

**Stewart v City of Port Jervis**

2021 NY Slip Op 33753(U)

April 19, 2021

Supreme Court, Orange County

Docket Number: Index No. EF009924-2019

Judge: Catherine M. Bartlett

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK  
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
DAVID GEOFF STEWART and LAURA ANN  
KIERSTEAD,

Plaintiffs,

-against-

CITY OF PORT JERVIS,

Defendant.

To commence the statutory time  
period for appeals as of right  
(CPLR 5513 [a]), you are  
advised to serve a copy of this  
order, with notice of entry,  
upon all parties.

-----X  
CITY OF PORT JERVIS,

Third-Party Plaintiff,

-against-

HAYWARD BAKER, INC.,

Third-Party Defendant.

Index No. EF009924-2019

Motion Date: March 18, 2021  
(Mot. Seq. No. 3)

-----X  
CITY OF PORT JERVIS,

Second Third-Party Plaintiff,

-against-

D.A. COLLINS CONSTRUCTION CO.,

Second Third-Party Defendant.

Motion Date: March 19, 2021  
(Mot. Seq. No. 4)

-----X

The following papers numbered 1 to 8 were read on the motion of D.A. Collins  
Construction Co. to dismiss the cross claims of Hayward Banker, Inc., and the cross motion of  
Hayward Baker, Inc. for leave to file a verified amended answer with cross claims:

Notice of Motion - Affirmation / Exhibits - Memorandum ..... 1-3

Notice of Cross Motion - Affirmation / Exhibits - Memorandum ..... 4-6

Reply Affirmation - Reply Memorandum ..... 7-8

Upon the foregoing papers, it is ORDERED that the motions are disposed of as follows:

**A. Factual and Procedural Background**

Plaintiffs commenced this action against the defendant City of Port Jervis to recover for personal injuries arising out of a construction site accident. The City of Port Jervis commenced a third-party action against Hayward Baker, Inc. (“HBI”) a subcontractor on the project, and a second third-party action against D.A. Collins Construction Co. (“D.A. Collins”), the general contractor. After the commencement of the second third-party action, HBI filed a document entitled “Cross Claim Against Second-Third-Party Defendant D.A. Collins Construction Co., Inc.” asserting claims for contribution and common law indemnification against D.A. Collins.

D.A. Collins moves for dismissal of HBI’s cross claims on the grounds that (1) HBI’s filing was a nullity, and (2) HBI purportedly waived all rights of action against D.A. Collins in the Subcontract Agreement. HBI moves for leave to amend its answer to assert a cross claim for contribution (but not indemnification) against D.A. Collins. Inasmuch as the “Cross Claim” which HBI filed is not a kind of pleading authorized by CPLR §3011, that filing is a nullity. On the other hand, if HBI does have valid cross claims against D.A. Collins, there is no reason why it should not be accorded leave to amend its answer to assert them. Hence, the question presented is whether HBI has valid cross claims against D.A. Collins for common law indemnification or for contribution.

**B. The Standard Governing CPLR §3211(a)(1) Motions To Dismiss Based On Documentary Evidence**

A motion to dismiss pursuant to CPLR §3211(a)(1) based upon documentary evidence may be granted only where the evidence “utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law...” *Goshen v. Mutual Life Insurance Company of New York*, 98 NY2d 314, 326 (2002); *25-01 Newkirk Avenue, LLC v. Everest National Ins. Co.*, 127 AD3d 850, 851 (2d Dept. 2015); *Louzoun v. Kroll Moss and Kroll, LLP*, 113 AD3d 600, 601 (2d Dept. 2014). *See, Leon v. Martinez, supra*, 84 NY2d at 88; *Dodge v. King*, 19 AD3d 359, 360 (2d Dept. 2005) (under CPLR 3211[a][1] “the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim”).

**C. The Subcontract Agreement**

The Subcontract Agreement between D.A. Collins as general contractor and HBI as subcontractor provides in pertinent part as follows:

**INDEMNIFICATION**

81. Subcontractor agrees to protect, defend, indemnify and save harmless, to the fullest extent permitted by law, the Contractor and the Owner against any and all liabilities, judgments, damages, penalties, fines, expenses and costs, including attorneys’ fees, caused or incurred...for any physical injury or death occurring to any person, all to the extent arising in whole or in part, directly or indirectly from or in connection with the neglect, fault, act or omission, failure to act, on the part of Subcontractor, its agents, employees or lower tier subcontractors, suppliers or materialmen.
82. This indemnification includes, but is not limited to, any claims, damages, loss, liability or expense of any kind, which is in any way connected with Subcontractor’s performance of the Work and which is based upon a breach of statutory duty or obligation on the part of the Contractor where the Contractor is not found to have committed a negligent act or omission. Subcontractor agrees to purchase and maintain such insurance as will protect it and the Contractor, including contractual coverage....

Annexed as “Exhibit C” to the Subcontract Agreement is a document entitled “Insurance Requirements.” It states in pertinent part:

**INSURANCE.** The Subcontractor shall procure and maintain, at its own sole cost and expense, and shall maintain in force at all times during the term of this Agreement including any extensions or renewals until Agreement Final Acceptance, the policies of insurance covering all operations under the Agreement whether performed by it or its Second Tier Subcontractors as herein below set forth....

**A. Conditions Applicable to Insurance.** All policies of insurance required by this Agreement must meet the following requirements:

.....

