Alvarado v Trustees of Columbia Univ. in the City of N.Y.
2022 NY Slip Op 30888(U)
March 18, 2022
Supreme Court, New York County
Docket Number: Index No. 156715/2016
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ, *Justice* — **PART** 47

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INDEX NO. 156715/2016

ELISEO ALVARADO,

Plaintiff,

MOTION DATE 04/22/2021, 04/22/2021

- v -

MOTION SEQ. NO. 004 005

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, THE TRUSTEES OF COLUMBIA UNIVERSITY, COLUMBIA UNIVERSITY, BLUE WATER CONSTRUCTION & RESTORATION CORP., DOUMAS ELECTRIC, INC.,

Defendants.

DECISION + ORDER ON MOTION

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THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, THE TRUSTEES OF COLUMBIA UNIVERSITY, COLUMBIA UNIVERSITY, BLUE WATER CONSTRUCTION & RESTORATION CORP.

Third-Party Index No. 596021/2018

Plaintiffs,

-against-

DOUMAS ELECTRIC, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 136, 137, 138, 139, 140, 141, 142, 143, 145

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 144, 146, 147, 148

were read on this motion to/for JUDGMENT - SUMMARY.

In this Labor Law action plaintiff, Eliseo Alvarado alleges that on June 28, 2016 while he was working as a carpenter for defendants Blue Water Construction & Restoration Corp. (Blue Water) and Lemark Renovation Inc. (Lemark) at 181 Claremont Avenue, Apartment #43, in

Manhattan, New York, he tripped and fell "as a result of tripping hazards/obstructions," causing him personal injuries (the Complaint)[1] (Doc No. 62). Plaintiff asserts causes of action under Labor Law §§200, and 241(6) and in violation of the Industrial Code of the State of New York.

Defendants/third-party plaintiffs The Trustees of Columbia University in the City of New York, the Trustees of Columbia University, Columbia University (collectively, Columbia) and Blue Water move for summary judgment pursuant to CPLR § 3212 on their contractual and common law indemnification claims against defendant/third-party defendant, Doumas Electric, Inc. (Doumas) (Motion Seq. No. 004) (Doc No. 110)[2].

Doumas moves for summary judgment pursuant to CPLR § 3212 to dismiss Columbia and Blue Water's claims against it in the third-party complaint for contractual indemnification and breach of contract for failure to procure insurance (Motion Seq. 005) (Doc No. 112).

The motions are consolidated for decision.

FACTUAL AND PROCEDURAL BACKGROUND

On or about May 15, 2012, Blue Water, as "General Contractor," executed a "Standard Form of Agreement Between Contractor and Subcontractor" (the 2012 Subcontract) (Doc No. 104) with Lemark Renovation Inc. (Lemark). The scope of work, work schedule, proposed start date and completion date were all identified in the 2012 Subcontract as "Per project" (*id.*). The

[1] On or about August 11, 2016, plaintiff Alvarado commenced this action by filing a Summons and Verified Complaint against Columbia which interposed its Answer on September 30, 2016 (Doc No. 6). Alvarado also commenced a separate action against Blue Water by Summons and Complaint dated September 15, 2017 (Doc No. 1) and Blue Water interposed an Answer thereto on January 9, 2018 (see Doc No. 30). On March 27, 2018, this Court issued an Order (Doc No. 38) consolidating these two actions. Soon after the order of consolidation, Blue Water and Columbia commenced a Third-party Action against Doumas (see Doc No. 57).

[2] Counsel for defendants/third-party plaintiffs is reminded that 22 NYCRR 202.8-g requires a *separate* statement of material facts not in dispute; the statement pursuant to this rule is not to be included in counsel's affirmation.

location of the work to be performed was not identified on the face of the 2012 Subcontract. However, Columbia and Blue Water assert that the 2012 Subcontract covered construction work performed in 2016 at 181 Claremont Avenue in Manhattan, New York (see Columbia's counsel affirmation Doc No. 87 at ¶ 12). Nelson Falcon (Falcon), the Director of Residential Services for Columbia University and manager of 181 Claremont Avenue (the premises) described the Premises as a six-story building with four apartments on each floor (Falcon tr at 16:2-7) (Doc No. 107). There is no dispute that The Trustees of Columbia University in the City of New York is the owner the premises pursuant to a deed dated March 1, 1967 (the Deed)[3] (Doc No. 101).

