SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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Carlos Mayorquin,

Plaintiff,

- against -

Board Of Education of the City of New York, et al.,

Defendants.
----------X
AND A THIRD PARTY ACTION

DECISION and ORDER
Index No. 302669/2014E

Lucindo Suarez, J.

In Motion Sequence No. 5, defendant/third-party plaintiff Carriage House Owner's Corp. ("Carriage House") moves for an order pursuant to CPLR § 3212 granting summary judgment to Carriage House on Carriage House's cross claims against Advanced Carpentry Construction Inc. ("Advanced Carpentry") and M&A Projects, Inc. ("M&A") for (1) contractual indemnification; (2) common law indemnification; and, (3) breach of contract for failure to procure insurance.

In Motion Sequence No. 6, defendant Advanced Carpentry moves for summary judgment on its cross-claims against M&A for (1) contractual indemnification, (2) common law indemnification, (3) breach of contract for failure to procure and maintain proper insurance; and, (4) dismissing Carriage House's and M&A's cross claims against Advanced Carpentry.

Plaintiff, an employee of third-party defendant Modu Builders Corporation ("Modu"), was allegedly injured on April 11, 2014, by a falling brick during construction at premises owned by defendant Carriage House. Carriage House hired Advanced Carpentry to prepare and repair water-damaged surface areas, perform waterproofing of the facade and install an architectural panel at the building. Advanced Carpentry subcontracted certain masonry work to M&A, which in turn subcontracted certain work to Modu, plaintiff's employer. There is evidence in the record herein that the brick that fell onto plaintiff came from a debris bag that tore open while two of Modu Builder's employees were working on a hanging scaffold located directly over the plaintiff.

As this Court observed in a prior decision (Suarez, J., Motion Sequence No. 4), plaintiff , was performing renovation work to the facade of a building when he was instructed by his foreman, Gabriel Ortega, to lay bricks on top of a sidewalk bridge located at the front of the jobsite. He also testified that there was a hanging scaffold directly above the area he was laying bricks, but he could not recall whether workers were working on the hanging scaffold. Plaintiff testified that his hard hat fell to the ground below, and thereafter, he felt the impact of a brick falling and striking him on the top of his head causing him to lose consciousness and sustain injures. This Court held that plaintiff's testimony that he was injured by an unsecured brick that fell from a height coupled with Ortega's statements in the accident report that Plaintiff was in fact injured by unsecured masonry debris, which fell from the suspended scaffold that was located directly above, and that the hanging scaffold lacked adequate netting. The Court concluded that plaintiff established that defendants violated Labor Law §240(1), and that said violation proximately caused his injuries. (*See Hill v Acies Group*, LLC, 122 AD3d 428, 996 NYS2d 235 [1st Dept. 2014] [plaintiff established Labor Law § 240 (1) claim where the defendants' witnesses confirmed that a brick fell out of the hands of a masonry worker]).

Motion Sequence No. 5

In Motion Sequence No. 5, Carriage House argues it is free from fault for the occurrence of the accident. Carriage House argues that it is entitled to contractual indemnity from Advanced Carpentry based on the October 18, 2012 contract between Carriage House and Advanced Carpentry. That contract provides that Advanced Carpentry will defend and indemnify Carriage House from any claim "arising out of or resulting from performance of the Work ... but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder."

Carriage House further contends that it is entitled to contractual indemnity from M&A in accordance with the terms of the contract dated October 22, 2018 and the rider dated November 12, 2012. Carriage House argues that M&A agreed to defend and indemnify Carriage House as owner from any claims "arising out of, resulting from, or occurring in connection with the performance of the Work by Subcontractor, its subcontractors and suppliers, or their agents, servants, or employees, whether or not caused in part by the active or passive negligence or other fault of a party indemnified hereunder; provided, however, Subcontractor's duty hereunder shall not arise if such injury, sickness, disease, death, damage or destruction is caused by the sole negligence of a party indemnified hereunder."

Carriage House also seeks common law indemnification from Advanced and M&A on the ground that Carriage House is completely freedom of negligence.

