At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28 day of January, 2020.

PRESENT:

HON. ELLEN M. SPODEK
Justice.

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GALBEL FELIZ

Plaintiff,

- against -

Index No.505238/13

ms# 10 & 11

CITNALTA CONSTRUCTION CORP., AND
STV CONSTRUCTION, INC.,

Defendants.

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CITNALTA CONSTRUCTION CORP.,

Third- Party Plaintiff,

- against -

STV CONSTRUCTION, INC., STV ARCHITECTS P.C.
AND LJC DISMANTLING CORP.,

Third-Party Defendants.

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KINGS COUNTY CLERK
FILED
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The following papers numbered 1 to 8 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 5-6
Opposing Affidavits (Affirmations)	3,4,7
Reply Affidavits (Affirmations)	8
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant/third-party defendant STV Construction, Inc., (STV) moves, by order to show cause, seeking an order: 1) granting STV judgment, pursuant to CPLR 3212, 4401 and/or 4404, against defendant/third-party plaintiff Citnalta Construction Corp., (Citnalta) and third-party defendant LJC Dismantling Corp. (LJC) on its claims for contractual indemnity; 2) pursuant to CPLR 5001, granting STV prejudgment interest; and 3) awarding a money judgment to STV for settlement of fifty thousand dollars ($50,000) and defense costs in the amount of fifty seven thousand three hundred fifty four dollars and seventy eight cents ($57,354.78) and continuing. Citnalta cross-moves for an order, pursuant to CPLR 3212, 4401 and 4404 granting its claim for contractual indemnification against LJC.

Background and Procedural History

The underlying action involved an accident in which plaintiff Galbel Feliz was injured when a sprinkler pipe fell and struck him while he was performing demolition work at the South Beach Psychiatric Center in Staten Island. STV was the construction manager for the project, and had hired Citnalta as the general contractor. Citnalta subcontracted the demolition work to plaintiff's employer, LJC. Plaintiff commenced an action against Citnalta and STV alleging violations of Labor Law §§ 240 (1), 241 (6), 200 and common law negligence. Citnalta commenced a third-party action against STV seeking contribution, common law and contractual indemnification and, as against LJC, alleging breach of contract and failure to procure insurance. STV answered and

interposed cross-claims against LJC and counterclaims against Citnalta seeking contractual indemnification.

Citnalta moved for summary judgment dismissing plaintiff's claims, and for an order granting its claims and cross-claims asserted against LJC and STV. STV also moved for summary judgment dismissing plaintiff's claims as asserted against it, and for summary judgment on its claims as against Citnalta and LJC. Plaintiff cross-moved for partial summary judgment as to liability against Citnalta and STV on his Labor Law §§ 240 (1) and 241 (6) claims. By order dated September 27, 2017, the Honorable Loren Baily Schiffman denied Citnalta and STV's motions in their entirety and granted that branch of plaintiff's cross motion seeking summary judgment on his Labor Law § 240 (1) claim as against Citnalta and STV.

Thereafter, a jury trial was conducted before this court on March 8, 2018 to address the apportionment of fault amongst the defendants and third-party defendant. During the course of the trial, STV moved for a directed verdict on its cross-claims for contractual indemnification, at which point the decision was reserved. At the close of the trial, STV again moved for a directed verdict in its favor on its contractual indemnification claim arguing that it was not negligent. A decision on STV's motion was again reserved. On March 8, 2018, before the jury rendered its verdict, STV entered into a settlement with plaintiff for fifty thousand dollars ($50,000). However, STV remained on the verdict sheet. On March 9, 2018, the jury rendered a verdict finding that STV was not

negligent, and finding that Citnalta and LJC were both equally negligent (each 50 percent at fault) for plaintiff's accident. After the verdict, Citnalta and LJC settled with plaintiff for three million nine hundred thousand dollars ($3.9 million).

