NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART **24**

----------X

Index №. 33373/2019E

GUSTAVO HERNANDEZ,

Plaintiff,

- against –

Hon. **DORIS M. GONZALEZ**,
Justice of the Supreme Court

11 PARK PLACE LLC, et al.

Defendant(s).

----------X

The following papers numbered _64_ to _143_ were read on these motions **(Seq. No.** 2) for **AMEND/DISMISSAL** noticed on **March 30, 2021** and duly submitted as **Nos.** on the Motion Calendar of **July 7, 2021**

Sequence No.	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	64-84
Cross Motion – Exhibits and Affidavits Annexed	85-105
Answering Affidavit and Exhibits, Memorandum of Law	107-114; 115-117; 133-138
Reply Affidavit	139-141; 142-143

This motion is decided in accordance with the accompanying memorandum decision.

Dated: 10/13/2021

Hon. _____
DORIS M. GONZALEZ, J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☑ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------X

GUSTAVO HERNANDEZ,

Plaintiff,

- against -

11 PARK PLACE LLC, WILLIAMS REAL ESTATE CO., INC., M GROUP MANAGEMENT CORP., and PARSONS CONSTRUCTION, INC.,

Defendants.
----------X

DECISION and ORDER
Index No. 33373/2019E

HON. DORIS M. GONZALEZ

Upon the forgoing papers, the defendant M Group Management Corp. ("M Group") moves for an order (1) pursuant to CPLR 3025, granting it leave to amend its answer to assert Workers' Compensation as an affirmative defense, and (2) pursuant to CPLR 3211(a)(1) and (7), and/or 3212, dismissing the plaintiff's complaint pursuant to the Workers' Compensation defense, and any and all cross-claims, against defendant M Group, on the ground that the plaintiff is barred from proceeding against M Group, and for such other and further relief as this Court deems just and proper.

Co-defendants 11 Park Place LLC ("Park") and Williams Real Estate Co., Inc. ("Williams") (collectively, the "Park Defendants") partially oppose the motion and cross-move for an order (1) pursuant to CPLR 3212, granting summary judgment in Park's favor on its cross-claims for contractual indemnification against M Group, including reimbursement of all legal fees, and (2) pursuant to CPLR 3212, granting summary judgment in Williams' favor, dismissing the plaintiff's complaint and any and all cross-claims against it in their entirety, and for such other and further relief as the court deems just and proper.

The plaintiff Gustavo Hernandez ("Plaintiff") opposes the motion and cross-motion, to the extent that the cross-motion seeks dismissal of his complaint as to Williams.

Defendant Parsons Construction, Inc. ("Parsons") opposes M Group's motion.

M Group opposes Park Defendants' cross-motion.

The motion and cross-motion have been transferred to the undersigned due to the unavailability of Justice Mary Ann Brigantti.

I. Background

Plaintiff commenced this personal injury action against defendants alleging that he was injured in a work-related accident that occurred on September 16, 2019, at a construction site located at 11 Park Place, New York, New York. The construction site was allegedly owned by the Park Defendants, who contracted with M Group, as the general contractor, to perform façade work. At the time of the accident Plaintiff was allegedly working as an employee of M Group.

II. M Group's Motion

Leave to Amend

It is "fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v. Booz Allen Hamilton Inc.*, 85 A.D.3d 502 [1st Dept 2011] *citing* CPLR 3025[b]). "On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations…but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit…" (*MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499 [1st Dept. 2010]). In this case, for the reasons that follow, M Group has established that it is entitled to amend its complaint to assert a defense predicated on workers' compensation law. Although Parsons opposes this branch of the motion, they do not describe any prejudice that they would endure if such an amendment was granted, and "[m]ere delay is insufficient to defeat a motion for leave to amend" (*see Kocourek*, 85 A.D.3d at 505).

Dismissal and/or Summary Judgment based on Workers' Compensation Law

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial

of the motion, regardless of the sufficiency of any opposing papers (*id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]).