Lastly, Carriage House argues that Advanced Carpentry and M&A breached their contractual duty to obtain and maintain proper insurance. In this regard, Advanced Carpentry was required to procure commercial liability coverage ($1 million) and excess coverage ($5 million) that named Carriage House as an additional insured for claims arising out of Advanced Carpentry's work at the Premises, and failed to do so. Similarly, Carriage House argues, M&A failed to procure insurance insuring Carriage House as an additional insured by way of commercial liability coverage ($1 million) and excess liability coverage ($2 million).

In opposition, M&A contends that Carriage House's motion must be denied to the extent it seeks contractual and common law indemnification from M&A, as well as the breach of contract for failure to procure insurance. M&A argues that the obligation to indemnify is not triggered until a judgment which is within the scope of an indemnification obligation is obtained, citing Plaza Constr. Corp. v. Zurich Am. Ins. Co., 2011 N.Y. Misc. LEXIS 1234 (Sup. Ct., New York County 2011), and therefore, as there has been no determination yet as to whether any party is liable for plaintiff's

injuries, contractual indemnity must be denied. As to common law indemnity, M&A argues that Carriage House failed to identify any negligent conduct on the part of M&A that proximately caused Plaintiff's accident, and thus failed to satisfy the showing required for common law indemnity. As to the obligation to procure insurance, M&A maintains that it did in fact purchase general liability insurance pursuant to its contractual obligation, and it adduces a policy which includes a blanket endorsement that covers any obligation by M&A to provide insurance to an additional insured.

Advance Carpentry argues in opposition that its contractual obligation to indemnify Carriage House has not been shown to have been triggered, as the agreement requires that the obligation to indemnify under the contract is triggered only on a finding of negligence against Advance Carpentry. For the same reason, Advanced Carpentry argues that, absent any showing of negligence against Advance Carpentry, common law indemnity cannot be granted against it. Lastly, Advanced Carpentry maintains that it purchased a commercial general liability policy from American Empire Insurance Company with limits in the amount of $1 million per occurrence/$2 million general aggregate per project (Policy No. 13CG0176084), an excess liability policy from American Empire Insurance Company with limits of $1 million per occurrence/$2 million general aggregate (Policy No. 13CX0176096), and an excess liability policy from Commerce & Industry Insurance Company with limits of $10 million (Policy No. BE 015820447). These policies are annexed to the opposition papers.

Contrary to M&A's argument that indemnity may be awarded only after a judgment on liability, the First Department has held that "[w]here an entity is held strictly liable based solely on its status as owner of the premises pursuant to Labor Law § 240 (1) . . . , the owner is entitled to contractual indemnification where such has been agreed to between the parties." (*Velez v Tishman Foley Partners*, 245 A.D.2d 155, 156, 666 N.Y.S.2d 591 [1st Dept. 1997].)

"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 Atlantic Scaffold & Ladder Co*., 70 NY2d 774, 777, 515 N.E.2d 902, 521 N.Y.S.2d 216 [1987], quoting *Margolin v New York Life Ins. Co*., 32 NY2d 149, 153, 297 N.E.2d 80, 344 N.Y.S.2d 336 [1973]). Further, the right to indemnity "depends upon the specific language of the contract" (*Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255, 904 N.Y.S.2d 205 [2d Dept. 2010]; *see Trawally v City of New York*, 137 AD3d 492, 492-493, 27 N.Y.S.3d 505 [1st Dept. 2016]). With respect to the contractual indemnification claims, the agreement with Advanced Carpentry requires that Advanced Carpentry must indemnify Carriage House for claims "arising out of or resulting from performance of the Work ... but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable." (Emphasis added.) Therefore, even though there is no evidence that Advanced Carpentry was negligent, as Carriage House correctly argues, the obligation to indemnify arises based on a showing of negligence on the part of Advanced Carpentry, *or any other contractor or subcontractor employed by them*.

