

**Mejia v Fort Hamilton Group LLC**

2022 NY Slip Op 30181(U)

January 20, 2022

Supreme Court, Kings County

Docket Number: Index No. 508587/2016

Judge: Lillian Wan

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 17

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LUIS A. MEJIA,

Plaintiff,

Index No.: 508587/2016  
Motion Seq.: 17 & 18

-against-

FORT HAMILTON GROUP LLC, NINTH AVENUE  
CONSTRUCTION GROUP LLC, ROCK GROUP NY  
CORP. and RB NY ENTERPRISES, INC.,

**DECISION AND ORDER**

Defendants.

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ROCK GROUP NY CORP.,

Third-Party Plaintiff,

-against-

RB NY ENTERPRISES, INC.,

Third-Party Defendant.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the defendants' motions for summary judgment and dismissal.

The following e-filed documents, listed by NYSCEF document number (Motion 17) 238-264, 296, 299-301, 304, 309-311 and (Motion 18) 265-292, 298, 302-303, 305, 312, and 314 were read on these motions for summary judgment.

The defendant/third party plaintiff, Rock Group NY Corp. (Rock Group), moves for summary judgment (Motion 17), pursuant to CPLR § 3212, seeking dismissal of the plaintiff's complaint; a grant of summary judgment on its third-party summons and complaint against RB NY (RBNY) Enterprises, Inc.; and summary judgment and dismissal of all cross-claims. Defendant/third party defendant, RB NY Enterprises, Inc., seeks dismissal of the plaintiff's complaint, cross-claims and third-party claims, pursuant to CPLR § 3211(a)(7) and/or for summary judgment (Motion 18). After oral argument and a consideration of the parties' submissions, the motions are decided as follows.

Initially, application of a summary judgment standard is appropriate in the case at bar. The defendant/third party defendant, RBNY, seeks dismissal pursuant to CPLR § 3211(a)(7) or alternatively, for dismissal pursuant to CPLR § 3212. Further, CPLR § 3211(c) permits a court, in its discretion, to treat a CPLR § 3211(a) motion to dismiss as a motion for summary judgment "after adequate notice to the parties." However, the notice requirement may be dispensed with

where, as in the instant case, the parties have “clearly charted a summary judgment course by laying bare their proof and submitting documentary evidence and evidentiary affidavits” in support of their respective positions. *See Hopper v McCollum*, 65 AD3d 669, 670 (2d Dept 2009); *see also Sokol v Leader*, 74 AD3d 1180 (2d Dept 2010).

This action arises from an accident that occurred on April 20, 2016 when the plaintiff fell from a scaffold on a construction site located at 6002 Fort Hamilton Parkway, in the City and State of New York. At the time of the accident, the plaintiff was employed by non-party Mag Builders, Inc. (MAG) as a construction helper to assist the mason workers. The subject property was owned by defendant Fort Hamilton Group, LLC (Fort Hamilton). Fort Hamilton hired defendant Ninth Avenue Construction Group LLC (Ninth Avenue) as the general contractor to rehabilitate existing structures and perform new construction. Ninth Avenue in turn hired Rock Group to furnish and install both a sidewalk shed and scaffolding throughout the site. Rock Group allegedly subcontracted the furnishing of either just the sidewalk shed or the entire scaffolding system to RBNY.

In support of its motion (Motion 17) and in opposition to RBNY’s motion, Rock Group maintains that the plaintiff’s actions were the sole proximate cause of the accident, and that the accident had nothing to do with the condition of the scaffolding. It argues that Rock Group did not erect or install the subject scaffolding; did not supervise or control the plaintiff’s work; and did not have actual or constructive notice of the allegedly defective condition that caused the plaintiff’s injuries. Rock Group further argues that it is entitled to contractual indemnification from RBNY because it erected the scaffolding at the jobsite, and there were two separate indemnity agreements between Rock Group and RBNY agreeing to indemnify Rock Group for any claims arising from the erection of the scaffolding. Rock Group also claims that it was not negligent, and bears no responsibility for the incident, and therefore the co-defendants’ cross-claims for common-law indemnification and contribution against Rock Group must fail.