STV's Motion

In its motion, STV seeks judgment against Citnalta and LJC on its claims for contractual indemnity; an order granting STV prejudgment interest pursuant to CPLR 5001; and a money judgment in the amount of fifty thousand dollars ($50,000) representing the amount it paid in settlement of plaintiff's claims and defense costs in the amount of fifty seven thousand three hundred fifty four dollars and seventy eight cents ($57,354.78).[1]

STV argues that Citnalta and LJC are bound and obligated, pursuant to the unambiguous terms of their respective contracts, to indemnify STV for the losses it sustained related to the underlying action. STV contends that Citnalta and LJC were on notice of STV's claims against them seeking contractual indemnification. STV maintains that its settlement with plaintiff was both reasonable and made in good faith as it had been found statutorily liable for plaintiff's injuries. In addition, STV notes that its prior motion and applications for contractual indemnification had been denied by the court based upon the existence of questions of fact. STV further notes that this court reserved its decision on its motion to dismiss which it (STV) believed was an indication that the

[1] That branch of STV's motion seeking defense costs was withdrawn on the record before this court on September 7, 2018.

court thought there was sufficient proof against STV to allow the issue of its negligence to go to the jury. STV contends that it faced potential exposure in excess of five million four hundred thousand dollars ($5.4 million) based upon plaintiff's lost earnings claim alone. Thus, STV argues that its fifty thousand dollar ($50,000) settlement with plaintiff was reasonable. STV further points out that since it was still included on the verdict sheet, the jury could have found it negligent.

Finally, STV argues that it is entitled to prejudgment interest associated with its losses pursuant to CPLR 5001, contending that its cause of action accrued on the date it tendered its payment to plaintiff, which was April 20, 2018. STV maintains it is entitled to interest from that date to present.

In opposition, LJC argues that STV is not entitled to indemnification because it had no reason to believe it would be held liable for plaintiff's claim when the jury assessed liability and that the carriers for LJC and Citnalta were providing STV with a defense in the case. In this regard, LJC notes that its primary insurance carrier, Houston Casualty, had offered the full limits of its two million dollar ($2.0 million) policy to settle the case, and that at no point was STV, or its carrier, asked to participate or contribute to the settlement, as neither LJC nor Citnalta anticipated liability would be imposed against STV. LJC contends that the only reason it didn't settle prior to trial was that there was a dispute regarding the priority of coverage between LJC's excess carrier (Scottsdale/Nationwide) and Citnalta's primary carrier (Travelers). LJC notes that STV

reached its settlement with plaintiff after the liability phase of the trial concluded, including summations, and contends that there was no evidence presented related to STV's culpability. LJC points out that neither counsel for Citnalta, nor counsel for LJC, even mentioned STV in their closing arguments. LJC argues that this creates a question of fact regarding the reasonableness of STV in voluntarily settling with plaintiff for fifty thousand dollars ($50,000). Moreover, LJC maintains that the amount of the settlement was not reasonable as the extent of damages alleged far exceeded fifty thousand dollars ($50,000). LJC contends that STV only settled to forego participation in a damages trial.

LJC maintains that, in order to preserve its right to make the instant motion, STV would have needed all the parties to consent to its settlement under the condition that it would be seeking indemnification. LJC argues that STV failed to seek or obtain such consent and, thus, deprived Citnalta and LJC of the right to object to the settlement.

Citnalta also opposes STV's motion arguing that STV failed to preserve its right for contractual indemnification as it never informed any of the representatives from Citnalta and LJC's insurance carriers, the attorneys or the court, that they would be seeking indemnification related to the voluntary settlement. STV also failed to seek or obtain consent to enter into the settlement. Citnalta further argues that the settlement amount was not reasonable in light of the liability issues, noting that STV's defense was assumed by the insurance carrier for another party and STV's primary carrier, Colony, was not participating in the payment of defense costs or indemnity payments. Thus,

Citnalta argues that it was not reasonable for STV to offer plaintiff any settlement money. Moreover, Citnalta contends that the amount of fifty thousand dollars ($50,000) was not reasonable and was merely an attempt to get out of participating in a damages trial, which would have been at no cost to STV, inasmuch as its costs were borne by other carriers. Finally, Citnalta argues that STV is not entitled to interest as it is only permitted on a "sum awarded because of a breach of performance of a contract." Here, however, there has been no determination that Citnalta breached its contract.

