Venezia v LTS 711 11th Ave.
2020 NY Slip Op 33838(U)
November 17, 2020
Supreme Court, New York County
Docket Number: 156034/2015
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

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PETER VENEZIA, CHRISTINE TRIPLER-VENEZIA,

Plaintiff,

- v -

LTS 711 11TH AVENUE, JRM CONSTRUCTION MANAGEMENT, LLC,

Defendant.

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INDEX NO. 156034/2015

MOTION DATE N/A

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

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LTS 711 11TH AVENUE, JRM CONSTRUCTION MANAGEMENT, LLC

Plaintiff,

-against-

CONCRETE INDUSTRIES ONE CORP.,

Defendant.

Third-Party
Index No. 595925/2017

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LTS 711 11TH AVENUE, JRM CONSTRUCTION MANAGEMENT, LLC

Plaintiff,

-against-

BINYAN CONSTRUCTION CORP.

Defendant.

Second Third-Party
Index No. 595517/2018

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 211, 212, 213, 214, 215, 216, 217, 221, 222, 224, 225, 226, 227, 228, 229, 230

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Motion, pursuant to CPLR 2221 by Defendant / Third-Party Plaintiff / Second Third-Party Plaintiff LTS 711 11th Avenue ("LTS") to renew and reargue its motion (Seq. 004) for summary judgment, and upon renewal and reargument, grant LTS the branch of said motion for summary judgment on its contractual indemnification claim as against by Third-Party Defendant Concrete

Industries One Corp. ("Concrete") and Third-Party Defendant Binyan Construction Corp. ("Binyan") is GRANTED for the reasons stated herein.

On February 19, 2020, this Court issued a bench decision ("the Summary Judgment Decision") which, in sum and substance denied Plaintiffs Peter Venezia (Plaintiff) and Christine Tripler Venezia's (collectively, "Plaintiffs'") motion (Seq. 003) for summary judgment, pursuant to CPLR 3212, on their claims pursuant to Labor Law §§ 241 (6) and 200 and granted in part LTS's Construction Management, LLC's motion (Seq. 004) for summary judgment to the extent that Plaintiffs' causes of action pursuant Labor Law 240 (1) and 200 were dismissed, and said motion was otherwise denied. In addition the, the cross-motion by Third-Party Defendant Concrete Industries One Corp. ("Concrete") was denied as untimely. (NYSCEF Doc. No. 218.) The factual background and procedural history in this case were discussed at length in said decision and will not be repeated herein.

On this motion, LTS seeks to renew and reargue the branch of its motion for contractual indemnification as against Concrete and Binyan. Only Binyan opposes said motion.

As a preliminary matter, this Court notes that although LTS denominates this motion as both to renew and reargue, it is in fact only a motion to reargue.[1]

A motion for leave to reargue is addressed to the sound discretion of the motion court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. (CPLR 2221 [d] [2]; *Frenchman v Lynch*, 97 AD3d 632, 633 [2d Dept 2012]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], lv dismissed in part and denied in part, 80 NY2d 1005 [1992], rearg denied, 81 NY2d 782 [1993]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979].) Reargument is "not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented." (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; *see also Levi v Utica First Ins. Co*., 12 AD3d 256, 258 [1st Dept 2004].)

"A party's right to contractual indemnification depends upon the specific language of the relevant contract." (*Hanna v Milazzo*, 179 AD3d 907, 909 [2d Dept 2020].) "[T]he 'intention to indemnify [must] be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.'" (*Masciotta v Morse Diesel Intl*., 303 AD2d 309, 310 [1st Dept 2003], quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987].) "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant." (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999].)

[1] In sum and substance, LTS argues that the instant motion is also to renew because there has been "a new pronouncement of the law governing the case" in that the Court determined that LTS was free from negligence in the Summary Judgment Decision. However, in doing so, and as will be further explained, this Court could have—and should have—also granted LTS summary judgment on its claim for contractual indemnification as against Concrete and Binyan.

On the instant motion, LTS argues, in sum and substance, that: 1) this Court determined that it was not negligent in the Summary Judgment Decision; 2) that LTS can only be found statutorily liable pursuant to Labor Law § 241 (6); and 3) that it is entitled to be indemnified by Binyan and Concrete for such liability pursuant to valid written agreements.

Binyan—the only party opposing the motion—argues: 1) that there has not been a sufficient showing that Plaintiff's injury arose out of work that it was performing; and 2) that the subject agreement does not specifically list LTS as an indemnitee, and only lists an amorphous "owner" as an indemnitee; and 3) that the Binyan subcontract is "not job specific." (NYSCEF Doc. No. 221 at 4.)

