SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

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JOSEPH ITARA, TABETHA ITARA,

Plaintiff,

- v -

MASARYK TOWERS CORPORATION D/B/A MASARYK TOWERS MANAGEMENT, METRO MANAGEMENT & DEVELOPMENT INC.,A/K/A METRO MANAGEMENT DEVEL., INC.,

Defendant.

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INDEX NO. 152948/2020

MOTION DATE 11/10/2021

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

MASARYK TOWERS CORPORATION D/B/A MASARYK TOWERS MANAGEMENT

Plaintiff,

-against-

CENTENNIAL ELEVATOR INDUSTRIES, INC.

Defendant.

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Third-Party
Index No. 595639/2021

The following e-filed documents, listed by NYSCEF document number (Motion 003) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 88, 117, 118, 119, 120, 121, 122, 123, 124, 125, 129, 130, 131, 132

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 133, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 161, 162, 163, 164

were read on this motion to/for STRIKE PLEADINGS.

Plaintiff Joseph Itara ("Plaintiff"), an elevator mechanic, alleges that he was walking on a staircase owned by Defendant Masaryk Towers Corporation ("Masaryk") when a single step collapsed, causing him to fall through the staircase and to suffer injuries as a result. Masaryk

commenced a third-party action against Plaintiff's employer, Centennial Elevator Industries ("Centennial").

In motion sequence 003, Centennial moves to dismiss the third-party complaint in its entirety, on the grounds that it fails to state a claim and that a total defense is founded upon documentary evidence. Plaintiff has submitted an affirmation in support of Centennial's motion.

In motion sequence 004, Plaintiff moves, pursuant to CPLR 3126, to strike Masaryk's answer for willfully providing false discovery responses, violating court orders, and commencing a frivolous third-party action, which Plaintiff alleges was intended to obstruct and delay discovery. In the alternative, Plaintiff requests that Masaryk's thirteenth affirmative defense of failing to sue an indispensable party be stricken. Plaintiff also moves, pursuant to CPLR 1010, to dismiss the third-party action, or in the alternative, for severance. Masaryk cross-moves, pursuant to 22 NYCRR 130-1.1, for costs and sanctions, arguing that Plaintiff's motion is frivolous. The motions have been fully submitted and are consolidated for disposition.

Background

Pursuant to a contract dated December 13, 2001 (NYSCEF Doc No. 83, Contract), Centennial agreed to provide elevator maintenance services to Masaryk for 16 elevators located within six buildings owned by Masaryk, including 65 Columbia Street, New York, NY (the "building"). Plaintiff was an employee of Centennial and worked as an elevator mechanic.

Plaintiff alleges that on August 13, 2019, as he was walking up a staircase located on the roof of the building to access the elevator motor room to perform maintenance, one of the metal steps collapsed and fell, causing him serious injury. (NYSCEF Doc No. 1, Complaint, at ¶¶ 14-17.) Plaintiff commenced this action on March 19, 2020, setting forth one cause of action for

negligence, while Co-Plaintiff Tabetha Itara, Plaintiff's spouse, sets forth one cause of action for loss of consortium.

Centennial's motion sequence 003 to dismiss the third-party complaint

Masaryk filed the third-party complaint against Centennial on July 16, 2021, setting forth the following causes of action: 1) common law indemnification; 2) contribution; 3) contractual indemnification; and 4) breach of the contractual provision to procure appropriate insurance. (NYSCEF Doc No. 17, 3PC.)

Centennial moves to dismiss, arguing that it fails to state a cause of action and that a total defense is based upon documentary evidence. (NYSCEF Doc No. 75, Centennial's Memo.) First, Centennial argues that Masaryk's claims for contribution and common law indemnification must be dismissed because they are barred by Worker's Compensation Law § 11 and because there is no underlying tort liability as to Centennial. (*Id.* at ¶¶ 23-30.) Second, Centennial argues that the claim for contractual indemnification must be dismissed because the contract only obligates Centennial to indemnify Masaryk for losses incurred due to Centennial's acts within the scope of the contract, rather than losses arising from dangerous conditions on Masaryk's property; and that Masaryk's interpretation of the contract would result in a violation of General Obligations Law § 5-322.1[1], which renders unenforceable any maintenance agreement wherein a promisor purportedly agrees to indemnify a promisee for losses caused by the promisee's own negligence. (*Id.* at ¶¶ 31-36.) Third, Centennial argues that the cause of action for breach of contract must be dismissed because Centennial complied with the insurance requirements contained within the contract. (*Id.* at ¶¶ 37-39.) Finally, it argues that the third-party complaint is frivolous and seeks attorneys' fees and expenses. (*Id.* at ¶¶ 40-43.)