Discussion

"To recover a settlement from an indemnitor who had prior notice of the settled claim, an indemnitee must demonstrate not only notice to the indemnitor and that it made a reasonable settlement in good faith, but also that the indemnitee 'could have been held liable if it had proceeded to trial'" (*Leon Holdings, LLC v Northville Indus. Corp.*, 134 AD3d 910, 912 [2015] quoting *Freehill v ITT Sheraton Corp.*, 74 AD3d 876, 877 [2010]; *see Thome v Benchmark Main Tr. Assocs., LLC*, 125 AD3d 1283, 1286 [2015] quoting *Nesterczuk v Goldin Mgt., Inc.*, 77 AD3d 800, 804 [2010] [holding that an indemnitor with notice of the claim against it will be bound by any reasonable good faith settlement the indemnitee might thereafter make]; *Slepian v Motelson*, 66 AD3d 871 [2009]; *HSBC Bank USA v Bond, Schoeneck & King, PLLC*, 55 AD3d 1426, 1428[2008]; *Fidelity Natl. Tit. Ins. Co. of N.Y. v First N.Y. Tit. & Abstract*, 269 AD2d 560, 561-562 [2000]; *Jemal v Lucky Ins. Co.*, 260 AD2d 352, 353[1999] [holding that "[w]here a party voluntarily

settles a claim, he must demonstrate that he was legally liable to the party whom he paid and that the amount of [the] settlement was reasonable in order to recover against an indemnitor"]; *Goldmark Indus. v Tessoriere*, 256 AD2d 306 [1998]; *Coleman v J.R.'s Tavern*, 212 AD2d 568, 568[1995]; *Horn Constr. Co. v MT Sec. Serv. Corp.*, 111 AD2d 220 [1985]).

"In the context of indemnification, courts routinely find settlements to be "reasonable" when the recovery at trial could have been greater" (*Koch Indus. v Hoechst Aktiengesellschaft*, 727 F. Supp. 2d 199, 225, 2010 U.S. Dist. LEXIS 86908, *71-73 [court found settlement reasonable where the Koch Group faced potential damages far in excess of the amount it paid to settle the claims against it]; *see Pahl v Grenier*, 279 AD2d 882 [2001] [settlement found reasonable where "a verdict in favor of plaintiffs was by no means unlikely and, if rendered, could well have resulted in a greater award of damages"]).

In *Acunto v Conklin* (285 AD2d 712, 713-714 [2001]), the court found that a defendant's settlement was reasonable where plaintiff had obtained summary judgment on liability against defendants. Thus, there was no question that defendants were already legally obligated to plaintiff when they reached a settlement on the eve of trial. The *Acunto* court further found that the "defendants demonstrated the reasonableness of the settlement amount which was less than half of the first jury verdict."

Turning to the instant matter, Article 18.1 of the contract between STV and Citnalta provides in pertinent part as follows:

> "Contractor [Citnalta] hereby assumes entire responsibility and liability for Damages involving the following: . . . (b) Injury or death to any person . . . resulting from or arising out of or in connection with the Work, whether or not any such damage or loss is due to the negligence of any kind or character or other fault of any one or more of the Indemnified Parties or breach of any statutory duty, contractual obligation by one or more of the Indemnified Parties [STV] . . .[Citnalta] hereby agrees to the fullest extent permitted by law, to indemnify, and save harmless . . . [STV] from and against any and all such claims and further from and against any and all loss, cost, expense, liability, damages. . . that [STV] may directly or indirectly, sustain, suffer or incur as a result thereto . . ."