RBNY opposes Rock Group’s motion, and in support of its motion (Motion 18), RBNY argues that it is entitled to summary judgment on the plaintiff’s complaint, and the third-party complaint, as well as dismissal of all cross-claims for, inter alia, contribution, common-law indemnification and contractual indemnification. RBNY contends that it was not negligent, as the scope of its work included only installation of the sidewalk shed, and it had nothing to do with erecting and installing the scaffold. RBNY also contends that it did not have any authority to direct, control or supervise the plaintiff’s work.

As a threshold matter, in his opposition papers the plaintiff concedes that neither Rock Group nor RBNY are entities subject to statutory liability pursuant to Labor Law §§ 240(1) or 241(6) as neither entity was either an owner, general contractor, or agent as defined in those statutes. The plaintiff limits his opposition to his common law negligence claims against Rock Group and RBNY.

According to the plaintiff’s deposition testimony, the accident occurred when in response to a directive from his supervisor to adjust scaffolding located on the ground level, he proceeded to descend to the lower level using the scaffold’s exterior cross-braces, and fell to the ground. The plaintiff and his co-workers would normally use the building’s interior staircase to descend to the lower levels of the building, however prior to the accident he observed that the staircase had been

blocked by other workers with nets, plastic and protective bars. Since the plaintiff and five to seven of his co-workers were unable to access the building's interior staircase, they used the exterior scaffold staircase. As they proceeded down the exterior scaffold steps to approximately the second floor, the scaffold steps ended, and the plaintiff and his co-workers climbed outside of the scaffold and down the exterior scaffold crossbeams. The plaintiff testified that he lost his grip on the cross-braces and fell approximately 20 feet.

The premises owner, Ninth Avenue, produced Joseph Buchinger as a witness for the deposition. Mr. Buchinger testified that Ninth Avenue hired Rock Group to supply and erect sidewalk bridges and scaffolding on site. He testified that the scaffolding was in place before the plaintiff's employer began the brick and masonry work on the exterior of the building. He further testified that Rock Group performed the scaffold erection on site, and no other company installed any exterior scaffolding on the project. Mr. Buchinger testified that the scaffolding permit and drawings were provided by Rock Group, and that he was not familiar with an entity called RB NY Enterprises Inc. According to his testimony, the scaffolding stairs used by the plaintiff on the day of the accident were present only on some portions of the scaffolding, where the stairs did not extend all the way down to the ground level.

According to the deposition of RBNY's owner/president, Romel Balbuena, RBNY was hired as a subcontractor by Rock Group only to install a sidewalk bridge. Mr. Balbuena testified that RBNY worked at the construction site for two days, and that he supervised a crew which installed approximately 100-150 feet of sidewalk bridge at the premises. He testified that RB NY did not install any scaffolding or stair towers at the site, and that he did not know who installed the scaffolding. Mr. Balbuena testified that after completing the construction of the sidewalk shed, RBNY did not return to the construction site.

Rock Group produced its general manager, Prabhjit Singh, for deposition. He testified that although Rock Group contracted with Ninth Avenue to provide scaffolds on the construction site, Rock Group subcontracted the scaffold erection and installation to RBNY. According to Mr. Singh, Rock Group merely provided the material, including, inter alia, the sidewalk shed and scaffolding, frames, cross-braces, planks, and stairs, and Rock Group did not provide any labor for the construction of the scaffold. Rather, RBNY ordered the scaffold materials from Rock Group, and Rock Group would load them onto Rock Group's trucks and deliver them to the site. He testified that Rock Group relied on its subcontractor, RBNY, to construct the scaffold properly, and that the scaffold was never inspected by Rock Group. According to his testimony, no representative from Rock Group was present during the erection and installation of the scaffolding.

