SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

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INDEX NO. 151927/2014

MOTION DATE 11/18/2021

MOTION SEQ. NO. 009

THOMAS WALDRON,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, THE METROPOLITAN TRANSPORTATION AUTHORITY, MTA CAPITAL CONSTRUCTION COMPANY, JUDLAU CONTRACTING, INC., SCHIAVONE CONSTRUCTION, LLC., PLAZA CONSTRUCTION CORPORATION, PLAZA/SCHIAVONE A JOINT VENTURE, STEALTH ARCHITECTURAL WINDOWS, INC.,

Defendant.

DECISION + ORDER ON MOTION

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THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, THE METROPOLITAN TRANSPORTATION AUTHORITY, MTA CAPITAL CONSTRUCTION COMPANY, JUDLAU CONTRACTING, INC.

Plaintiff,

-against-

EATON ELECTRIC, INC.

Defendant.

Third-Party
Index No. 595055/2015

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 362, 363, 364

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Thomas Waldron, a union electrical foreman on March 27, 2013 when, while working at a construction site located at 11 John Street in Manhattan (the Premises), he was injured when he tripped over an allegedly uneven concrete seam between the landing of a newly installed flight of

stairs (the Stairway) and the existent concrete of the adjoining hallway, causing him to fall down the Stairway.

In motion sequence number 009, third-party defendant Eaton Electric, Inc. (Eaton), moves, pursuant to CPLR 3212, for summary judgment dismissing all claims within the third-party complaint as alleged by defendants/third-party plaintiffs The City of New York (the City), The Metropolitan Transportation Authority (MTA), MTA Capital Construction Company (MTACC), and Judlau Contracting, Inc. (Judlau). Eaton does not seek relief as against defendant/third-party plaintiff New York City Transit Authority (NYCTA) (collectively, City, MTA, MTACC and NYCTA are referred to herein as the City defendants).

The City defendants and Judlau cross-move, pursuant to CPLR 3212, for summary judgment in their favor on their third-party contractual indemnification and breach of contract for the failure to procure insurance claims against Eaton.

BACKGROUND

On the day of the accident, the City was the owner of the Premises and the subway system beneath the Premises. The City leased the subway to NYCTA, a subsidiary of the MTA. MTACC is an agency whose primary duty includes managing large construction projects for the MTA. The City hired Judlau as the general contractor for a project at the Premises that included the renovation of the building to provide an egress to the adjacent Fulton Street Transit Center, a subway station (the Project). Third-party defendant Eaton Electric, Inc. (Eaton) was an electrical subcontractor on the Project. Plaintiff was employed by Eaton.

As these motions focus solely on third-party issues, the court's recitation of facts will be limited to those relevant to address those issues. The court has summarized the relevant facts in

its order regarding motion sequence number 007 and they will not be repeated here (NYSCEF Doc. No. 308).

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed as an electrical foreman for Eaton at the Project. While at work, plaintiff tripped and fell down a stairway due to "a difference in height from the top of the stair landing to the existing floor" (plaintiff's tr at 63).

Deposition Testimony of Robert Sammons (Judlau's Project Engineer)

Robert Sammons testified that on the day of the accident, he was Judlau's project engineer for the Project. Judlau was a general contractor for the Project at the Premises.

Deposition Testimony of Gary Eaton (Eaton's President)

Gary Eaton testified that on the day of the accident, he was the owner and president of Eaton. Eaton was hired by non-party Five Star Electric Corp. (Five Star), to perform electrical work at the Project. Gary Eaton was never present at the Project and was unaware of who was working there. He did not know plaintiff personally but acknowledged that plaintiff worked for Eaton.

The Eaton/Five Star Agreement

Five Star and Eaton entered into "Contract No. 9698-0002" on June 22, 2010 (the Eaton/Five Star Agreement) for electrical work at the Project (notice of motion, exhibit J; NYSCEF Doc. No. 339). As relevant, the Eaton/Five Star Agreement includes the following incorporation clause:

> "[Eaton] agrees to abide by all terms and conditions of [Five Star's] Contract with the General Contractor and the Prime Contract with New York City Transit Authority"

(*id.*, page 1 [the Incorporation Clause]).

In addition, the contract includes two riders, denominated A and B. Rider A contains an indemnification provision. Rider B contains insurance procurement provisions.