In addition, pursuant to Section 14 of the LJC-Citnalta contract, LJC contracted to indemnify, defend, and hold STV harmless

> "from and against any and all claims, suits, damages, liabilities, professional fees, including attorneys' fee costs, expenses and disbursements related to death, personal injuries . . Or the alleged violation of any laws, statutes, rules or ordinances, brought or assumed against . . . [STV] by any person, entity, or firm, arising out of or in connection with or as a result of or as a consequence of the performance of the Work undertaken by . . . [LJC] . . . The parties expressly agree that this indemnification agreement contemplates 1) full indemnity in the event of liability imposed against . . . [STV] without negligence and solely by reason of statute, operation of law or otherwise . . ."

It is well settled that "[t]he party seeking contractual indemnification must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability" (*Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 931

[2016] quoting *Arriola v City of New York*, 128 AD3d 747, 749 [2015]; *see* General Obligations Law § 5-322.1; *Fedrich v Granite Bldg. 2, LLC*, 165 AD3d 754, 756 [2018]). "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" (*De Souza v Empire Tr. Mix, Inc.*, 155 AD3d 605, 606 [2017] quoting *Cuellar v City of New York*, 139 AD3d 996, 998 [2016] [internal quotation marks omitted]; *see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *Dos Santos v Power Auth. of State of N.Y.*, 85 AD3d 718, 722 [2011]; *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2009]).

Here, both the Citnalta-STV contract and the LJC-STV contract provide for indemnification of STV for any claims for which it is found statutorily liable. It is undisputed that plaintiff's motion for summary judgment as to liability on his Labor Law § 240 (1) claim was granted and, thus, STV was found to be statutorily liable for plaintiff's injuries. Moreover, the court notes that Citnalta and LJC had notice of STV's settlement with plaintiff, as well as notice of STV's contractual indemnification claims against them. Furthermore, the court finds that STV's settlement with plaintiff for fifty thousand dollars ($50,000) was clearly reasonable and made in good faith as the potential existed that STV could have been obligated to pay significantly more in damages had the jury found that it was any percent at fault for plaintiff's injuries. Additionally, LJC and Citnalta's assertion that STV needed to obtain their permission to settle plaintiff's claim

against it (STV) lacks merit. While it is true that LJC was providing a defense to STV, STV also maintained its own counsel throughout the trial. There is nothing in the contract between these parties containing such a precondition, nor do defendants cite any case law in support of this position. Accordingly, that branch of STV's motion seeking summary judgment on its claim for contractual indemnification as against Citnalta and LJC is granted. As such, Citnalta and LJC are directed to indemnify STV for the fifty thousand dollars ($50,000) it paid out to plaintiff pursuant to its agreed upon settlement. However, that branch of STV's motion seeking prejudgment interest pursuant to CPLR 5001 is denied. Section 5001 provides for prejudgment interest to be awarded solely in breach of contract and property damage actions and, thus, is not applicable to the instant case.

Citnalta's Cross Motion

Citnalta cross-moves for an order granting its claim for contractual indemnification against LJC. Citnalta argues that the testimony at trial established that plaintiff's accident arose out of, occurred in connection with, as a result of, and as a consequence of, the demolition work performed by LJC.

The indemnification provision contained in the contract between Citnalta and LJC provides in pertinent part as follows:

> "14. Indemnity. Subcontractor [LJC] agrees to the fullest extent permitted by law to indemnify, defend, and hold harmless [Citnalta] . . . from and against any and all claims, suits, damages, liabilities, professional fees, including attorneys' fees, costs, expenses and disbursements related to death, personal injuries . . . or the alleged violation of any laws, statutes, rules or ordinances, brought or assumed against

