

<b>D'Amato v Clifford Group, Inc.</b>
2022 NY Slip Op 31370(U)
April 27, 2022
Supreme Court, New York County
Docket Number: Index No. 154592/2017
Judge: Frank Nervo
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. FRANK NERVO**

**PART 04**

*Justice*

-----X

ANTHONY D'AMATO,

Plaintiff,

- v -

CLIFFORD GROUP, INC., ERST 112 WEST 34TH STREET,  
LP,

Defendant.

-----X

CLIFFORD GROUP, INC.

Plaintiff,

-against-

DFNY ACOUSTICS & DRYWALL, INC., TRI-STATE  
DISMANTLING SERVICES, INC.

Defendant.

-----X

CLIFFORD GROUP, INC., ERST 112 WEST 34TH STREET,  
LP

Plaintiff,

-against-

PRISTINE SERVICES INC.

Defendant.

-----X

[continued on following page]

INDEX NO. 154592/2017

MOTION DATE 12/07/2020

MOTION SEQ. NO. 004

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595924/2017

Second Third-Party  
Index No. 595920/2019

ERST 112 WEST 34TH STREET, LP

Third Third-Party  
Index No. 595147/2021

Plaintiff,

-against-

DFNY DRYWALL & ACOUSTICS, INC., TRI-STATE  
DISMANTLING CORP.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 192, 201, 216, 217, 218, 219, 235, 244, 245, 246

were read on this motion to/for

JUDGMENT - SUMMARY

This motion was transferred to Part IV.

Tri State Dismantling Corp (hereinafter “Tristate”) seeks summary judgment dismissing the third-party complaint against it and plaintiff’s Labor Law § 240(1) claim. Clifford Group (hereinafter “Clifford”) and ESRT 112 West 34<sup>th</sup> Street oppose.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact

requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). “When a plaintiff moves for summary judgment, it is proper for the court to ... deny summary judgment if facts are alleged in opposition to the motion which, if true, constitute a meritorious defense” (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175 [1982]). “Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact” (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). However, a “feigned issue of fact” will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

As discussed in the Court’s Decisions and Orders in motion sequences 002 and 003, issues of fact preclude summary judgment. Plaintiff alleges that after slipping on drywall debris he tripped on an epoxy lip, a remnant from a demolished wall, completing his fall. The parties have submitted two demolition plans for the subject construction project, with the removal of the

wall at issue differing between the two plans. Furthermore, there is conflicting testimony by Clifford and Tristate as to the parties' knowledge of the second plan and their responsibility related to same. As discussed throughout motion sequences 002 and 003, the parties in this action were performing various construction work contemporaneously and in overlapping areas, as the construction progressed. Consequently, summary judgment is inappropriate, as there exist issues of fact as to which parties are responsible for creating the drywall debris, failing to remove the epoxy lip, and failing to remove the drywall debris.

Likewise, and as discussed in motion sequence 002 and 003, issues of fact preclude determination of any of the indemnification claims. Until such time as it is determined which party(ies) are responsible for creating the hazardous condition(s) plaintiff alleges caused his fall, it cannot be determined whether a party is seeking indemnification for its own negligence. Accordingly, to the extent that summary judgment is sought on any indemnification claims, same is denied until after a determination has been reached on liability.

Finally, Tristate seeks dismissal of Clifford's claim that Tristate breached the parties' agreement by failing to procure insurance. Tristate has proffered

documentary evidence of its general and excess liability insurance policies (NYSCEF Doc. No. 181). Those policies name, as additional insureds, “any person or organization that you are required by written contract to name as an additional insured,” and there is no dispute that the contract between Tristate and Clifford required Tristate name Clifford as an additional insured (*id.*). Accordingly, Tristate has established, as a matter of law, that it did not breach the agreement by failing to name Clifford as an additional insured.

Accordingly, it is

ORDERED that the motion is granted to the extent of dismissing plaintiff’s Labor Law § 240 claim, consistent with the Court’s Decision and Order in motion sequence 003, and dismissing Clifford Group’s breach of contract claims for failure to procure insurance, and otherwise denied; and it is further

ORDERED that denial of summary judgment on indemnification claims is without prejudice to renew following trial.

4/27/2022  
DATE

  
FRANK NERVO, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
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"/> REFERENCE