

**Sosa v Celtic Servs. NYC Inc.**

2021 NY Slip Op 34253(U)

October 25, 2021

Supreme Court, Bronx County

Docket Number: Index No. 29222/2019E

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 1, 2

JESUS L. HERRERA SOSA,

Index No.: 29222/2019E

Plaintiff,

- against -

**DECISION and ORDER**

CELTIC SERVICES NYC INC., KINGS GROUP NY CORP., 1639-1641 FIRST NY LLC, TF085 LLC, EXTELL DEVELOPMENT COMPANY, KERMAN 85 LLC, 350 EAST 86 LLC, FIRST NY LLC, 1651 FIRST LLC, MARIN MANAGEMENT CORP. and GILBANE RESIDENTIAL CONSTRUCTION, LLC,

Defendants.

and Third-Party actions.

	PAPERS NUMBERED
Defendant Kerman 85 LLC's Notice of Motion, Affirmation in Support, Exhibits (Mtn. Seq. # 1)	1, 2, 3
Second Third-Party Defendant White Star NYC Inc.'s Notice of Cross-Motion, Affirmation in Opposition/Support, Memorandum of Law in Support, Exhibits (Mtn. Seq. # 1)	4, 5, 6, 7
Defendant Kerman 85 LLC's Affirmation in Opposition/Reply (Mtn. Seq. # 1)	8
Second Third-Party Defendant White Star NYC Inc.'s Reply Affirmation (Mtn. Seq. # 1)	9
Defendant King Group NY Corp.'s Notice of Motion, Affirmation in Support, Memorandum of Law in Support, Exhibits (Mtn. Seq. # 2)	10, 11, 12, 13
Defendants TF085, LLC's, Extell Development Company's, 350 East 86 LLC's, First NY LLC's and Marin Management Corp.'s Affirmation in Opposition (Mtn. Seq. # 2)	14
Defendant King Group NY Corp.'s Reply Affirmation (Mtn. Seq. # 2)	15
Plaintiff's Affirmation in Opposition, Exhibit (Mtn. Seqs. # 1, 2)	16, 17
Third-Party Defendant Gilbane Residential Construction LLC's to Cross-Motion, Exhibits (Mtn. Seq. # 1)	18, 19

Upon the enumerated papers; and due deliberation; the court holds:

That Defendant Kerman 85 LLC's ("Kerman") motion seeking to impose sanctions against Third-Party Defendant White Star NYC Inc. ("White Star"), *inter alia*, is denied and Kerman's request for a dismissal of White Star's cross-claims is granted.<sup>1</sup> Furthermore, Defendant Kings Group NY Corp.'s ("Kings Group") motion seeking a dismissal of all cross-claims asserted against it is granted. However, its request to impose sanctions against

<sup>1</sup> White Star's cross-motion seeking to compel discovery, *inter alia*, is denied as it failed to comport with the published rules of the Labor Law, Products Liability, and Non-Medical Professional Malpractice ("LPM") Part regarding discovery related motions.

Defendants TF085, LLC, Extell Development Company, 350 East 86 LLC, First NY LLC, and Marin Management Corp. (collectively “Defendants”) is denied.<sup>2</sup>

I. Sanctions

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct, which is defined as: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. *See* 22 NYCRR §130-1.1(a)(c)(1)(2)(3).

Similarly, CPLR §8303-a(a)(c)(i)(ii) provides in pertinent part: “If in an action to recover damages for personal injury ... is commenced or continued by a plaintiff or a counterclaim, defense or cross claim is commenced or continued by a defendant and is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney’s fees not exceeding ten thousand dollars... In order to find the action, claim, counterclaim, defense or cross claim to be frivolous ... the court must find one or more of the following: (1) the action, claim, counterclaim, defense or cross claim was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or (2) the action, claim, counterclaim, defense or cross claim was commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law...”

Kerman and Kings Group make similar arguments in support of their respective applications for the imposition of sanctions. Kerman and Kings Group posit that sanctions should be imposed against White Star and Defendants due to their refusal in signing a stipulation discontinuing their cross-claims against them. Kerman and Kings Group contend that White

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<sup>2</sup> Kings Group’s application for a dismissal of Plaintiff’s complaint went unopposed by Plaintiff. Therefore, that branch of Kings Group’s motion will not be addressed herein. In addition, Kings Group withdrew their application for sanctions against Defendant 1651 First LLC via a stipulation dated June 8, 2021.

Star's and Defendants' failure to sign the stipulation discontinuing their cross-claims constitutes frivolous conduct and requiring the imposition of sanctions.

In opposition, White Star argues that its refusal in signing the subject stipulation was not frivolous in that White Star was not given sufficient discovery from Kerman or any other party in to determine the viability of its cross-claims against Kerman. White Star contends that they did not receive any discovery responses that confirmed that Defendant TF085 LLC owned the subject premises at the time of Plaintiff's accident nor did it receive sufficient information to establish the exact location of Plaintiff's accident.