There is no *bona fide* dispute in this action that Modu was an authorized subcontractor hired by M&A, and thus "indirectly" employed by Advanced Carpentry. There is also no dispute that Carriage House is free from negligence. (*Velez v. Tishman Foley Partners*, 245 A.D.2d 155, 157, 666 N.Y.S.2d 591, 593 [1st Dept. 1997] [a finding of liability predicated upon Labor Law § 240 is not the equivalent of a finding of negligence].)[1]

[1] It is inappropriate to grant conditional summary judgment on an owner or general contractor's contractual indemnification claim against a subcontractor where an issue of fact exists as to whether the owner or general contractor's negligence was the sole proximate cause of the underlying claim. (*Cackett v Gladden Props., LLC*, 183 A.D.3d 419, 422, 123 N.Y.S.3d 581, 584 [1st Dept. 2020].) As there is no evidence of negligence on the part of Carriage House, this proscription on the grant of conditional summary judgment is inapplicable.

As noted above, Advanced Carpentry is liable under the indemnity clause in the event any indirect employee was negligent. In this regard, it appears that Modu may have been negligent in employing debris bags which failed to broke open, and in failing to erect proper netting around the hanging scaffold. However, no party advances argument or demonstrates prima facie that Modu (or any other party) was actually negligent. In this regard, as noted above, the granting of summary judgment under the Scaffold Law is not tantamount to a finding of negligence.

Accordingly, Carriage House is entitled only to conditional contractual indemnity against Advanced Carpentry, based on a showing of negligence of any subcontractor or employee. (*See Crimi v. Neves Assocs*., 306 A.D.2d 152, 153-154, 761 N.Y.S.2d 186, 188 [1st Dept. 2003] [indemnity agreement provided that contractor was obligated to defend and indemnify owner for "bodily injury * * * but only to the extent caused in whole or part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable;" in view of this provision, the grant of summary judgment in favor of owner on its cause of action against contractor for contractual indemnification was properly conditioned upon a finding of contractor's negligence].)

With respect to M&A's obligation to indemnify Carriage House, M&A agreed to defend and indemnify Carriage House as owner from any claims "arising out of, resulting from, or occurring in connection with the performance of the Work by Subcontractor, its subcontractors and suppliers, or their agents, servants, or employees . . . ." (Emphasis added.) M&A thus agreed to indemnify Carriage House for any injury arising out of "the performance of the Work by … its subcontractors," irrespective of negligence. The submissions on the motion make it clear that the accident arose out of the performance of the work by Modu, M&A's subcontractor.

As to the claims by Carriage House against Advanced Carpentry and M&A based on common law indemnification, the obligation to indemnify imposed by common law applies only when those

parties are actually at fault, i.e., in the Labor Law context, those parties must "actually supervise and/or direct the injured plaintiff's work." (*McCarthy v Turner Constr., Inc.*, 17 N.Y.3d 369, 378, 953 N.E.2d 794, 801, 929 N.Y.S.2d 556, 563 [2011].) The owner defendant Carriage House is not entitled to common-law indemnification from Advanced Carpentry and M&A, because there is no evidence that these contractors were negligent. (*See Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484, 899 NYS2d 30 [1st Dept. 2010]; *see also Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603, 523 NE2d 803, 528 NYS2d 516 [1988]).

As to the claim of breach of contract based on failure to procure insurance, movant Carriage House failed to attach the relevant policies or raise the appropriate arguments on the motion in chief, and raises new issues in reply. A party moving for summary judgment cannot meet its prima facie burden by submitting evidence for the first time in reply. (*See Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879, 23 N.Y.S.3d 251 [2d Dept. 2015].)

Motion Sequence No. 6

Advanced Carpentry contends that M&A agreed to indemnify Advanced Carpentry under two separate indemnity clauses in the contract for injuries "caused by, arising out of, resulting from, or occurring in connection with the performance of the Work by Subcontractor [and] its subcontractors," or "caused in whole or in party by any acts or omissions of the Sub-contractor [M&A], its employees, agent or Subcontractors or anyone directly or indirectly employed by any of them." Advanced Carpentry accordingly maintains that it is entitled to summary judgment on its contractual indemnification claims against M&A since the accident arose out of and in connection with the performance of the work of M&A's subcontractor Modu.

