

**Total Facility Servs., Inc. v GC Plumbing & Heating Inc.**

2022 NY Slip Op 31002(U)

March 21, 2022

Supreme Court, New York County

Docket Number: Index No. 655799/2019

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. NANCY BANNON PART 42**

*Justice*

-----X

TOTAL FACILITY SERVICES, INC.,  
Plaintiff,

- v -

GC PLUMBING & HEATING INC.,  
Defendant.

-----X

GC PLUMBING & HEATING INC.  
Plaintiff,

-against-

CBRE GWS, LLC, CBRE GWS REAL ESTATE SERVICES,  
INC., TD BANK US HOLDING COMPANY, FIELDSTONE  
CAPITAL, INC.  
Defendant.

-----X

GC PLUMBING & HEATING INC.  
Plaintiff,

-against-

CBRE GWS, LLC, CBRE GWS REAL ESTATE SERVICES,  
INC., TD BANK US HOLDING COMPANY, FIELDSTONE  
CAPITAL, INC., LAMAR PLUMBING, INC., TRANSWESTERN,  
M & L SERVICE & MAINTENANCE CORP.

Defendant.

-----X

GC PLUMBING & HEATING INC.  
Plaintiff,

-against-

TRANSWESTERN COMMERCIAL SERVICES NY, LLC

Defendant.

-----X

INDEX NO. 655799/2019  
MOTION DATE 01/11/2022  
MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595542/2020

Second Third-Party  
Index No. 595607/2021

Third Third-Party  
Index No. 595607/2021

The following e-filed documents, listed by NYSCEF document number (Motion 003) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 106, 107

were read on this motion to/for

JUDGMENT - DEFAULT

In this property damage action, the plaintiff, Total Facility Services, Inc. (Total), an entity offering single-source facility maintenance and construction management services, brings claims sounding in, *inter alia*, breach of contract and negligence against its plumbing subcontractor, GC Plumbing & Heating, Inc. (GC). Total alleges that while performing services to repair a leaking pipe for Total's customer, TD Bank, N.A. (TD Bank), on August 7, 2018, GC caused the pipe to fail and release significant amounts of water throughout the building. GC brings, *inter alia*, third-party claims against M&L Service & Maintenance Corp. (M&L) and Transwestern Commercial Services New York, LLC (Transwestern), seeking common law indemnification and contribution.

GC now moves pursuant to CPLR 3215 for leave to enter a default judgment against M&L and Transwestern. Pursuant to the stipulation between GC and Transwestern filed on January 4, 2022, the motion is withdrawn with prejudice as against Transwestern. For the following reasons, the motion is denied without prejudice as against M&L.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720 [2<sup>nd</sup> Dept. 2008])." Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2<sup>nd</sup> Dept. 2011). While the "quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1<sup>st</sup> Dept. 2006); see Joosten v Gale, 129 AD2d 531 (1<sup>st</sup> Dept. 1987). The proof submitted must establish a prima facie case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2<sup>nd</sup> Dept. 1983); see also Martinez v Reiner, 104 AD3d 477 (1<sup>st</sup> Dept. 2013); Beltre v Babu, 32 AD3d 722 (1<sup>st</sup> Dept. 2006).

As to the facts constituting the claims against M&L here, GC submits, *inter alia*, the unverified second third-party summons and complaint and an affidavit of John Likidis, GC's

owner and manager, who was not present at the subject premises at the time of the underlying incident and relays information he learned from one of GC's mechanics. According to Likidis, M&L's alleged application of black electric tape to the leaking pipe as a temporary fix the night before GC came to make repairs "may have contributed to the August 7, 2018 water incident."

"In the classic [common-law] indemnification case, the one entitled to indemnity from another committed no wrong, but by virtue of some relationship with the tortfeasor or obligation imposed by law, was nevertheless held liable to the injured party." D'Ambrosio v City of New York, 55 NY2d 454, 461 (1982). The foregoing submissions do not establish that GC has been held vicariously liable without proof of any negligence or actual supervision or control on its part, nor do they show that M&L as proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work. See Chatham Towers, Inc. v Castle Restoration & Const., Inc., 151 AD3d 419 (1<sup>st</sup> Dept. 2017); Ausby v 365 West End LLC, 135 AD3d 481 (1<sup>st</sup> Dept. 2016); Naughton v City of New York, 94 AD3d 1 (1<sup>st</sup> Dept. 2012); Blank Rome LLP v Parrish, 92 AD3d 444 (1<sup>st</sup> Dept. 2012); Reilly v DiGiacomo & Son, 261 AD2d 318 (1<sup>st</sup> Dept. 1999). Moreover, entry of a default judgment on a claim for indemnification should generally await a finding of liability. See IMP Plumbing and Heating Corp. v 37 East 34<sup>th</sup> Street, LLC, 89 AD3d 593 (1<sup>st</sup> Dept. 2011); Slovik v Wang, 110 AD2d 630 (2<sup>nd</sup> Dept. 1985). In that regard, the mandate of CPLR 3215[c] "that an action is deemed abandoned unless a default motion is brought within one year of the default does not apply to indemnification claims until liability is established in the main action." IMP Plumbing and Heating Corp. v 37 East 34<sup>th</sup> Street, LLC, supra at 594.


As to GC's claim for common law contribution, in order to determine whether such a claim may be asserted the court must inquire "whether the third-party defendant owed a duty to the plaintiff which was breached and which contributed to or aggravated plaintiff's damages." Rosner v Paley, 65 NY2d 736, 738 (1985). "[T]he breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought." Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp., 71 NY2d 599, 603 (1988); see Nelson v Chelsea GCA Realty, Inc., 18 AD3d 838, 840-841 (2<sup>nd</sup> Dept. 2005). Here, even though M&L may ultimately be subject to liability for damages for the same incident (see CPLR 1401), the moving papers do not establish a *prima facie* case of contribution. See generally Schauer v Joyce, 54 NY2d 1 (1981); Blank Rome LLP v Parrish, supra.

Accordingly, it is

ORDERED that the motion of GC Plumbing & Heating, Inc., for leave to enter a default judgment pursuant to CPLR 3215 as against Transwestern Commercial Services New York, LLC, is withdrawn with prejudice, upon the parties' stipulation dated January 4, 2022, and it is further

ORDERED that the motion of GC Plumbing & Heating, Inc., for leave to enter a default judgment pursuant to CPLR 3215 as against M&L Service and Maintenance Corp. is denied without prejudice.

This constitutes the Decision and Order of the court.

  
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NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

3/21/2022  
DATE

CHECK ONE:

- CASE DISPOSED
- GRANTED
- DENIED
- NON-FINAL DISPOSITION
- GRANTED IN PART
- OTHER