6. **Waiver of Subrogation.** As to every type and form of insurance coverage required from the Subcontractor, there shall be no right of subrogation against D. A. Collins....

.....

9. **Waiver of Indemnities.** The Subcontractor waives any right of action it and/or its insurance carrier might have against the Contractor or Owner (including its employees, officers, or agents) for any loss that is covered by a policy of insurance that is required by this Agreement. The Subcontractor waives any right of action it and/or its insurance carrier might have against the Contractor or Owner (including its employees, officers, or agents) for any loss, whether or not such loss is insured.

**D. HBI Has No Valid Claim Against D. A. Collins For Common Law Indemnification**

The Subcontract Agreement provides for *contractual* indemnification of D. A. Collins by HBI. This is a “one way obligation” to indemnify, flowing by contract from HBI as indemnitor to D. A. Collins. As a matter of law, any reciprocal *common law* obligation by D. A. Collins to indemnify HBI is extinguished. *See, Lamela v. Verticon, Ltd.*, 185 AD3d 1319, 1322 (3d Dept. 2020) (citing *Service Sign Erectors Co. v. Allied Outdoor Adv.*, 175 AD2d 761, 763 [1991], *appeal dismissed* 79 NY2d 823 [1991], *lv denied* 79 NY2d 754 [1992]; *Rosado v. Proctor & Schwartz*, 106 AD2d 27, 30 [1984], *aff'd* 66 NY2d 21 [1985]).

Therefore, HBI has no valid cross claim against D. A. Collins for common law indemnification.

**E. D. A. Collins Has Not Conclusively Demonstrated That HBI Has No Valid Cross Claim For Contribution**

D. A. Collins claims that Paragraph (A)(9) (“Waiver of Indemnities”) of Exhibit “C” to the Subcontract Agreement (“Insurance Requirements”) constitutes a waiver by HBI of all rights of action against Collins, including a claim for contribution.

“A contract should be read as a whole with every part of it construed with reference to the whole. To give effect to the intent of the parties, the court should construe a contract by considering all of its provisions. Consideration of the entire contract avoids adopting an interpretation that would result in inconsistency between two provisions of the contract; or rendering a particular provision superfluous.” 28 N.Y. Prac., Contract Law §10.4 (“Construction as a whole”). *See, Global Funding Group, LLC v. 133 Community Road, Ltd.*, 251 F.Supp.3d 527, 531 (E.D.N.Y. 2017) (“a Court ‘must consider the entire contract to avoid adopting an interpretation that would result in an inconsistency between provisions or that would render a particular provision superfluous’”).

“A contract should be construed so as to give full meaning and effect to all of its provisions....A construction of a contract that has the effect of rendering at least one clause superfluous or meaningless is not to be preferred and will be avoided if possible....No portion of the contract should be mere surplusage as a result of the interpretation.” 28 N.Y. Prac. §10.7 (“Surplusage”). *See, Beal Savings Bank v. Sommer*, 8 NY3d 318, 324 (2007) (“The court should ‘construe the agreements so as to give full meaning and effect to the material provisions’”);

*Roman Catholic Archdiocese of Brooklyn v. Christ the King Regional High School*, 164 AD3d 1390, 1393 (2d Dept. 2018).

Considered in light of these principles, D. A. Collins' position that HBI by virtue of the "Waiver of Indemnities" provision in Exhibit "C" to the Subcontract Agreement waived all rights of action against Collins – including a claim for contribution – is not without difficulty.

First of all, the "Waiver of Indemnities" provision on which D. A. Collins relies is not a substantive provision of the Subcontract Agreement between Collins and HBI, but rather a "condition applicable to insurance", that is, a requirement that the insurance policies mandated by the Agreement had to meet (*see*, Subcontract Agreement, Ex. "C", ¶A [9]). Whether or not those insurance policies in fact met the "Waiver of Indemnities" requirement is unclear, as the policies have not been proffered on D. A. Collins' motion for dismissal. Second, D. A. Collins' interpretation of the "Waiver of Indemnities" provision as a waiver of *all rights of action* would render wholly superfluous the "Waiver of Subrogation" provision set forth immediately before (*see*, Subcontract Agreement, Ex. "C", ¶A[6]).

In view of the foregoing, the Court finds that the Subcontract Agreement is in this respect ambiguous, and that D. A. Collins has not *conclusively* disposed of HBI's proposed claim for contribution by means of documentary evidence. *See*, CPLR §3211(a)(1); *Goshen v. Mutual Life Insurance Company of New York*, *supra*. Consequently, HBI is granted leave pursuant to CPLR §3025(b) to amend its answer to assert a cross claim for contribution against D. A. Collins.

It is therefore

ORDERED, that the motion of D.A. Collins Construction Co. to dismiss the filing by Hayward Baker, Inc. entitled “Cross Claim Against Second-Third-Party Defendant D.A. Collins Construction Co., Inc.” is granted, and said “Cross Claim” is hereby dismissed, and it is further

ORDERED, that the cross motion of Hayward Baker, Inc. for leave to file an amended answer is granted, and the Amended Verified Answer set forth in Exhibit “H” to Hayward Baker, Inc.’s motion papers is deemed electronically filed as of the date of this Order.

The foregoing constitutes the decision and order of the Court.

Dated: April 19, 2021      E N T E R  
Goshen, New York



HON. CATHERINE M. BARTLETT, A.J.S.C.