There is also no dispute that on June 18, 2015, Blue Water and The Trustees of Columbia University in the City of New York executed a "Task Order Agreement" (the Blue Water Contract) (Doc No. 103). Pursuant to Article 2 of the Blue Water Contract, the "Scope of the Work" to be performed by Blue Water included:

> "... requested services and/or construction in a workmanlike manner to the reasonable satisfaction of [Columbia], and specifically shall furnish all necessary supervision, labor, materials, tools, equipment and insurance required to fully complete the Work described in the Task Order. Additional General Specifications, if any, applicable to the [Blue Water], are annexed hereto as Schedule I (submitted per service/project). A Project Proposal Form will be provided for each requested service/project." (See §2.2.1 of the Blue Water Contract).

The Blue Water Contract does not, on its face, identify a specific location where the requested services/construction was to be performed. Instead, the "Scope of Work" was to be performed "at grounds, buildings and other structures owned, managed, or leased by" Columbia (see pg. 1 of the Blue Water Contract) which the parties assert encompassed work to be performed at the premises (see Columbia's counsel's affirmation, Doc No. 87 at ¶ 10). Blue Water subsequently

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[3] The Deed was executed by Mathilde Samuelson a/k/a Mathilde L. Samuelson, John Samuelson, and The Trustees of Columbia University in the City of New York.

subcontracted the work to be performed at the premises to Lemark pursuant to their 2012 Subcontract terms (*id*. at ¶ 19).

In addition to the Blue Water Contract, The Trustees of Columbia University in the City of New York executed a three year "Task Order Agreement" on July 20, 2015 with Doumas (the Doumas Contract) (Doc No. 103). The Doumas Contract incorporates the following indemnification provision:

> "In addition to any liability or obligation of the [Doumas] to the Owner under other provisions of this Agreement or at law or in equity, [Doumas], to the fullest extent permitted by law, shall be liable to, hold harmless, defend and indemnify the Owner and its directors, officers, agents and employees (the "Indemnitees") against any and all damages, suits, claims, liabilities, costs and expenses (including actual attorneys' fees) resulting from bodily injury, sickness, disease or death or destruction of tangible property (exclusive of the Owner's property insurance, if any, pursuant to Paragraph 9.2 hereof), including loss of use resulting therefrom, arising out of or relating to the performance of Work by [Doumas], Subcontractors and suppliers, and anyone directly or indirectly employed or retained by any of them. However, [Doumas] shall not be required to indemnify or hold harmless an Indemnitee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of such Indemnitee" (the Indemnification Provision) (§7.13.1 of the Doumas Contract).

Additionally, Doumas was to obtain insurance pursuant to § 9.1 of the Doumas Contract entitled "Contractor's Insurance" which states, in pertinent part, as follows:

> "9.1.1 The Contractor shall purchase and maintain at its own cost and expense, insurance, as set forth below, from insurance companies rated "A-" "VII" or better by A.M. Best, and licensed to do business in the State of New York (or approved beforehand by the Owner in writing). The insurance, which shall be purchased prior to the commencement of any Work, shall protect the Contractor from claims which may arise out of or result from the Contractor's operations pursuant to any Task Order, whether such operations be by the Contractor or by any Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable. The following insurance shall be provided by the Contractor:
>
> > 1. <u>Commercial General Liability Insurance</u> written on an occurrence from covering all operations by or on behalf of the Contractor and the Owner with minimum limits of coverage not less than $5,000,000 per occurrence ...

> 9.1.2 Provisions in Policies ...shall be endorsed to name the Trustees of Columbia University in the City of New York ... as an additional insured. ..."

Doumas asserts that it procured insurance from Harleysville Worcester Insurance Company in accordance with the requirements of Contractor's Insurance § 9.1 of the Doumas Contract.

Falcon testified that sometimes the apartments at the premises would be renovated when a tenant moved out (Falcon tr at 16:15-25; and 17:1-13) and that Blue Water was the carpentry contractor (*id.* at 17:22-25; and 18:1-4) and Doumas was the electrical contractor (*id.* at 40:5-8). Both the Blue Water Contract and the Doumas Contract identify The Trustees of Columbia University in the City of New York as "Owner" of the Premises, and Blue Water and Doumas respectively as "Contractor." Columbia specifically asserts that defendant/third-party plaintiffs The Trustees of Columbia University in the City of New York, The Trustees of Columbia University and Columbia University are the same entity and that "[w]hen the Trustees of Columbia University in the City of New York interposed an Answer [Doc No. 91] to plaintiff's Complaint, they answered as 'the Trustees of Columbia University in the City of New York sued herein as the Trustees of Columbia University and Columbia University.'" (See Columbia's counsel Reply affirmation at ¶16) (Doc No. 145).