" 'As a general rule, when an employee is injured in the course of his employment, his sole remedy against his employer lies in his entitlement to a recovery under Workers' Compensation Law' " (*Clifford v. Plaza Housing Development Fund Co., Inc.*, 105 A.D.3d 609, 610 [1st Dept. 2013], *quoting Billy v. Consolidated Mach. Tool Corp.*, 51 N.Y.2d 152, 156 [1980]; Workers' Compensation Law §11). This exclusivity provision applies to employers and their agents that exercise supervisory control over an employee (*id.*, citing *Kudelski v. 450 Lexington Venture,* 198 A.D.2d 157 [1st Dept. 1993]).

In this case, M Group has established that an actual employment relationship existed between itself and Plaintiff at the time of this accident. M Group has submitted an affidavit from its president and post-accident incident reports documenting the accident and indicating that M Group was Plaintiff's employer. M Group further submits a C3 form completed by Plaintiff himself for the purpose of obtaining workers' compensation benefits, wherein he identifies M Group as his employer. Additional documentation establishes that Plaintiff in fact sought such benefits through M Group's workers' compensation insurance policy. Ultimately, Plaintiff was awarded workers' compensation benefits and the notice of decision from the Workers' Compensation Board identifies M Group as Plaintiff's employer. The above establishes that Plaintiff's direct claims and any cross-claims seeking contribution or common law indemnification against M Group are barred by Workers' Compensation Law (*Clifford*, 105 A.D.3d at 610; *Samper v. 352 Broadway LLC*, 174 A.D.3d 415 [1st Dept. 2019]). Contrary to Parson's contentions, M Group's submissions were properly before the Court as M Group moved for dismissal under both CPLR 3211(a)(1) and 3212, therefore it clearly indicated that it was "deliberately charting a summary judgment course" (*Elsky v. Hearrst Corp.*, 232 A.D.2d 310 [1st Dept. 1996][internal citations and quotation marks omitted]).

In opposition, the co-defendants and Plaintiff failed to raise a triable issue of fact as to whether the workers' compensation exclusivity provision applies to this matter. Plaintiff and the co-defendants contend that another entity, Oli, was actually Plaintiff's employer, as evidenced by paychecks issued before the accident occurred. Plaintiff alleges in an affidavit that Oli hired him, and he was unaware of any employment relationship with M Group. Co-defendant Parsons further contends that Oli issued a letter in response to a discovery demand indicating that Oli had

no payroll records since it had no business since July 20, 2019. Parsons notes, however, that this allegation is refuted by paychecks Oli issued to Plaintiff in September 2019. Parsons further notes that this letter was signed by Juan Martinez, the same individual who signed the affidavit submitted in support of M Group's motion.

The above does not raise any fact issue as to whether M Group was Plaintiff's employer. Significantly, Plaintiff does not dispute that he applied for and accepted workers' compensation benefits upon the basis that M Group was his employer, and he obtained those benefits through M Group's workers' compensation policy. Under these circumstances, the paychecks and Plaintiff's affidavit fail to raise any issue of fact, as Plaintiff cannot now argue that he was actually employed by a different entity (*Samper*, 174 A.D.3d at 416, citing *Zabava v. 178 E. 78,*, 212 A.D.2d 406 [1st Dept. 1995]; *Monteverde v. Delta Intern. Machinery Corp.*, 215 A.D.2d 240 [1st Dept. 1995]; *see also Hynes v. Start Elevator, Inc.*, 2 A.D.3d 178, 181 [1st Dept. 2003]["…when an employee files a workers' compensation claim, and the Workers' Compensation Board determines that an identified party is the employer, the employee is thereafter estopped in a civil action from asserting that a different entity is the employer"]). Furthermore, the fact that a letter from Oli was signed by Martinez, the president of M Group, does not negate or disprove the above evidence demonstrating that M Group was also Plaintiff's employer (*see, e.g., Crean v. Queens Boulevard Tenants Corp.*, 252 A.D.2d 352 [1st Dept. 1998]).