Rider A provides, in pertinent part, the following:

> "To the extent permitted by law [Eaton] hereby assumes entire responsibility and liability for any and all damage and Injury of any kind or nature whatsoever to all persons . . . arising out of, or resulting from the performance of this contract . . . and agrees to indemnify and save harmless the Contractor and/or Owner and their agents, servants and employees from and against any and all loss . . . or injury arising out of, or resulting there from, or occurring in connection therewith"

(*id.*, Rider A [the Indemnification Provision]).

Rider B provides, in pertinent part, the following:

> "[Eaton] shall provide Comprehensive General Liability Insurance covering Bodily and Property Damage including death arising from any one (1) occurrence, including any contractual agreement assuming liability of OWNER by the terms of the CONTRACT in an amount of not less than [$1,000,000] per occurrence and [$2,000,000] in the aggregate. Policies will be endorsed to name the Owner and Contractor as additional insureds on a primary basis. The Owner and Contractor's insurance will be excess of the subcontractor's liability coverage"

(*id.*, Rider B [the Procurement Provision]).

Rider B also defines the term "Owner" as NYCTA and "Contractor" as Five Star (*id.*).

Also included in the Eaton/Five Star Agreement is the cover page for a subcontract agreement between Judlau, as general contractor, and Five Star as subcontractor.

DISCUSSION

> "[T]he 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers"

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). 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]).

In the third-party complaint, Judlau and the City defendants allege claims against Eaton sounding in common-law indemnification and contribution, contractual indemnification, and breach of contract for the failure to procure insurance.

The Contractual Indemnification Claims Against Eaton

Eaton moves for summary judgment dismissing the contractual indemnification claims brought by the City, MTA, MTACC and Judlau (it does not seek any relief as against NYCTA). The City defendants and Judlau (the cross-movants) cross move for summary judgment in their favor on the same.

"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 Co.,* 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.,* 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

"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 v*

Professional Data Mgt., 259 AD2d 60, 65 [1st Dept 1999]; *see also Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia,* 259 AD2d at 65).

Here, by its terms, the Eaton/Five Star Agreement's Indemnification Provision requires Eaton to indemnify the "Contractor and/or Owner and their agents, servants and employees" (notice of motion, exhibit J, Rider A; NYSCEF Doc. No. 339). Contractor is defined as Five Star and Owner is defined as NYCTA. By the Indemnification Provision's terms, Judlau, the City, MTA and MTACC can only be indemnitees if they are agents, servants or employees of NYCTA or Five Star.

Initially, the cross-movants argue that the Incorporation Clause in the Eaton/Five Star Agreement should act to bind Eaton to the indemnification provisions found in Judlau's contract with Five Star, and the prime contract between Judlau and the City.[1] This argument is unpersuasive.

Construction contract clauses that seek to "incorporate prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor" (*Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 244 [1st Dept 2001]; *Naupari v Murray*, 163 AD3d 401, 402 [1st Dept 2018] [denying indemnification claim where "the claims for contractual indemnification against Shearman were based on the main agreement between the Murrays and the Board, to which Shearman was not a signatory"]; *see also* Matter of *Wonder Works Constr. Corp. v R.C. Dolner, Inc.*, 73 AD3d 511, 513 [1st Dept 2010] [language in a

[1] The court notes that the cross-movants do not include in their cross-motion copies of these purportedly controlling indemnification provisions.

subcontract "granting general contractor every right and remedy as against subcontractor that it has against owner does not constitute an express and specific agreement to arbitrate"]).

Accordingly, Eaton – which was not a signatory to the prime contract or Judlau's contract with Five Star – is not bound by any indemnification provision in those contracts.

Next, the cross-movants argue that the City, MTA, MTACC and Judlau are all agents of NYCTA. However, cross-movants offer no explanation or argument to support this theory, aside from a conclusory statement that these entities are agents of NYCTA. Accordingly, this argument is unpersuasive.

Cross-movants also appear to argue that the City is the true owner of the Premises and MTA, MTACC, NYCTA and Judlau are all, ultimately, the City's agents. Therefore, they argue that as agents of the City, all cross-movants are entitled to indemnification under the Indemnification Provision. This argument is unpersuasive. Redefining the term "Owner" from NYCTA to the City is improper, as it would "distort the meaning of [the terms] used and thereby make a new contract for the parties" (*Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.,* 143 AD3d 146, 156 [1st Dept 2016], *affd sub nom. Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire and Mar. Ins. Co.*, 31 NY3d 131 [2018] [internal quotation marks and citations omitted]).