Nick Livaditis (Livaditis), the secretary and treasurer of Doumas, testified at his deposition (Livaditis tr) (Doc No. 109) that Doumas was an electrical contractor (Livaditis tr at 9:20-22) hired by Columbia to perform electrical work "throughout Columbia University['s] campus and [ ] off-campus residential buildings" (see Doc No. 137 at ¶ 34), including the "complete electrical rewiring" of Apartment #43 (the apartment) at the premises described as "a vacant three bedroom off-campus apartment" (see Doumas' attorney's affirmation, Doc No. 137 at ¶3, ¶ 32, and ¶34; and Livaditis tr at 27:14-18).

Specifically, Doumas was hired to place temporary lighting and remove wiring in the apartment (Livaditis tr at 32:7-9). Doumas began working in the apartment on June 20, 2016, and completed its agreed upon task on July 17, 2016, as evidenced by its invoice (Doc No. 105). Livaditis explained at his deposition that Doumas would provide temporary lighting before any demolition began at the apartment (Livaditis tr at 52:4-5) and that it was the responsibility of Doumas to remove all hanging wires in the ceiling and walls (*id*. at 42:11-18 and 54:3-24). Livaditis further testified that Doumas was retained by Columbia (*id*. at 47:23-25), did not have a contract with Blue Water (*id*. at 48:2-5) and neither Columbia nor Blue Water advised or supervised Doumas on how to perform its work (*id*. at 48:17-25; and 49:1-16).

Plaintiff Eliseo Alvarado (Alvarado) testified at his July 19, 2019 deposition that he was employed by Blue Water and Lemark to do carpentry work in the apartment (Alvarado 7/19/19 tr at 14:6-10) (Doc No. 140). Alvarado asserts at his November 13, 2018 deposition that he wore Blue Water t-shirts while working at the apartment (Alvarado 11/13/18 tr at 57:14-25) (Doc No. 106) but that his paychecks came from Lemark (Alvarado 7/19/19 tr at 15:18-23). He believed both Blue Water and Lemark were "partners" and/or "associates" (*id*. tr at 15:3-4). Plaintiff's co-worker, Bernardo Sanchez (Sanchez), corroborated Alavarado's testimony that they were employed by both Blue Water and Lemark, but Sanchez claims he received paychecks from both entities. Sanchez stated that one week he would receive a paycheck from Blue Water and another week he would receive his paycheck from Lemark (Sanchez tr at 12:4-8) (Doc No. 141).

Marek Lesniewski (Lesniewski), the foreman for Lemark, confirmed at his deposition that the work performed in the apartment included, but was not limited to, removing the walls, installing new walls, drywall, plastering and painting (Lesniewski tr at 20:9 – 21:12) (Doc No. 142). Lesniewski also confirmed that Blue Water and Lemark were in a "partnership" as joint

venturers for all projects (Lesnewiski tr at 66: 19-25; and 67:2-3). Blue Water avers that it subcontracted its work under the Blue Water Contract with Columbia to Lemark, though the president of Blue Water, Robert Lopez testified at his deposition on September 9, 2019 that Blue Water did perform construction renovations at the premises (Lopez tr at 21:22-25; and 22:2) (Doc No. 108) but not electrical work (*id.* at 22:3-4).

During the first day working in the apartment, Alvarado noticed "gray," "dirty," and "rusty" electrical wires hanging down to the floor from the unfinished wall he was working on (Alvarado 11/13/18 tr at 34:7-23; 35:4-19; 77:11-25; 78:2-8; and 79:9-22). Alvarado did not observe anyone performing electrical work (Alvarado 7/19/19 tr at 21:3-8), but asserted that he immediately complained to his supervisor, Lesniewski, that "someone has to fix the wires" hanging down from the wall to the floor and that Lesniewski assured Alvarado that someone would fix them (*id.* at 16:19-21; and 37:1-17). Lesniewski, however, denied that any worker complained to him about electrical wires, or cables (Lesniewski tr at 122:24-25; and 123:2-4). In fact, Lesniewski testified that no wires were hanging down to the floor from the ceiling or walls in Alvarado's work area (Lesniewski tr at 30-31; and 33:6-8). Sanchez, Alvarado's co-worker, corroborated Lesniewski's testimony testifying that he did not have any difficulty walking in the apartment's corridor due to wires or cables (Sanchez tr at 109:16-21). Additionally, Sanchez testified that if there were any old cables hanging from the ceiling/walls, workers were responsible for cutting them, or rolling them, to secure the area where they were working (Sanchez tr at 29:3-21).

