

<b>Carter v Empire State Realty Trust Inc.</b>
2022 NY Slip Op 31128(U)
April 6, 2022
Supreme Court, New York County
Docket Number: Index No. 153276/2016
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK  
 NEW YORK COUNTY**

**PRESENT:** HON. BARBARA JAFFE **PART** **12**

*Justice*

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VAN CARTER,

Plaintiff,

- v -

**INDEX NO.** 153276/2016

**MOTION DATE** \_\_\_\_\_

**MOTION SEQ. NO.** 006

EMPIRE STATE REALTY TRUST INC.,  
 SPK/LEWIS, INC.,

Defendants.

**DECISION + ORDER ON  
 MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 204-231, 234-247 were read on this motion for summary judgment.

By notice of motion, defendant/second third-party plaintiff Empire State Realty Trust Inc. moves pursuant to CPLR 3212 for an order granting it summary judgment on its claims for common law and contractual indemnity, contribution, and attorney fees and costs against second third-party defendant WDFG North America LLC, defendant SPK/Lewis, Inc., and third-party defendant Precision Fabricators Corp., and dismissing all cross and counterclaims against Empire. WDFG, SPK, and Precision oppose.

I. PERTINENT BACKGROUND

A. April 2020 decision and order (NYSCEF 162)

By decision and order dated April 26, 2020, as pertinent here, plaintiff’s motion for partial summary judgment on his Labor Law §§ 240(1) and 241(6) claims, SPK and Precision’s cross motions for partial summary dismissal of plaintiff’s claims, and SPK’s motion for summary judgment on its third-party claims against Precision were decided. In that decision, the following material facts were set forth:

(1) On April 1, 2015, plaintiff, a construction worker employed by Precision, was working on a construction project at premises leased by WDFG. He was injured when he allegedly fell off of a ladder that had been placed on top of a rolling scaffold; the scaffold's wheels were either unlocked or unsecured.

(2) Empire was the owner of the building at issue and leased the premises at issue to WDFG which hired SPK to renovate the premises, and pursuant to their contract, SPK agreed to be responsible for all injury or damages of any kind, resulting from SPK's work or activities, and to indemnify and hold WDFG and Empire harmless from any resulting loss.

(3) SPK contracted with Precision to complete work on the project, and their agreement provides that Precision must defend and indemnify and hold harmless Empire, WDFG, and SPK from all claims "arising out of or in any connected with the performance on [sic] lack of performance of the work under the agreement . . . and caused in whole or in part by any actual or alleged: - Act or omission of [Precision] or anyone directly or indirectly retained or engaged by it or anyone for whose acts it may be liable; or - Violation of any standard duty, regulation, ordinance, rule or obligation by an Indemnitee, provided that the violation arises out of or is in any way connected with the [Precision's] performance or lack [of] performance of the work under the agreement."

(4) No one employed by Empire was at the site during the construction, nor did an Empire employee monitor the construction, provide tools or equipment to workers, or instruct them.

It was determined that plaintiff was entitled to summary judgment on liability as to his Labor Law § 240(1) claim as

defendants violated the statute by failing to provide him with a scaffold that was secured and offered proper protection. The wheels of the scaffold were not locked, plaintiff was

not provided with a harness, another fall-prevention device, or equipment sufficient to reach his work space, as neither the ladder nor the scaffold were tall enough on their own, and there were no other ladders or scaffolds available.

Plaintiff also demonstrated that there were no triable issues as to several alleged violations of the Industrial Code underlying his Labor Law § 241(6) claim.

Moreover, it was decided that SPK was entitled to a conditional award of summary judgment on its contractual indemnity claim against Precision, as it was undisputed that plaintiff's injury arose from his work for Precision. SPK also demonstrated that conditional summary judgment was warranted on its claim for common law indemnity against Precision, as it did not exercise sufficient control over plaintiff's work for holding it liable in negligence. A triable issue remained as to whether plaintiff had suffered a grave injury and thus, whether Precision could be liable for common law indemnity and contribution.

SPK's motion for summary judgment was denied as an improper successive motion, and WDFG's cross motion was denied absent a showing of what discovery remained outstanding.

#### B. Pertinent agreements

In the lease between Empire and WDFG, WDFG agreed to indemnify Empire for claims arising from or in connection with the operation, use, and occupation by WDFG of the premises, and for any act of negligence committed by WDFG, its agents, employees, or contractors. (NYSCEF 227).

Also, WDFG, as owner, entered into an agreement with SPK, as general contractor, for the construction at issue. In that agreement, SPK agreed to indemnify WDFG, as well as Empire, for claims arising from or in any way connected to SPK's work at the premises. (NYSCEF 225).

## II. ANALYSIS

Given the law of the case, as SPK was granted conditional summary judgment on its

claims for contractual indemnity, as well as common law indemnity and contribution against Precision, Empire establishes, *prima facie*, that it should also be granted conditional summary judgment for the reasons set forth in the April 2020 decision. In particular, there is no evidence that Empire was negligent in any manner related to plaintiff's accident, and it is undisputed that plaintiff was injured while working for Precision on WDFG's construction project.

The opposing parties raise no triable issue here for the reason they failed to do so in the prior motions. Contrary to SPK's arguments, the anti-subrogation rule does not bar Empire's claims, as Empire is entitled to indemnity to the extent that any judgment exceeds the limit of the applicable insurance policy. (*Ging v F.J. Sciame Constr. Co., Inc.*, 193 AD3d 415 [1st Dept 2021] [court properly conditioned judgment on contractual indemnity claim on plaintiff's damages exceeding limit of parties' insurance policy]; *Mitchell v NRG Energy, Inc.*, 142 AD3d 1366, 1367 [4th Dept 2016] [same]).

### III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant/second third-party plaintiff Empire State Realty Trust Inc.'s motion is granted conditionally pending a determination at trial of liability as against second third-party defendant WDFG North America LLC, defendant SPK/Lewis, Inc., and third-party defendant Precision Fabricators Corp., and further conditioned as to SPK to the extent that plaintiff's damages exceed the limit of the applicable insurance policy; and as to its claims for common law indemnity and contribution, it is further conditioned on plaintiff having suffered a grave injury; it is further

ORDERED, that the motion is also granted to the extent of dismissing any cross or counterclaims against Empire; and it is further

ORDERED, that to the extent that any discovery remains outstanding, the parties are directed to submit a compliance conference stipulation, in Word format and by email to cpaszko@nycourts.gov, on or before May 4, 2022. If no discovery is outstanding, plaintiff is directed to file his note of issue by May 4, 2022.

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4/6/2022  
DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	<input type="checkbox"/>
				OTHER	
				REFERENCE	