For similar reasons, this branch of M Group's motion is not premature. Under CPLR 3212(f), "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion." A party alleging that a motion is premature for want of discovery must demonstrate that the needed proof is in the exclusive knowledge of the moving party, that the claims in opposition are supported by more than mere hope or conjecture, and that the party has at least made some attempt to discover facts at variance with the moving party's proof (see *Voluto Ventures LLC. v. Jenkens, Gilchrist Parker Chapin LLP*, 44 AD3d 557, 557 [1st Dept. 2007][internal citations omitted]). In this case, the C3 form completed by Plaintiff himself demonstrates that M Group's employer status is not within M Group's exclusive knowledge. Furthermore, the opponents to the motion have only provided speculation that further evidence presumably disproving M Group's status as Plaintiff's employer will be uncovered during the discovery process, which is

insufficient to deny a summary judgment motion as premature (*see State ex rel. Perkins v. Cooke Center for Learning & Development, Inc.*, 164 A.D.3d 445, 446 [1st Dept. 2018]; *see also Mateo v. 1875 Lexington, LLC*, 134 A.D.3d 1072 [2d Dept. 2015]).

M Group, however, is not entitled to dismissal of Park's cross-claim against it seeking contractual indemnification. "Where the plaintiff has not sustained a 'gravy injury,' section 11 of Workers' Compensation Law bars third-party actions against employers for indemnification or contribution unless the third-party action is for contractual indemnification pursuant to a written contract in which the employer 'expressly agreed' to indemnify the claimant" (*Tonking v. Port Authority of New York and New Jersey*, 3 N.Y.3d 486, 490 [2004], quoting Workers' Compensation Law §11). In this case, Park Defendants have submitted agreements dated May 2, 2016 (the "2016 Agreement) and April 18, 2019 (the "2019 Agreement") between Park and its agent, Colliers International NY LLC ("Colliers"), and M Group. These agreements both contain clauses providing that M Group shall indemnify and hold harmless Park/the owners of the premises for losses incurred in connection with any claims arising out of the acts, omissions, negligence, or willful misconduct of M Group. M Group fails to eliminate issues of fact as to whether this provision applies to this matter, therefore its motion for summary judgment with respect to Park Defendants' cross-claim for contractual indemnification is denied (*see, e.g., Mullins v. Center Line Studios, Inc.*, 194 A.D.3d 421, 423 [1st Dept. 2021]).

III. Park Defendants' Cross-Motion

Contractual Indemnification

Park Defendants' cross-motion for summary judgment on Park's contractual indemnification claim against M Group is denied as premature. It is well-settled that parties are entitled to full contractual indemnification where it is evident that the " 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Karwowski v. 1407 Broadway Real Estate, LLC*, 160 A.D.3d 82, 88 [1st Dept. 2018], quoting *Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774 [1987], and *Margolin v. New York Life Ins. Co.*, 32 N.Y.2d 149, 153 [1973]).

In this case, even when accepting M Group's contention that only the 2019 Agreement applies, Park has established that M Group agreed "[t]o the fullest extent permitted by law," to indemnify and hold harmless the Park and other owner entities from losses "arising out of acts,

omissions, negligence, or willful misconduct" of M Group (2019 Agreement at Par. 5). Paragraph 7(e) of the 2019 Agreement similarly provides that M Group shall indemnify the owner and their agents for "any damage, liability, or loss incurred in connection with any claim by any entity or person arising out of the acts, omissions, negligence or willful misconduct" by M Group. Contrary to M Group's contentions, these broad provisions do not include a "negligence trigger," and therefore a finding that M Group was negligent is not required before determining whether M Group is obligated to indemnify Park (*see Licata v. AB Grean Gansevoort, LLC*, 158 A.D.3d 487, 490-91 [1st Dept. 2018]). The provisions also do not violate General Obligations Law §5-322.1, since they contain the requisite savings language "to the fullest extent permitted by law" which contemplates partial indemnification and intends to limit M Group's contractual indemnity obligation to its own negligence (*Brooks v. Judlau Contracting, Inc.*, 11 N.Y.3d 204, 210 [2008]).

Still, to be entitled to summary judgment on its contractual indemnification claim, Park as indemnitee is required to establish that it is free of active negligence, and any liability imposed on it would be solely on the basis of applicable statutes (*see Correia v. Professional Data Mgt.*, 259 A.D.2d 60, 64-65 [1st Dept. 1999]["once the owner was showed to be liable solely on the basis of the statute, it became entitled to indemnity irrespective of whether or not the subcontractor, the indemnitor, was negligent"], citing *Velez v. Tishman Foley Partners*, 245 A.D.2d 155 [1st Dept. 1997]; *see also Radeljic v. Certified of N.Y., Inc.*, 161 A.D.3d 588, 590 [1st Dept. 2018][summary judgment on indemnitee's contractual indemnification claim premature where issues of fact existed as to indemnitee's negligence]). A determination as to the proposed indemnitee's lack of negligence is required even where, as here, the applicable provisions do not violate GOL §5-322.1 (*Correia*, 269 A.D.2d at 64).