Adam Sokolowski, the foreman for MAG, and the plaintiff's supervisor, testified on behalf of MAG, and witnessed the accident. He testified that when MAG began its work on the premises the scaffold was already in place. He testified that at the time of the incident, the MAG workers were waiting for materials to be delivered, and that he had no knowledge of the plaintiff being instructed to descend to the ground level prior to the accident. According to his testimony, some workers went down to the ground level, while others waited on the scaffolding and outdoor terraces. Just prior to the accident, he observed the plaintiff and a co-worker chasing each other and running on the scaffold stairs from the second floor down to the first floor. Mr. Sokolowski testified that he called out to them, however they did not respond. He then observed the plaintiff

open the protective mesh net on the scaffold because he wanted to beat his co-worker to the lower level. After observing the plaintiff lift the net, he saw the plaintiff jump through the scaffolding from a six-foot height down to ground level, land on the ground in a standing position, and walk away. Mr. Sokolowski testified that the tower stair extended to the bottom of the terrace on the ground level.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez* at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212(b); *see also Alvarez* at 324; *Zuckerman* at 562.

In the instant matter the defendants, Rock Group and RBNY, have failed to meet their prima facie burden establishing their entitlement to summary judgment on liability on the plaintiff's common law negligence claims. The plaintiff's deposition testimony concerning the salient facts surrounding the accident conflict with that of the defendants' witnesses and Mr. Sokolowski, his supervisor, who witnessed the accident. In particular, issues of fact exist as to whether the exterior scaffold was missing a portion of the staircase below the second floor which, according to the plaintiff, required him to climb the cross-beams and jump down to the ground level. The plaintiff's contention is disputed by Mr. Sokolowski, who testified that the staircase reached the ground level. Mr. Buchinger, Ninth Avenue's manager on the site, who was present daily and was responsible for site safety, testified that he never received any complaints that there was no stair access on the scaffold down to the ground level. He also testified that he never observed MAG workers jumping down from the scaffolding to the ground. The testimony given by the plaintiff's co-workers, Grzegorz Wnorowski and Andrzej Chodnicki, at the plaintiff's Workers Compensation hearing also conflicts with the plaintiff's testimony. Both individuals testified that the plaintiff jumped down to the ground approximately four to five feet from the scaffold railing, instead of using the stairs.

There also remains an issue of fact as to which entity erected and installed the scaffolding, and in particular that portion of the scaffolding that the plaintiff claims was missing the staircase. Mr. Singh testified that he believed that Rock Group subcontracted with RBNY to perform the installation of the sidewalk shed and scaffolding, and that all of the labor was performed only by RBNY. However, Mr. Balbuena, RBNY's principal, testified that RBNY's work was limited only to installation of the sidewalk bridge and not the scaffold installation. Further, the plaintiff's testimony also raises issues of fact as to the manner in which the accident occurred. He testified that because of the missing staircase it was necessary to climb the cross-beams and that he lost his grip and fell approximately 20 feet to the ground. In contrast, Mr. Sokolowski observed the plaintiff racing with his co-workers to reach the bottom floor, tearing the mesh safety netting, and jumping approximately six feet to the ground level. His testimony also contradicted that of the plaintiff's testimony, which was that he was directed to descend to the lower level to adjust the

scaffold. Mr. Sokolowski testified that just prior to the accident the plaintiff and the other MAG employees were waiting for a delivery of materials, and that the plaintiff was not instructed to go to the ground level to adjust the scaffold.