On June 28, 2016, several weeks after Alvarado allegedly complained to Lesniewski about the hanging wires, Alvarado got his foot caught in "wires" that were touching the floor and hanging "two or three feet" from an electrical box which caused him to trip and fall to the

ground, causing injuries (Alvarado 7/19/19 tr at 19:6-9; 32:16-19; 33:21-23; 34:11-20; see also Verified Bill of Particulars, Doc No. 88 and the Supplemental Bill of Particulars, Doc No. 89). Specifically, Alvarado testified that when he tripped on the electrical wires and fell to the ground, he landed on debris (*id.* at 40:9-22; and 41:2-14) and cut the palm of his right hand on a piece of metal that was on the floor which was being used to frame the wall he was working on (Alvarado 7/19/19 tr 19-22; 40-42; 48:16-22; and 49:2-4). Relatedly, workers were provided with a box of gloves (Lesniewsky tr at 59:22-25; and 61:5-8) and any debris they created in the area where they were working (*id.* at 41:15-22; and 42:23-25), was the worker's responsibility to clean up as they performed their tasks (Sanchez tr at 111:12-19; and Lesniewski tr at 36:19-22; 37:12-19).

At the time of the accident, Sanchez and Lesniewski were both in the apartment, but neither witnessed Alvarado's accident as they were in other rooms (see Lesniewski tr at 26- 27). Sanchez testified that Alvarado, with his hands bleeding, came to the room where he was and told Sanchez that he tripped when "his boot got stuck to a nail on the floor" (Sanchez tr at 114:6-8) causing him to fall on a track that cut his hand (Sanchez tr at 24-25; 27-28; 104:2-21; and 113-114). Lesniewski testified that Alvarado told him at the time of the accident that he cut his hand while cutting metal tracks (Lesniewski tr at 27:3-10) and that at no time on the date of the accident did Alvarado tell him he had tripped, much less that he tripped on wires (Lesniewski at 27:15-25).

There is no dispute that on June 20, June 21 and June 27 Doumas was working in the apartment removing light fixtures, wiring and boxes (Livaditis tr at 34-38; see also Invoice Doc No. 105). Doumas asserts that the wires Alvarado described and claims to have tripped on were intercom wires exposed by the demolition work (Doumas attorney aff at ¶ 5) Doc No. 137) and

not wires that Doumas would work on and remove unless a new intercom was being installed (Livaditis tr 74:24-25; 75:1-8; and 80:3-7).

ARGUMENTS

Columbia and Blue Water contend that their motion for summary judgment should be granted on their contractual and common law indemnification claims against Doumas and a declaratory judgment should be issued declaring that Doumas must indemnify, defend and hold them harmless because: (1) Alvarado testified that he tripped over electrical wires left by Doumas, triggering the Indemnification Provision as the accident "*arose out of or related to the performance*" of Doumas's work; (2) Columbia did not direct, control or supervise Doumas's work in the apartment; and (3) Columbia as owner of the apartment and Blue Water as the contractor are entitled to common law indemnification from Doumas because the accident was caused by Doumas's negligence in leaving exposed wires thereby creating a tripping hazard in the apartment.

In opposition, Doumas contends that Blue Water and Columbia's summary judgment motion must be denied because: (1) Doumas entered into a contract with The Trustees of Columbia University in the City of New York and did not agree to contractually indemnify Columbia University, The Trustees of Columbia University, or Blue Water; and (2) there are factual disputes as to the cause of the accident and Doumas's purported negligence and therefore any claim for contractual and common law indemnification must be denied.

As to its summary judgment motion Doumas argues that the Court should dismiss Blue Water, The Trustees of Columbia University and Columbia University's contractual indemnification claims, and the Second Cause of Action in the Third-party Complaint asserting a breach of contract for failure to procure insurance because: (1) there was no contractual

agreement between Doumas and Blue Water, the Trustees of Columbia University and Columbia University; (2) the Doumas Contract with The Trustees of Columbia University in the City of New York did not require Doumas to indemnify any other entity; (3) Blue Water was not the agent for The Trustees of Columbia University in the City of New York and was not an intended third-party beneficiary of the Doumas Contract; (4) Blue Water and Doumas were separately retained trade contractors with no contractual obligation to each other and each had a separate agreement to indemnify The Trustees of Columbia University in the City of New York; and (5) Doumas obtained all requisite insurance pursuant to § 9.1.1 of the Doumas Contract.