In opposition, Masaryk argues that Plaintiff sustained his injuries "in connection with, or as a consequence of the performance of his services as an employee of Centennial," and thus the contract entitles Masaryk to indemnification. (NYSCEF Doc No. 117, Opposition, at ¶ 21.) Moreover, Masaryk argues that "it is not necessary that plaintiff himself be actively engaged in the type of work covered by the indemnity contract in order for such injury to fall within [the] broadly worded indemnification provision." (*Id.* at ¶ 26, *citing* cases.) Further, Masaryk argues that dismissal is premature, and that further discovery is needed. (*Id.* at ¶ 29.)

Plaintiff submitted an affirmation in support of Centennial's motion (NYSCEF Doc No. 124, Pl.'s Memo), along with the September 28, 2021 deposition transcript of Maximo Vasquez, the superintendent of all six buildings owned by Masaryk, who testified that he has been "the only person" responsible for the maintenance of the staircase at issue in this case for the past 23 years, not Centennial. (NYSCEF Doc No. 125, Vazquez Transcript, at 13:13-17:13.) Vasquez also testified that Metro Management and Development Corporation ("Metro") was the managing agent of the property at the time of the accident. (*Id.* at 10:05.)

After the parties stipulated to add Metro as a Defendant, Plaintiff filed a supplemental summons and complaint on November 30, 2021. (NYSCEF Doc No. 116, Am. Cmplt.)

Discussion

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], "the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory." (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) However, "factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by

documentary evidence are not entitled to such consideration." (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations" (*Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]; see also *Greenapple v Capital One, N.A.*, 92 AD3d 548, 550 [1st Dept 2012]), and "conclusively establishes a defense to the asserted claims as a matter of law." (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004] [internal quotation marks omitted].) "A paper will qualify as documentary evidence only if it satisfies the following criteria: (1) it is unambiguous; (2) it is of undisputed authenticity; and (3) its contents are essentially undeniable." (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], *quoting Fontanetta v John Doe 1*, 73 AD3d 78, 86-87 [2d Dept 2010] [internal quotation marks omitted].)

Masaryk's claims for common law indemnification and contribution

Workers' Compensation Law ("WCL") § 11 provides that:

> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

"Section 11 was enacted in 1996 as part of a comprehensive reform intended to reduce costs for employers while also protecting the interests of injured workers… Central to the reform was immunity from tort liability for employers who provide workers' compensation coverage by exposing employers to third-party liability only in cases involving narrowly defined 'grave'

injuries." (*Rubeis v Aqua Club Inc.*, 3 NY3d 408, 415 [2004] [internal citations and quotation marks omitted].) In order to be entitled to dismissal of common law contribution and indemnification claims brought by a third-party plaintiff, an employer must show that the "plaintiff was its employee at the time of the accident and that he did not suffer a 'grave injury' as defined by the Workers' Compensation Law § 11." (*Kanyuch v 11 West 19th Associates LLC*, 2020 WL 41665, at **3-4 [Sup Ct, NY County 2020]; *see also Marine v Haroldon Court Condominium, Inc.*, 2008 WL 11362263, at **8-9 [Sup Ct, NY County 2008].)

Here, Centennial meets its burden. It is undisputed that Plaintiff was employed by Centennial on the date of the accident, and Plaintiff testified that he did not suffer a grave injury as defined by WCL § 11. (NYSCEF Doc No. 132, Pl.'s Transcript, at 185:19-187:19.) In opposition, Masaryk fails to raise an issue of fact. (Opposition at ¶ 37.) Thus, Masaryk's claims for common law indemnification and contribution are dismissed.