Accordingly, by its plain terms, the Eaton/Five Star Agreement's Indemnification Provision applies only to NYCTA (as owner) and Five Star (as contractor) and any of their agents, servants and employees. As cross-movants have failed to present any testimony or evidence establishing that they are agents, servants or employees of NYCTA or Five Star, they fail to raise a question of fact sufficient to overcome Eaton's entitlement to summary judgment dismissing the contractual indemnification claims of the City, MTA, MTACC and Judlau.

Finally, NYCTA would be entitled to indemnification from Eaton, under the Indemnification Provision, because it is undisputed that plaintiff's accident – wherein he fell down a staircase at the jobsite – arose out of the performance of the Eaton's work at the Premises pursuant to the Eaton/Five Star Agreement. However, in this action there has not yet been a determination as to whether NYCTA was free from negligence (*Correia v Professional Data Mgt.*, 259 AD2d at 65). Therefore, summary judgment on this claim is premature.

Thus, Eaton is entitled to summary judgment dismissing the contractual indemnification claims of the City, MTA, MTACC and Judlau. The cross-movants are not entitled to summary judgment in their favor on the same.

The Common-Law Indemnification and Contribution Claims

Eaton moves for summary judgment dismissing all common-law indemnification and contribution claims against.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d at 65]); *see also Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]).

In other words, a claim for common-law indemnification is actionable only where a party has been found to be "vicariously liable without proof of any negligence . . . on its own part" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).

As plaintiff was employed by Eaton, Workers' Compensation Law § 11 applies to this case. Under section 11, "[a]n employer's liability for an on-the-job injury is generally limited to

workers' compensation benefits, [except] when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]). A grave injury is defined as

> "[D]eath, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability"

Worker's Compensation Law § 11.

The record does not allege a grave injury. Further, no party objects to the dismissal of this claim. Accordingly, Eaton is entitled to summary judgment dismissing all common-law negligence and contribution claims against it.

The Breach of Contract for the Failure to Procure Insurance Claims Against Eaton

Eaton moves for summary judgment dismissing all breach of contract for the failure to procure insurance claims against it. Cross-movants move for summary judgment in their favor on the same claims.

As an initial matter, Eaton is entitled to summary judgment dismissing this claim as it relates to the City, MTA, MTACC and Judlau, as the Eaton/Five Star Agreement only requires Eaton to procure insurance for "Owner and Contractor" – i.e. Five Star and NYCTA.

With respect to NYCTA, cross-movants concede that Eaton procured insurance. However, they argue, Eaton's insurer – non-party Utica National Insurance Company (Utica) – disclaimed tender of coverage on the ground that NYCTA is not a proper additional insured (*see* notice of cross motion, exhibit G; NYSCEF Doc. No. 359). Therefore, cross-movants argue, Eaton failed to procure insurance covering NYCTA for plaintiff's accident. This is incorrect.

If an insurance company refuses to indemnify under the coverage purchased, a party is not liable to another for breach of contract for the failure to procure insurance when that party "fulfilled its contractual obligation to procure proper liability insurance on behalf of" the other party (*Martinez v Tishman Constr. Corp.*, 227 AD2d 298, 299 [1st Dept 1996]; *see also Perez v Morse Diesel Intl, Inc.*, 10 AD3d 497, 498 [1st Dept 2004] [denying a breach of contract for the failure to procure insurance claim because "[t]he insurer's refusal to indemnify Morse Diesel under the coverage purchased by Property Resources does not alter this conclusion"]). Here, Eaton procured insurance that is applicable to plaintiff's accident. Whether NYCTA is properly an additional insured under the Utica policy is not an issue before this court.

Thus cross-movants are not entitled to summary judgment in their favor on their third-party claim for breach of contract for the failure to procure insurance against them and Eaton is entitled to summary judgment dismissing the same claim as against the City, MTA, MTACC and Judlau.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of third-party defendant Eaton Electric, Inc. (Eaton) (motion sequence number 009), pursuant to CPLR 3212, for summary judgment dismissing all third-party claims asserted by defendants/third-party plaintiffs The City of New York (the City), The Metropolitan Transportation Authority (MTA), MTA Capital Construction Company (MTACC), and Judlau Contracting, Inc. (Judlau) is granted; and the third-party complaint is dismissed as against those parties; and it is further

ORDERED that the cross motion of the City, MTA, MTACC, NYCTA and Judlau, pursuant to CPLR 3212, for summary judgment in their favor on their third-party contractual

indemnification and breach of contract for the failure to procure insurance claims against Eaton is denied.

6/24/2022
DATE

WILLIAM PERRY, 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