In opposition, Columbia does not oppose dismissal of Blue Water's contractual indemnification claim against Doumas but does oppose Doumas' remaining application because: (1) the Trustees of Columbia University and Columbia University are two entities which are one and the same with The Trustees of Columbia University in the City of New York and therefore can assert a contractual indemnification claim against Doumas; and (2) Doumas breached its contract when it failed to obtain the appropriate insurance coverage for The Trustees of Columbia University in the City of New York because the insurance obtained by Doumas limits additional insured coverage to "liability caused, in whole or in part, by the acts or omissions of the 'Named Insured' or those acting on the behalf of the 'Named Insured', in the performance of the 'Named Insured's' work for the additional insured…" rather than "protect the Trustees of Columbia University in the City of New York 'from claims which may arise out of or result from the Contractor's operations.'"

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion 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'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Contractual Indemnification

"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 Company, Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82 [1st Dept 2018];

Torres v Morse Diesel Intl., Inc., 14 AD3d 401, 403 [1st Dept 2005]). "'The right to contractual indemnification depends upon the specific language of the contract'" (*Trawally v City of New York,* 137 AD3d 492, 492-493 [1st Dept 2011], quoting *Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2d Dept 2010]) and indemnity contracts "must be strictly construed so as to avoid reading unintended duties into them" (*905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]). Moreover, a declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (CPLR 3001; *see also Long Is. Light. Co v Allianz Underwriters Ins. Co*., 35 AD3d 253 [1st Dept 2006]).

Doumas has no contractual duty to indemnify Blue Water because there is no privity of contract between them. Moreover, the Doumas Contract, includes a contractual indemnification provision between Doumas and The Trustees of Columbia University in the City of New York, and makes no mention of a contractual indemnification obligation owed by Doumas to defendants Columbia University, The Trustees of Columbia University or Blue Water. While counsel for the Columbia defendants argues that the three Columbia defendants are one and the same entity, the verified third-party complaint names all three as third-party plaintiffs. If indeed the Trustees of Columbia University and Columbia University are two separate entities as asserted in the third-party complaint, then those separate entities would not be entitled to contractual indemnification from Doumas as they too have no privy contract with Doumas, nor were they named beneficiaries of the Doumas Contract. Accordingly, Columbia's summary judgment motion will be denied and Doumas's summary judgment motion will be granted on Columbia's contractual indemnification claim as it pertains to Columbia University, The Trustees of Columbia University and Blue Water.

Turning to the contractual indemnification claim as it pertains to The Trustees of Coumbia University in the City of New York, the Indemnification Provision § 7.13.1 of the Doumas Contract states Doumas must indemnify The Trustees of Columbia University in the City of New York of liability from "bodily injury" that arises from, or relates to work performed by Doumas, but Doumas is not required to indemnify or hold harmless against damages "arising out of bodily injury to persons or damage to property caused by or resulting from the negligence" of The Trustees of Columbia University in the City of New York. This provision is consistent with the principle that parties are not entitled to indemnification for their own negligence (*see Correia v Professional Data Mgt., Inc.*, 259 AD2d 60 [1st Dept 1999]; *Urbano v Pavarini Constr. Co., Inc.*, 16 AD3d 320 [1st Dept 2005]). As the First Department has noted: "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 the statutory liability" (*Correia*, *supra* at 65; see also *DaSilva v Everest Scaffolding, Inc.*, 136 AD3d423, 424 [1st Dept 2016]).

An insurer's duty to indemnify arises only when an insured has been held liable for damages covered under the policy (*Bovis Lend Lease LMB Inc. v Garito Contr., Inc.,* 65 AD3d 872, 875 [1st Dept 2009], *app dismissed* 13 NY3d 878 [2009]). Therefore, "where the indemnitee's negligence remains unresolved, summary judgment in favor of the indemnitee on a claim for contractual indemnification is inappropriate" (*Pardo v Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 AD3d 298, 302 [1st Dept 2004]). Indeed, issues of fact as to liability in an underlying personal injury action render premature the conclusion that an insurer has a duty to indemnify other parties (*see Vasquez v NYC*, 200 AD3d 482, 483 – 484 [1st Dept 2021]; *Mt. Hawley Ins. Co. v Am. States Ins. Co.,* 168 AD3d 558, 559 [1st Dept 2019]; *N. River Ins. Co. v ECA Warehouse Corp.,* 172 AD2d 225, 226 [1st Dept 1991]). Thus, until plaintiff's action

against the defendants is decided, denial of a summary judgment motion based on an alleged "duty to indemnify" is appropriate (*see also Public Service Mut. Ins. Co. v. Goldfarb*, 53 NY2d 392, 398-99, 442 NYS2d 422 [1981] [any determination as to indemnity must await a trial of the underlying claims]; *Chunn v New York City Hous. Auth.,* 55 AD3d 437, 438 [1st Dept 2008] [issues of fact as to liability in the underlying personal injury action render premature the conclusion that the insurers have a duty to indemnify]).