> . . . [Citnalta] by any person, entity, or firm, arising out of or in connection with or as a result of or as a consequence of the performance of the Work undertaken by . . . [LJC] . . . The parties expressly agree that this indemnification agreement contemplates 1) full indemnity in the event of liability imposed against the Indemnitees without negligence and solely by reason of statute, operation of law or otherwise ; and 2) partial indemnity in the event of any actual negligence on the part of the Indemnities either causing or contributing to the underlying claim in which case, indemnification will be limited to any and all liability imposed over and above that percentage attributable to actual fault on the part of the Indemnities whether by statute, operation by law or otherwise. 14.a Payment to the Extent Negligent. In the event [Citnalta] . . . is determined to be any percentage negligent in any verdict or judgment, then, in addition to the above, [LJC's] . . . obligation to indemnify [Citnalta] . . . and any other Indemnities for any payment, judgment, settlement, mediation or arbitration award shall extend to the percentage of negligence of [LJC] . . . or anyone directly or indirectly engaged or retained by it or anyone else for whose acts [LJC] . . . may be liable in connection to such claim, damages, loss or expense."

Citnalta argues that the indemnification provision agreed to by LJC is clear and unambiguous as a matter of law. Citnalta notes that the provision does not violate General Obligations Law § 5-322.1 as it does not purport to hold LJC responsible for Citnalta's own negligence. Rather, Citnalta points out that the indemnification provision specifies that if Citnalta "is determined to be any percent negligent in any verdict or judgment, then [LJC's] obligation to indemnify [Citnalta] . . . shall extend to the percentage of negligence of [LJC]. Thus, Citnalta argues that since the jury only found Citnalta to be 50 percent at fault, it is entitled to contractual indemnification from LJC for the remaining 50

percent of Citnalta's statutory liability to plaintiff. Accordingly, Citnalta seeks an order granting its claim for contractual indemnification against LJC for 50 percent of the settlement.

LJC opposes the cross motion arguing that it does not owe Citnalta indemnity as the jury found LJC to be 50 percent liable for plaintiff's accident and its insurer is paying 50 percent of the settlement. In addition, LJC points out that Citnalta's defense and attorneys' fees have been provided through LJC's insurance policy. In this regard, LJC notes that after the jury determined that Citnalta and LJC were each 50 percent liable, the parties agreed to settle with plaintiff for three million nine hundred thousand dollars ($3,900,000). LJC claims that its insurer agreed to pay two million dollars ($2,000,000) of that settlement, and thus contends it has not only satisfied, but exceeded, its obligation under the settlement agreement. LJC asserts that Citnalta's primary insurer and LJC's excess insurer have agreed to resolve how each insurer will contribute to the remaining one million nine hundred thousand dollars ($1,900,000) of the settlement.

LJC admits that the indemnification provision at issue allows for partial indemnity, but contends that Citnalta is seeking more than partial indemnity, which would be indemnification for Citnalta's own negligence in violation of GOL 5-322.1.

In reply, Citnalta notes that LJC maintained primary insurance coverage with US Specialty Insurance Company (USSIC) with policy limits of two million dollars ($2,000,000) under which Citnalta was named as an additional insured. USSIC accepted

the tender and defense of Citnalta. Citnalta argues that it is not seeking to be indemnified for its own negligence, but rather is seeking to be indemnified from LJC for the 50 percent liability that was not attributed to Citnalta. Citnalta contends that LJC's argument that it satisfied its obligation to indemnify it because USSIC defended Citnalta and is paying the first two million dollars ($2,000,000) of the settlement is prohibited by New York law, which does not recognize the doctrine of pre-indemnification. Thus, Citnalta contends that it has already paid its portion of the settlement attributable to its 50 percent negligence by the payment of the two million dollars ($2,000,000) paid by USSIC. It now seeks to be indemnified from and against the remaining 50 percent balance of the settlement attributable to LJC, which is one million nine hundred thousand dollars ($1,9000,000).