For the reasons set forth above, there are genuine issues of material fact that preclude summary judgment on those prongs of Rock Group's motion seeking summary judgment against RBNY on its third party complaint and all cross-claims for contribution and common-law indemnification. Likewise, those branches of RBNY's motion seeking summary judgment on Rock Group's third-party complaint and dismissal of all cross-claims must also be denied. It is well-settled that a party seeking common-law indemnification must prove its own lack of negligence, as well as actual negligence on the part of the proposed indemnitor, or in the absence of such negligence, that the proposed indemnitor directed, supervised, and controlled the work giving rise to the injury. *See Campoverde v Fabian Bldrs., LLC*, 83 AD3d 986 (2d Dept 2011). Moreover, as a general proposition, "an award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the [relative] degree of fault attributable to the parties." *See Mendelsohn v Goodman*, 67 AD3d 753, 754 (2d Dept 2009).

Further, neither Rock Group nor RBNY are entitled to summary judgment on the contractual indemnification claim contained in Rock Group's third-party complaint. Issues of fact exist as to whether the plaintiff's injuries arose from RBNY's work, and whether Rock Group and/or RBNY were negligent. The indemnification provision of the contract between Rock Group and RBNY provides in pertinent part:

To the fullest extent permitted by law, the Subcontractor agrees to indemnify, defend and hold harmless the Contractor [Rock Group] as well as all parties Contractor is required to name as additional insureds in connection with the subject jobsite...from any and all claims, suits, damages, liabilities, professional fees, including attorneys' fees, costs, court costs, expenses and disbursements related to...personal injuries...brought against any of the Indemnitees by any person or entity, arising out of or in connection with or as a result or consequence of the performance of the Work of the Subcontractor [RBNY]...

The hold harmless agreement between the parties provided that:

To the fullest extent permitted by law, Subcontractor will indemnify and hold harmless [owner(s), Rock Group NY Corp.]...from and against any and all claims... and liability (including statutory liability) arising in whole or in part and in any manner from injury and/or death of person...resulting from the acts, omissions, breach or default of Subcontractor...Subcontractor will defend and bear all costs of defending any actions or proceedings brought against [owner(s) and Rock Group NY]...arising in whole or in part out of any such acts, omission, breach or default..

"The right to contractual indemnification depends upon the specific language of the contract." *See Roldan v New York Univ.*, 81 AD3d 625, 628 (2d Dept 2011); *see also Hooper*

*Assoc. v AGS Computers*, 74 NY2d 487 (1989). “The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.” See *Roldan v New York Univ.*, 81 AD3d at 628. Moreover, it is well-settled that a party seeking contractual indemnification “must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor.” See *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 (2d Dept 2009); see also *Kim v Kirchoff-Consigli Construction Management, LLC*, 197 AD3d 1289 (2d Dept 2021); General Obligations Law § 5–322.1. Where a genuine issue of fact exists regarding the indemnitee’s negligence, summary judgment on a claim for contractual indemnification must be denied as premature. See *Baillargeon v Kings County Waterproofing Corp.*, 91 AD3d 686, 688 (2d Dept 2012).

Here, the language of the contract provisions specifically require a showing by Rock Group that the plaintiff’s injuries arose from RBNY’s work. RBNY’s witness, Mr. Balbuena, testified that he personally supervised a crew which installed only the sidewalk bridge at the subject premises. He testified that RBNY did not install any scaffolding or stair towers at the site, and did not know who installed the scaffolding. However, Rock Group’s witness, Mr. Singh, testified that Rock Group subcontracted the entire scope of the work involving the scaffold installation to RBNY, and that it only supplied the materials for the scaffold project. In light of the conflicting testimony relating to which entity installed the scaffold and was responsible for the allegedly dangerous condition, issues of fact exist as to whether the plaintiff’s injuries arose out of RBNY’s work.

The remaining contentions are without merit.

Accordingly, it is hereby

**ORDERED**, that the motions of defendant third-party plaintiff Rock Group NY Corp. (Motion 17) and defendant/third-party defendant against RB NY Enterprises, Inc. (Motion 18) are granted only to the extent that the plaintiff’s Labor Law claims are dismissed without opposition with respect to Rock Group NY Corp. and RB NY Enterprises, Inc. The balance of the motions is denied.

This constitutes the decision and order of the Court.

Dated: January 20, 2022

  
HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.