Here, the relevant provision in the Binyan Subcontract with the general contractor Defendant / Third Party Plaintiff JRM Construction Management, LLC ("JRM"), states as follows:

> "To the fullest extent permitted by law, Subcontractor shall indemnify, defend and hold harmless, Owner, Architect, Owner's Indemnitees listed in the Purchase Order, Contractor's other laborers, subcontractors or suppliers and all of their agents and employees from and against any claims, damages, losses, liabilities, fines, payments and expenses, including but not limited to attorney's fees, arising out of and in connection with injuries (including death) or damage to property…whether furnished by the Owner, Contractor or Subcontractor resulting from performance of the Work caused or alleged to be caused in whole or in any part by a violation of any law, ordinance or regulation by any negligent or willful act or omission, or any claim of strict liability, arising out of Work by Subcontractor or anyone directly or indirectly employed by Subcontractor or by any anyone for whose acts Subcontractor may be liable."

(NYSCEF Doc. No. 215 ¶ 10.1 [Binyan Subcontract].)

At oral argument, Plaintiffs conceded that LTS was not negligent in the happening of the accident and consented to dismissal of said claims against LTS under Labor Law § 200 and common law negligence.[2] In its opposition, Binyan conclusorily asserts that the indemnification provision was not triggered because Plaintiff's accident did not arise out of Binyan's work—although that argument was rejected by the court at the oral argument. However, the evidence, submitted in the underlying summary judgment motion, clearly shows that Plaintiff's accident occurred at the worksite where he was employed to perform construction work by Binyan, and there is no evidence to the contrary. (*Kehoe v 61 Broadway Owner LLC*, 186 AD3d 1143 [1st Dept 2020] [awarding contractual indemnification against employer-subcontractor where the plaintiff was "in the course of his employment" and "the motion court dismissed the common-law negligence and Labor Law § 200 claims against" the indemnitee]; *Regal Const. Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 39 [2010] [awarding contractual

[2] The Court notes that during oral argument Binyan's counsel argued that LTS could be negligent by virtue of JRM being negligent. (*See* NYSCEF Doc. No. 218 at 40 [Oral Arg Tr].) However, that argument was not made on this motion.

indemnification against Regal where Regal's employee "was walking through the work site to indicate additional walls that needed to be demolished by Regal's subcontractor when he slipped on a recently-painted metal joist"]; *Zito v Occidental Chem. Corp*., 259 AD2d 1015, 1016 [4th Dept 1999] ["Because that indemnification clause encompasses injuries or accidents 'in any way connected with performance of the work', the court properly determined that ITC was obligated to provide a defense and indemnification pursuant to its agreement to procure insurance."]; *see also* NYSCEF Doc. No. 218 at 26-27 [Oral Arg Tr].)

Binyan also argues that they cannot be held liable because the provision does not specifically state that LTS is the "Owner." Binyan relies heavily upon *Tonking v Port Authority*—where there was ambiguity concerning who qualified as an "agent" of the owner—but here, there is no good-faith dispute about the entity whom the term "owner" refers to in the instant circumstance. (3 NY3d 486 [2004]; *see also Landgraff v 1579 Bronx Riv. Ave., LLC*, 18 AD3d 385, 386-87 [1st Dept 2005].) Even though this particular provision does not identify LTS as the "Owner," as LTS points out, the Binyan Subcontract and the Binyan Purchase Order expressly and specifically state a requirement that Binyan name the owner of 711 11th Avenue, LTS, as an additional insured under an insurance policy, and Binyan complied by naming LTS as an additional insured noting that it was a "landlord entit[y]." (*See* NYSCEF Doc. Nos. 224-227.) As such, it is clear that LTS is the "Owner" in the above indemnification provision. (*Frank v 1100 Ave. of Americas Assoc.*, 159 AD3d 537, 538 [1st Dept 2018] ["The purchase order on its face identifies the 'Building Owner' and 'Landlord' as an indemnitee; there is no question that 1100 Associates owns the subject building."]; *Drzewinski v Atl. Scaffold & Ladder Co., Inc*., 70 NY2d 774, 777 [1987] ["A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances."].)

With regards to Binyan's argument that the indemnification provision is not enforceable because the subcontract is "not job specific," the Court rejects that argument. The Binyan Purchase Order clearly identifies the "Job #" and the "Job Address." (NYSCEF Doc. No. 226 at 1 of 4.)

The Court finds that the remaining arguments in opposition by Binyan are unavailing.

CONCLUSION

Accordingly, it is

ORDERED that the motion, pursuant to CPLR 2221 by Defendant / Third-Party Plaintiff / Second Third-Party Plaintiff LTS 711 11th Avenue ("LTS") to renew and reargue its motion (Seq. 004) for summary judgment, and upon renewal and reargument, grant LTS the branch of said motion for summary judgment on its contractual indemnification claim as against by Third-Party Defendant Concrete Industries One Corp. ("Concrete") and Third-Party Defendant Binyan Construction Corp. ("Binyan") is GRANTED; and it is further

ORDERED that the counsel shall serve, via NYSCEF, a copy of the instant decision and order with notice of entry within twenty (20) days.

The foregoing constitutes the decision and order of this Court.

11/17/2020
DATE

ROBERT DAVID KALISH, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**