As discussed above in relation to STV's motion, "[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" (*De Souza*, 155 AD3d at 606). In *Brooks v Judlau Contr., Inc.* (11 NY3d 204, 210-211 [2008]), the Court of Appeals held that "there is no language within General Obligations Law § 5-322.1 that prevents partial indemnification provisions such as the one currently before us from being enforced in a case where it is shown that both a general contractor and its subcontractor are joint tortfeasors." Where, as here, "[t]he indemnity clause expressly limits its own scope '[t]o the fullest extent permitted by law."

Such qualifying language "limit[s] [a party's] contractual indemnity obligation solely to [the party's] own negligence" (*Brooks*, 11 NY3d at 210), and redeems an otherwise facially violative indemnity provision (*Frank v 1100 Ave. of the Ams. Assoc.*, 159 AD3d 537, 537 [2018]; *see Johnson v Chelsea Grand E., LLC*, 124 AD3d 542, 543, 2 NYS3d 446 [2015]).

In New York, an employer is absolved of civil liability to an employee for negligence resulting in a non-grave injury if the employer provides workers' compensation benefits (*see* Workers' Compensation Law § 11). However an employer can still be held liable by way of indemnification or contribution for its own neglect to one obligated to respond in damages to the employee (*see Cusick v Lutheran Medical Center*, 105 AD2d 681,681 [1984]; *Nelson v Dykes Lumber Co.*, 52 AD2d 808 [1976], lv denied 40 NY2d 805; *Tallarico v Long Is. Light. Co.*, 45 AD2d 845, affd 38 NY2d 733 [1974]; *Viera v Uniroyal, Inc.*, 142 Misc. 2d 1099, 1106-1107 [1988 NY County]). In *Klinger v Dudley*, (41 NY2d 362, 371 [1977]), the Court of Appeals held that "main defendants may not recover against a third-party defendant until such main defendants have paid the respective plaintiffs an amount in excess of their *Dole*[2] share of the judgments."

Here, it is undisputed that, pursuant to Judge Bailey-Shiffman's September 27, 2017 decision, Citnalta was found to be statutorily liable for plaintiff's injuries. The

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[2] *Dole v Dow Chem. Co.*, 30 NY2d 143 (1972)

action then proceeded to trial on the issue of liability, where the jury returned a verdict finding Citnalta and LJC both 50 percent responsible for plaintiff's injuries. Subsequent to the verdict, settlement negotiations between the parties resulted in an agreement pursuant to which it was agreed that three million nine hundred thousand dollars ($3,900,000) would be due to plaintiff in settlement of his claims against Citnalta. The jury's finding as to Citnalta's liability to plaintiff is a determination that Citnalta was, itself, partially (50 percent) negligent and responsible for plaintiff's injuries. As such, Citnalta is precluded from seeking indemnification for that portion of liability attributed to its own negligence (*see Abetta Boiler & Welding Serv., Inc. v. Am. Int'l Specialty Lines Ins. Co.*, 76 AD3d 412, 414, [2010]). Thus, Citnalta cannot be reimbursed for the 50 percent of that portion of the settlement amount pertaining to its own negligence. However, pursuant to the terms of the contractual indemnity provision (section 14.a) set forth in the Citnalta-LJC contract, LJC's obligation to indemnify Citnalta for the settlement payment extends to the percentage of negligence on the part of LJC. Therefore, LJC's indemnification obligation is limited only to the percentage of negligence attributable to LJC, which is 50 percent. LJC is therefore required to reimburse Citnalta for payment of 50 percent of the three million nine hundred thousand dollars ($3,900,000) settlement amount.

Accordingly, Citnalta's cross motion for summary judgment on its contractual indemnification claim against LJC is granted but only to the extent it seeks indemnity for

50 percent of the three million nine hundred thousand dollars ($3,900,000) settlement amount attributable to LJC's negligence.

Therefore, STV's motion is granted in part and denied in part. Citnalta's cross-motion is granted in part.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.