Here, factual issues remain unresolved as to whether the accident arose out of or is related to Doumas's work. Alvarado claims he tripped and fell on electrical wires, while Alvarado's co-worker Sanchez testified that plaintiff told him he tripped on a nail and fell on a metal track. Another version of the accident was provided by Lesniewski who testified that plaintiff told him he cut his hand on a piece of metal track and that plaintiff never mentioned that he tripped. Moreover, there is an issue of fact that even if there were exposed wires whether those wires were intercom wires exposed by the demolition work rather than the wiring work done by Doumas. Indeed, if plaintiff tripped on a nail, a track or intercom wires, then defendants/third-party plaintiffs could not, under those set of facts, establish that Doumas was negligent. Therefore, sufficient triable issues of fact have been raised precluding summary judgment on defendants/third-party plaintiffs' contractual indemnification claims (*see also Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Accordingly, Columbia and Doumas's motions for summary judgment on plaintiff The Trustees of Columbia University in the City of New York's contractual indemnification claim will be denied.

<u>*Common Law Indemnification*</u>

To establish a claim for common-law indemnification, "a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part, and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept. 2012]). Here, as shown above questions of fact remain as to whether Doumas was negligent and there was no evidence presented that Doumas, which was not in the Apartment at the time of the accident, exercised actual supervision or control over the demolition/carpentry work being performed by Alvarado when the Accident occurred (*see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).

Accordingly, Columbia and Blue Water's motion for summary judgment on their common law indemnification claims will be denied.

<u>*Insurance Procurement*</u>

In support of their argument that Doumas obtained the insurance required of it pursuant to the Doumas Contract, Doumas attaches to its moving papers policies procured from Harleysville Worcester Insurance Company (see Doumas's counsel's affirmation, Doc No 114, Exs Q & R). However, the policies are attached to an attorney affirmation and are not authenticated pursuant to CPLR 4518(a). Therefore, the policies are inadmissible and cannot form the basis upon which to grant summary judgment (*Clarke v Am. Truck & Trailer Inc.*, 171 AD3d 405, 406 (1st Dept 2019).

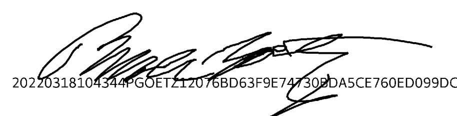
Accordingly, Doumas's motion for summary judgment on the breach of contract claim in the Third-party Complaint will be denied.

The parties remaining arguments have been considered and they are unavailing, without merit and/or moot.

Accordingly, it is

ORDERED that the application (Motion Seq. No. 004) by defendants/third-party plaintiffs The Trustees of Columbia University in the City of New York, the Trustees of Columbia University, Columbia University and Blue Water Construction & Restoration Corp. for summary judgment on their contractual and common law indemnification claims against defendant/third-party defendant, Doumas Electric, Inc., is denied, in its entirety; and it is further

ORDERED that the application (Motion Se. No. 005) by Doumas Electric, Inc. for summary judgment is granted to the extent that the Clerk of the Court shall render judgment in favor of Doumas Electric, Inc. and against the Trustees of Columbia University, Columbia University, and Blue Water Construction & Restoration Corp. dismissing their contractual indemnification claim in the Third-party Action (note that The Trustees of Columbia University in the City of New York's Third-party Action claim for contractual indemnification against Doumas Electric, Inc. shall remain) and the motion is otherwise denied.



3/18/2022
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	☐ **CASE DISPOSED**	☒ **NON-FINAL DISPOSITION**	
	☐ **GRANTED** ☐ **DENIED**	☒ **GRANTED IN PART**	☐ **OTHER**
APPLICATION:	☐ **SETTLE ORDER**	☐ **SUBMIT ORDER**	
CHECK IF APPROPRIATE:	☐ **INCLUDES TRANSFER/REASSIGN**	☐ **FIDUCIARY APPOINTMENT**	☐ **REFERENCE**