Third Party Complaint.

PC also argues its claims for common law and contractual indemnification, and contribution as against CCC are not against public policy, even though Plaintiff’s claims against it are based on allegations of intentional wrongdoing. Although Plaintiff alleged CCC was her

employer, she also alleged a joint employer relationship between CCC and PC. Consequently, PC argues CCC can still be held liable for Plaintiff's employment discrimination claims pursuant to Executive Law 296-d and NYC Admin. Code 8-107(13)(d), which provide, in pertinent part, that an employer knew or should have known of the harassment and failed to take corrective action. Executive Law 296-d further provides, "In reviewing such cases involving non-employees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the harasser shall be considered". Consequently, PC argues in determining whether it is liable under the NYSHRL, the Court must consider the extent of it's and CCC's alleged joint/vicarious employer control over Plaintiff, and any legal responsibility it and CCC may have with respect to the alleged conduct of Conciecao. As such, PC argues that CCC must provide the following discovery: Plaintiff's employment with CCC; information CCC possesses regarding claims that it allowed other employers to direct or control it's Plaintiff's work on the Job Site; CCC's knowledge of Conciecao's alleged conduct and Conciecao's claims against CCC's employees; Plaintiff's alleged complaints to CCC about Conciecao; CCC's actions on those complaints, if any; and the interactions of CCC's employees with those of PC and TSC, and between Plaintiff and Conciecao.

In opposition, TSC and Conciecao argue the motion should be denied, because they adequately stated a cause of action for common law indemnification and/or contribution. Although TSC and Conciecao acknowledge indemnification cannot be sought for Plaintiff's intentional tort claims, they note Defendants can pass through liability to CCC for those claims that are not intentional torts, such as vicarious liability, negligence, and negligent infliction of emotional distress.

Conciecao also submitted an affidavit wherein he stated, Plaintiff was not employed by TSC. Conciecao stated that on November 5, 2018, he was working at the job site when he saw two CCC employees walking at the edge of the building in violation of the safety code. Thereupon, these employees of CCC were removed from the worksite. Conciecao claims, about an hour later the air valve on his tire was cut off, causing his tire to flatten. Conciecao believed the employees from CCC who were removed from the worksite did this. Conciecao immediately contacted CCC, but they failed to investigate. The next day a CCC worker and supervisor requested Conciecao provide them a Hot Work Permit. Conciecao denied this request, because it would require a separate worker to watch the Hot Work in accordance with FDNY rules. Thereafter, CCC directed Plaintiff to request a Hot Work Permit from him. Conciecao claims he was set up by CCC, because Plaintiff had never requested a Hot Work Permit from him before. Conciecao also denies making any derogatory or inappropriate statements to Plaintiff. Conciecao also claims CCC did not report this incident to TSC, or speak to him regarding this matter.

In the alternative, TSC and Conciecao argue that CCC is a necessary party, and dismissal of the Third Party Complaint in its entirety is premature, because discovery has not commenced and an issue of fact exists as to CCC's culpability for Plaintiff's alleged injuries. Although TSC and Conciecao do not know the identity of the non-parties who Plaintiff alleges witnessed

Conciecao's alleged actions, they claim they are managers and/or supervisors of CCC. Consequently, TSC and Conciecao argue as Plaintiff's employer, CCC is a necessary party because it had a duty to protect her from discrimination and/or harassment. As such, TSC and Conciecao assert discovery regarding the following issues is necessary: the non party witnesses who witnessed the alleged statements Conciecao made to Plaintiff; the substance of the initial complaint Plaintiff made to her supervisor; the date(s) of any complaints; the extent of CCC's knowledge of prior alleged wrongdoing, the duration of time it took CCC to report the complaint to the appropriate entities, and the investigation by CCC, if any, that took place as a result of the investigation.

In reply, CCC argues, among other things, Conciecao's affidavit is improper and should not be considered by the Court in determining this motion. CCC claims this affidavit does not cure any defects in the pleadings, and merely bolsters Defendants' third party claims for contribution. CCC further argues that it is not a necessary party under the NYSHRL and NYCHRL.

When determining a motion to dismiss a complaint or counterclaim pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the Court must afford the pleading a liberal construction, accept as true all facts as alleged in the pleading, accord the pleader the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Baker, Sanders, Barshay, Grossman, Fass, Muhlstock & Neuworth, LLC v Comprehensive Mental Assessment & Med. Care, P.C., 110 AD3d 1022[2d Dept. 2013]).


Indemnification rights can be created by a contractual agreement, or they can be implied based on equitable principles of what is fair and proper as between the parties (McCarthy v Turner Constr., Inc., 17 NY3d 369, 374 [2011]; Mass v Two Bridges Assoc., 75 NY2d 680, 690 [1990]). Common law indemnification is a restitution concept that allows shifting loss where "to fail to do so would result in the unjust enrichment of one party at the expense of the other" ( *Id.*, quoting McDermott v City of New York, 50 NY2d 211, 216-217 [1980]). "Where one is held liable solely on account of the negligence of another, indemnification . . . principles apply to shift the entire liability to the one who was negligent" (Eisman v Village of E. Hills, 149 AD3d 806, 808 [2d Dept. 2017], quoting Fox v County of Nassau, 183 AD2d 746, 747 [2d Dept. 1992]).

Contribution allows the splitting of loss between joint tortfeasors by requiring each to pay a proportionate share (See Rosado v Proctor & Schwartz, Inc., 66 NY2d 21, 23-24 [1985]). "Contribution arises automatically when certain factors are present and does not require any kind of agreement between or among the wrongdoers" (*Id.*). To state a contribution claim, a party must show a duty was owed and was breached resulting in the underlying claims (Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp., 71 NY2d 599, 603 [1988]; Eisman, 52 N.Y.S.3d 115, 118). Whether indemnification or contribution applies depends on a careful analysis of the basis of recover against each tortfeasor (Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559, 568 [1987]).

Initially, the Court agrees with Plaintiff that Conciecao's affidavit is improper. It is well settled that "[o]n a motion to dismiss, a court may consider affidavits to remedy pleading

problems” (Sargiss v Magarellu, 12 NY3d 527 [2009]). Here, Concecaio’s affidavit addressed the merits of this action, and did not address any defects in his pleadings. Notwithstanding this, the Court finds Defendants have demonstrated the existence of facts essential to justify opposition to the instant motion may exist, but cannot be stated with respect to their claims for indemnification and contribution (CPLR 3211[d]). Specifically, discovery is necessary to address the following, but not limited to, issues: Plaintiff’s employment with CCC; the non party witnesses who allegedly witnessed the alleged statements Conciecao made to Plaintiff; the substance of the initial complaint Plaintiff made to her supervisor; the date(s) of any complaints; the extent of CCC’s knowledge of prior alleged wrongdoing, the duration of time it took CCC to report the complaint to the appropriate entities, the investigation by CCC, if any, that took place as a result of the investigation, and; and the interactions of CCC’s employees with those of PC and TSC, and between Plaintiff and Conciecao. Accordingly, the motion is denied, and CCC is directed to file an Answer within 20 days after service of a copy of this order with notice of entry.

**DATED: September 8, 2020**

  
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**ROBERT I. CALORAS, J.S.C.**

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