Masaryk's contractual claims for indemnification and breach

"The right to contractual indemnification depends upon the specific language of the contract." (*Crutch v 421 Kent Dev., LLC*, 146 NYS3d 151, 153 [2d Dept, Mar 24, 2021].) "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.'" (*Drzewinski v Atl. Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], *quoting Margolin v New York Life Ins. Co.*, 32 NY2d 139, 153 [1973].)

Here, the indemnification provision within the contract provides that:

> The Contractor [Centennial] hereby agrees, to the fullest extent permitted by law, to assume the entire responsibility and liability for the defense of and to pay and indemnify the Owner [Masaryk] … against any loss, cost expense, liability or damage and will hold … harmless from and pay any loss, cost, expense, liability or damage (including without limitation, judgment, attorney's fees, court costs and the cost of appellate proceedings) which the Owner incurs because of sickness, injury

> to or death of any person or on account of damage to or destruction of property, including loss of use thereof, or any other claim arising out of, in connection with, or as a consequence of the performance of the services or the furnishing of the equipment and supplies and/or any acts or omissions of the Contractor or any of its officers, directors, employees, agents, subcontractors, or anyone directly or indirectly employed by the Contractor for whom it may be liable as it relates to the scope of this contract.

(Contract at § 4.02.)

Centennial has established that Masaryk is not entitled to contractual indemnification for Plaintiff's accident under the plain language of the indemnification provision, which provides that Centennial agrees to indemnify Masaryk only for losses arising from services provided/acts and omissions of Centennial personnel relating to the scope of the contract. The contract, titled "Vertical Transportation Maintenance Full Coverage Contract and Specifications" provides that Centennial will furnish regular maintenance, inspection, and repair services for 16 elevators on a monthly basis. (Contract at 2-3.) There is no language in the contract which establishes that the maintenance or repair of the staircase falls within the scope of the contract. (*Gentile v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 9 Misc 3d 111 [1st Dept 2005] [building owner not entitled to contractual indemnification from third-party defendant/plaintiff's employer for injuries suffered by plaintiff when he tripped and fell at building owner's premises while performing routine maintenance inspection, as his "mere presence on the site could not be considered an 'act' sufficient to invoke indemnification"].)

Further, the deposition testimony of Masaryk's witness conclusively establishes that Centennial was under no duty, implied or explicit, to maintain the staircase. (Vazquez Transcript, at 13:13-17:13.) Likewise, there is no evidence that an implied contract to maintain such existed between the parties, and Masaryk's bare allegation to the contrary is not entitled to further consideration or further discovery. (*Skillgames*, 1 AD3d at 250.)

Lastly, Masaryk fails to state a cause of action for breach of contract, in that Masaryk's allegation is that Centennial breached the contract by failing to "maintain insurance to fully protect Masaryk … for Plaintiff's claims." (Opposition at ¶¶ 30-31.) Centennial produced evidence indicating that Masaryk was an additional insured on Centennials insurance policy, but that Centennial's insurance carrier disclaimed coverage on the grounds that Plaintiff's accident did not fall within the scope of the insurance contract. (NYSCEF Doc No. 84.)

The portion of Centennial's motion seeking sanctions and costs against Masaryk for alleged frivolous conduct is denied in this court's discretion. (*Global Export Marketing Co., Ltd. v Aab*, 2020 WL 5981734, at *4 [Sup Ct, NY County 2020].)

Plaintiff's motion sequence 004 to strike Masaryk's answer

Plaintiff moves to strike Masaryk's answer on the grounds that Masaryk has willfully provided false discovery responses. (NYSCEF Doc No. 91, Pl.'s Memo, at ¶¶ 14-51.) Namely, Plaintiff cites to Masaryk's March 22, 2021 response (NYSCEF Doc No. 99, Response) to Plaintiff's October 28, 2020 notice for discovery and inspection (NYSCEF Doc No. 96, Notice), wherein Masaryk stated that there were no maintenance contracts or records regarding the staircase at issue. (Pl.'s Memo at ¶¶ 14-25.) Plaintiff alleges that after he conducted his own independent investigation, however, he came across the existence of Metro, a management company for Masaryk, which was later confirmed in Masaryk's response to Plaintiff's notice to admit. (*Id.* at ¶¶ 26-27; NYSCEF Doc No. 107, Notice to Admit; NYSCEF Doc No. 109, Response to NoA.)