To the extent M&A contends that §4.6.1 of the ADVANCED/M&A agreement provides for indemnification for claims "arising out of or resulting from performance of the Subcontractor's

[M&A] Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury...but only to the extent caused by the negligent acts of omissions of the Subcontractor...," that section was superseded by the rider, and does not apply here. Thus, the two applicable indemnity provisions in the contract read together, are triggered by the fact that the accident arose out of the work of Modu, M&A's subcontractor. Nor was any showing of negligence required.

To the extent that M&A argues that Advanced Carpentry maintained general supervisory control over the worksite as well as safety practices, this does not preclude summary judgment on its indemnity claim. The First Department has held that summary judgment is warranted on contractual indemnification claims where the movants establish a prima facie showing that they were free of negligence, i.e., that the accident was caused by the means and methods of the work, and defendants did not exercise supervisory control over the activity that caused the injuries (see *Alvarado v French Council LLC*, 149 AD3d 581, 582, 50 N.Y.S.3d 280 [1st Dept. 2017]; *Balbuena v New York Stock Exch., Inc.*, 49 AD3d 374, 376-377, 853 N.Y.S.2d 330 [1st Dept. 2008], lv denied 14 NY3d 709 [2010]). A contractor's general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed (*see Sparendam v Lehr Constr. Corp*., 24 AD3d 388, 389, 807 NYS2d 335 [2005], lv denied 7 NY3d 703, 853 NE2d 241, 819 NYS2d 870 [2006]; *Mitchell v New York Univ*., 12 AD3d 200, 784 NYS2d 104 [2004]). Nor is the mere presence of the general contractor's personnel on the site sufficient to infer supervisory control (*Matter of New York City Asbestos Litig*., 25 AD3d 374, 807 NYS2d 84 [2006]).

Advanced Carpentry further argues that pursuant to Paragraph 1 of Schedule C of the Advanced Carpentry/M&A contract, M&A was required to purchase a commercial general liability insurance policy with limits of "not less than $1,000,000.00 each occurrence & $2,000,000.00 annual

aggregate." and an excess liability (umbrella) policy with limits of $2 million per occurrence. Advanced Carpentry was to be named as an Additional Insured on both the general liability and excess policies, which was to be primary to Advanced Carpentry's own insurance policies. Advanced Carpentry established its entitlement to summary judgment on its cross-claim against M&A for breach of contract for failure to procure because it procured a one million dollar excess policy in lieu of the contractually required 2 million. M&A is liable for any recovery in excess of the excess policy procured by M&A up to an additional $1 million.

To the extent Advanced carpentry seeks common law indemnity, there is no evidence that M&A was negligent.

M&A's contract with Advanced Carpentry did not require Advanced Carpentry to contractually indemnify M&A, or name M&A as an additional insured on Advanced Carpentry's insurance policy. Accordingly, those cross-claims are dismissed.

Conclusions

For the reasons stated above, it is accordingly

ORDERED that Carriage House Owner's Corp. is granted conditional contractual indemnity against Advanced Carpentry Construction Inc., upon condition that the negligence of Advanced Carpentry Construction Inc., or anyone directly or indirectly employed by it, is found to be a proximate cause of plaintiff's injuries, and it is further

ORDERED Carriage House Owner's Corp. is granted full contractual indemnity against M&A Projects, Inc., and it is further

ORDERED that Carriage House Owner's Corp.'s motion is otherwise denied, and it is further

ORDERED that Advanced Carpentry Construction Inc. is granted full contractual indemnity against M&A Projects, Inc., and it is further

ORDERED that Advanced Carpentry Construction Inc.'s motion for summary judgment on its cross-claim against M&A Projects, Inc. for breach of contract for failure to procure insurance is granted only as to the failure to procure the excess policy, and M&A Projects, Inc. is liable for any recovery in excess of the excess procured by M&A Projects, Inc., up to an additional $1 million over that existing excess policy, and it is further

ORDERED that M&A Projects, Inc.'s cross-claims against Advanced Carpentry Construction Inc. based on failure to procure insurance and contractual indemnity are dismissed, and it further

ORDERED that the motion of Advanced Carpentry Construction Inc. is otherwise denied.

This is the Decision and Order of the Court.

Dated: May 17, 2021

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Lucindo Suarez, J.S.C.