Likewise, Defendants oppose Kings Group's application for sanctions as they claim that due to the lack of discovery, they could not ascertain the viability of their cross-claims against Kings Group. Defendants contend that Kings Group conceded that they performed work at the subject premises albeit not at the time of Plaintiff's accident. Therefore, Defendants contend that at this stage of discovery they could not verify whether Plaintiff's injuries were attributed to the work performed by Kings Group.

This court finds that White Star's and Defendants' refusal to sign the stipulation was not frivolous as defined under 22 NYCRR §130-1.1(a)(c)(1)(2)(3) or CPLR §8303-a(a)(c)(i)(ii). White Star and Defendants had a reason not to sign a stipulation of discontinuance due to the fact that discovery was in its nascent stages and material information regarding their cross-claims still had not been fully disclosed at the time they were presented with said stipulations. *See Sanders v. Aqua Chlor Enters., Inc*, 90 A.D.3d 521, 934 N.Y.S.2d 406 (1st Dep't 2011).

## II. Cross -Claims

Kerman seeks the dismissal of White Star's cross-claims for contribution, common law indemnity, contractual indemnity, and breach of contract asserted against it. In addition, Kings Group seeks the dismissal of Defendants' cross-claims for common law and contractual indemnity asserted against it.

Contribution is generally available as a remedy "when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe to the injured person" *Trump Vil. Section 3, Inc. v. NY State Hous. Fin. Agency*, 307 A.D.2d 891, 764 N.Y.S.2d 17 (1st Dep't 2003). "A contribution claim can be made even when the contributor has no duty to the injured plaintiff." *Raquet v. Braun*, 90 N.Y.2d 177, 681 N.E.2d 404, 659 N.Y.S.2d 237 (1997).

In addition, common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence. *Martins v. Little 40 Worth Assoc., Inc.*, 72 A.D.3d 483, 899 N.Y.S.2d 30 (1st Dep't 2010).

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 statutory liability. *Correia v. Professional Data Mgt., Inc.*, 259 A.D.2d 60, 693 N.Y.S.2d 596 (1st Dep't 1999); *see also* GOL §5-322.1. Further, 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. *Torres v. Morse Diesel Int'l, Inc.*, 14 A.D.3d 401, 788 N.Y.S.2d 97 (1st Dep't 2005).

Lastly, to state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement; (2) plaintiff performed; (3) defendant failed to perform; and (4) damages. *VisionChina Media Inc. v. Shareholder Representative Servs., LLC*, 109 A.D.3d 49, 967 N.Y.S.2d 338 (1st Dep't 2013).

Kerman claims that it is entitled to a dismissal of all of White Star's cross-claims as it was not the owner of the property at the time of Plaintiff's accident. In support of its argument Kerman submits the affidavit of its Managing Agent, Ely Samuels, and a copy of the deed, which evinces that the Kerman transfer its interest in the subject premises approximately one year and four months prior to Plaintiff's accident.

Similarly, Kings Group submits the affidavit of its President, Harprett Singh, who averred that it completed its contracted work prior to Plaintiff's accident. Moreover, it submitted its invoice demonstrating that its contracted work was completed prior to Plaintiff's accident.

In opposition, both White Star and Defendants claim that discovery is still necessary in order to determine whether their cross-claims are viable.

This court finds that Kerman and Kings Group established their *prima facie* burden for a dismissal of all cross-claims asserted against them. White Stars and Defendants need for discovery cannot overcome Kerman's and Kings Group's entitlement to a dismissal as they failed to demonstrate that some evidentiary basis is offered to suggest that discovery may lead to relevant evidence. *See DaSilva v. Haks Engrs.*, 125 A.D.3d 480, 4 N.Y.S.3d 162 (1st Dep't 2015).

Accordingly, it is

ORDERED, that Kerman's motion seeking to dismiss White Star's cross-claims and for the imposition of sanctions is granted in part only as to the dismissal of White Star's cross-claim; and it is further

ORDERED, that White Star's cross-motion seeking to compel discovery, *inter alia*, is denied as it failed to comport with the published rules of the Labor Law, Products Liability, and Non-Medical Professional Malpractice ("LPM") Part regarding discovery related motions; and it is further

ORDERED, that Kings Group's motion seeking the dismissal of Plaintiff's complaint, dismissal of all cross-claims, and for the imposition of sanctions is granted in part only as to the dismissal of Plaintiff's complaint and all cross-claims asserted against it; and it is further

ORDERED, that the parties shall appear for a discovery conference on November 16, 2021, at 12:00 p.m. via Microsoft Teams.

This constitutes the decision and order of the court.

Dated: 10/25/2021



Hon.

LUCINDO SUAREZ, J.S.C.

**LUCINDO SUAREZ, J.S.C.**