This matter arises out of an alleged construction site accident, and Plaintiff makes claims against the defendants based on, among other things, violations of Labor Law §200, 240(1) and/or 241(6) and common law negligence. If an injury occurs because of a dangerous condition at a work site, a property owner may be held liable where the owner either created or had actual or constructive notice of the dangerous condition that caused the accident (*see Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 144 [1st Dept. 2012]). If the injury was caused by the manner in which the work was performed, a property owner is liable "if it actually exercised supervisory control over the injury-producing work" (*id.* at 144).

In this case, there is little admissible evidence establishing how the accident occurred. Plaintiff alleges in his bill of particulars that he fell from a height due to a defective scaffold. According to M Group's incident report, however, the accident occurred when workers were moving copping stones and men were standing two feet from the roof floor, when an "OSHA plank" broke and fell on Plaintiff's shoulder. The "qualified safety professional's log" report indicates that a plank broke and Plaintiff was struck in the face and shoulder. On this record the Court is unable to determine whether the accident occurred due to an allegedly defective condition on the premises or was caused by the means and methods used to perform the work. Park Defendants' submissions further fail to establish Park's alleged lack of involvement with the ongoing construction work. In support of the motion Park Defendants' exclusively rely on an affidavit from John DiFiore, the Executive Managing Director of the New York Portfolio of Colliers. Mr. DiFiore that M Group was responsible for the means and methods of the façade work on the premises, and none of the owner defendants performed any work on the premises or had any involvement with the accident. However, Mr. DiFiore does not claim to have personal knowledge of the responsibilities of the parties to the subject construction contract, or as to the nature of the actual work being performed on the date of Plaintiff's accident. In light of the above, Park has not demonstrated that it is entitled to summary judgment on its cross-claim for contractual contribution against M Group at this juncture as there is no finding yet whether Park was negligent (*see Santos v. BRE/Swiss, LLC.*, 9 A.D.3d 303, 304 [1st Dept. 2004][defendant entitled to summary judgment on its contractual indemnification claim where there was no evidence that it was negligent]). Park's motion will be denied, without prejudice, as premature.

Summary Judgment - Williams

Park Defendants' motion for summary judgment in favor of defendant Williams is similarly premature. Park Defendants, again, rely exclusively on the affidavit of Mr. DiFiore who contends, in pertinent part, that Williams "had no ownership interest in the subject premises." Mr. DiFiore does not explain the basis for his alleged firsthand personal knowledge as to that fact, and Park Defendants provide no documentary evidence substantiating DiFiore's claims. In opposition, Plaintiff submits a copy of a deed for the subject premises identifying Park as the owner, "c/o Williams Real Estate Co., Inc." The moving papers provide no explanation as to the relationship between Park and Williams or lack thereof, and this

information lies exclusively within the knowledge of Park Defendants. Accordingly, further discovery is warranted before summary judgment can be granted in favor of Williams (CPLR 3212[f]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that M Group's motion for leave to amend its answer is granted, and the proposed amended answer annexed to the moving papers is deemed served as of the date of this Decision and Order, and it is further,

ORDERED, that M Group's motion for dismissal and/or summary judgment is granted to the extent that Plaintiff's direct claims against it, and any cross-claims asserted against it, except Park Defendants' cross-claim for contractual indemnification, are dismissed, and the Clerk of this Court is hereby directed to enter judgment accordingly, and it is further,

ORDERED, that Park Defendants' motion for summary judgment on Park's cross-claim against M Group for contractual indemnification is denied without prejudice as premature, and it is further,

ORDERED, that Park Defendants' motion for summary judgment with respect to defendant Williams is denied without prejudice as premature.

This constitutes the Decision and Order of this Court.

Dated: 12/13/2021

ENTER

Doris M. Gonzalez, J.S.C.