Additionally, Plaintiff cites to Masaryk's March 22, 2021 response, wherein Masaryk stated that there were no notice witnesses as to the condition of the staircase (Pl.'s Memo at ¶¶ 32-36), which is contrary to an email provided by Masaryk's claims adjuster, which states that there was an employee of Centennial who claimed to have observed the condition of the rusted staircase.

(NYSCEF Doc No. 112.) Finally, Plaintiff argues that the third-party action must be dismissed, or in the alternative, severed, because it is frivolous and was commenced only to delay the discovery process. (Pl.'s Memo at ¶¶ 52-69.)

In opposition, Masaryk argues that it has complied with all discovery demands and court orders, to the extent that Plaintiff's discovery demands were "vague, overbroad and subject to numerous interpretations." (NYSCEF Doc No. 139, Ms004 Opposition, at ¶ 38.) Masaryk also argues that the third-party action is not frivolous. (*Id.* at ¶¶ 47-63.) Masaryk further cross-moves for sanctions, alleging that the current motion is frivolous. (*Id.* at ¶¶ 64-69.)

Discussion

Pursuant to CPLR 3126[3], "[i]f any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may … strik[e] out pleadings or parts thereof[.]"

"The determination of whether to strike a pleading lies within the sound discretion of the trial court." (*Stern v Starwood Hotels and Resorts Worldwide, Inc.*, 2020 WL 569280, at *2 [Sup Ct, NY County 2020].) However, striking an answer is a drastic remedy, "inconsistent with the courts' preference to reach the merits of a dispute wherever possible" (*Kolodziejski v Jen-Mar Electric Service Corp.*, 2020 WL 4207352, at **3-4 [Sup Ct, NY County 2020], and is "appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith." (*Henderson-Jones v City of New York*, 87 AD3d 498, 504, 928 NYS2d 536 [1st Dept 2011] [internal quotation marks omitted].) "Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses." (*Debono Bros. Builders & Developers, Inc. v Anmuth*, 2019 WL 1744250, at *2 [Sup Ct, NY County 2019].)

Here, although the court notes that Masaryk's discovery responses and proffered excuses therefore leave much to be desired, the record does not support the drastic remedy of striking the answer in its entirety. (*See Lefavre v 568 Broadway Holding LLC*, 2019 WL 4415457, at *5 [Sup Ct, NY County 2019].) In reaching this conclusion, the court notes that Masaryk has already stipulated to the addition of Metro as a defendant, and that Metro has since appeared by the filing of a joint answer to the amended complaint. (NYSCEF Doc No. 166, Stipulation; NYSCEF Doc No. 116, Am. Summons & Cmplt.; NYSCEF Doc No. 160, Joint Answer.)[1]

The court further notes that the Defendants' Joint Answer does not contain the affirmative defense alleging that Plaintiff has failed to join an indispensable party. (*Compare* Joint Answer at ¶¶ 29-44 *with* NYSCEF Doc No. 3, Answer, at ¶ 30.) Thus, the portion of Plaintiff's motion seeking the dismissal of that affirmative defense is moot, as is the portion seeking the dismissal of the third-party action, in light of the court's decision granting motion sequence number 003.

Finally, Masaryk's cross-motion for sanctions is denied in this court's discretion. (*Global Export Marketing Co., Ltd.*, 2020 WL 5981734, at *4.) Accordingly, it is hereby

ORDERED that Centennial's motion sequence 003 is granted to the extent that the third-party complaint is dismissed in its entirety as to Centennial, with costs and disbursements to Centennial as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the portion of Centennial's motion sequence 003 seeking sanctions against Masaryk is denied; and it is further

[1] The court notes that although the stipulation is dated September 17, 2021, it was not filed until November 30, 2021. (Stipulation.)

ORDERED that Plaintiff's motion sequence 004 is denied in its entirety, and Masaryk's cross-motion for sanctions is denied; and it is further

ORDERED that counsel are directed to appear for a remote status conference on December 9, 2021, at 2:30 PM.

12/6/2021
DATE

WILLIAM PERRY, J.S.C.

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