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| Rahmonov v Purves Dev. LLC |
| 2022 NY Slip Op 32434(U) |
| July 12, 2022 |
| Supreme Court, Kings County |
| Docket Number: Index No. 510605/2017 |
| Judge: Carl J. Landicino |
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of July 2022.

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PRESENT:

CARL J. LANDICINO, J.S.C.

-----X
SHERZOD RAIMONOV,

Index No.: 510605/2017

Plaintiff,

-against-

DECISION AND ORDER

PURVES DEVELOPMENT LLC, SILVERCUP PROPERTIES LLC, S2 CONSTRUCTION LLC and P-GOOM, INC.,

Motion Sequence #12, #13

Defendants.

-----X
PURVES DEVELOPMENT LLC, SILVERCUP PROPERTIES LLC and S2 CONSTRUCTION LLC,

Third-Party Plaintiffs,

-against-

V&P ALTITUDE CORP. and P-GOOM, INC.,

Third-Party Defendants.

-----X
PURVES DEVELOPMENT LLC, SILVERCUP PROPERTIES LLC and S2 CONSTRUCTION LLC,

Second Third-Party Plaintiffs,

-against-

CONSTRUCTION FORCE SERVICES and VALEX ENTERPRISES, INC.,

Second Third-Party Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

| | |
|---|----------------------------|
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed | 280-282, 284-294, 295-307, |
| Opposing Affidavits (Affirmatio..... | 338-339, 340-342, |
| Reply Affidavits (Affirmations)..... | 344-345, 346, |
| Memorandum of Law..... | 283, 308, 343, 347 |

After a review of the papers and oral argument the Court finds as follows:

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KINGS COUNTY CLERK
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Plaintiff Sherzod Rahmanov (hereinafter the "Plaintiff") alleges causes of action pursuant to New York State Labor Law 200, 240(1), 241, 242-(a) and common law negligence as against Defendants Purves Development LLC, Silvercup Properties, LLC, S2 Construction, LLC and P-Goom, Inc. Plaintiff alleges in his Verified Bill of Particulars that on January 23, 2017, he suffered injuries after he tripped and fell over debris while working for "V&P Altitude/Monanchock Construction, Inc." at 27-21 44th Drive, Long Island City, New York (the "Premises").

Third-Party Defendant V&P Altitude Corp. (hereinafter "V&P") moves (motion sequence #12) for an order, pursuant to CPLR 3212, for summary judgment dismissing the third-party action for common law and contractual indemnification, contribution and breach of contract and any cross-claims. V&P contends that summary judgment should be granted as the Plaintiff was an employee of V&P at the time of the alleged accident and the Workers' Compensation Reform Act bars any claims as against V&P. Moreover, V&P contends that it was contracted to work at the Premises by non-party Pioneer Window Manufacturing Corp. (hereinafter "Pioneer"), and as a result only Pioneer may maintain a viable contractual indemnity claim as against V&P.

Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs, Purves Development LLC and Silvercup Properties LLC, (hereinafter referred to individually or as the "Defendant Owners") and S2 Construction LLC ("Defendant GC") oppose the motion. The Defendant Owners and GC contend that both the contract between Defendant S2 Construction and Pioneer, and the contract between Pioneer and V&P, explicitly state that indemnification will be provided to the Defendant Owners and GC. The Defendant Owners and GC argue that the contract between Pioneer and V&P states that V&P has agreed to assume liability incurred by the Owners and GC for claims that arose out of V&P's activity at the Premises.

The Defendant Owners and GC also move (motion sequence #13) for an order pursuant to CPLR 3212 for summary judgment on their Third Cause of Action for Contractual Indemnification and Fourth Cause of Action for Breach of Contract (failure to procure insurance) against V&P. As stated above, the Defendant Owners contend that both the contract between Defendant S2 Construction and Pioneer and the contract between Pioneer and V&P should be read in broad terms to provide that V&P had a contractual duty to indemnify and procure insurance for the Defendant Owners and GC.

V&P opposes the motion. As stated above, V&P argues that it is not contractually obligated to any other party other than Pioneer. Specifically, V&P argues that it only contracted with Pioneer and that contract is silent to the Defendant Owners and GC.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it “should only be employed when there is no doubt as to the absence of triable issues of material fact.” *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment 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. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party.” *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v. Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

Generally, “[a] party’s right to contractual indemnification depends upon the specific language of the relevant contract.” *Desena v. N. Shore Hebrew Acad.*, 119 AD3d 631, 636, 989 N.Y.S.2d 505 [2d Dept 2014]. “When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed.” *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 548 N.E.2d 903 [1989].

Turning to the merits of the motion by V&P (motion sequence #12) the Court finds that V&P has met its *prima facie* burden. V&P argues that the Third-Party Complaint should be dismissed as the facts of the case do not provide for an exception under Article 11 of the New York State Workers’ Compensation Law. In general, Workers’ Compensation Law §11 prohibits “most third-party claims for contribution or indemnification against an employer for injuries sustained by an employee acting within the scope of employment.” *Flores v. Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 367, 795 N.Y.S.2d 491 [2005]. The two exceptions are when “the employee has sustained a ‘grave injury’ or when there is a ‘written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of

the claimant.” *Id.*, quoting Workers' Compensation Law § 11. “Grave injury is a statutorily-defined threshold for catastrophic injuries, and includes only those injuries which are listed in the statute and determined to be permanent.” *Blackburn v. Wysong & Miles Co.*, 11 AD3d 421, 783 N.Y.S.2d 609 [2d Dept 2004].

In support of their position, V&P relies on the Plaintiff’s Bill of Particulars, the Plaintiff’s deposition, the deposition of Josh Suna, and the deposition of Mihaly Vince. In the instant proceeding, the Plaintiff does not allege sustaining any injury that would constitute a “grave injury” in either his complaint or bill of particulars. Instead, he alleges a right ankle injury involving surgery, a left shoulder injury, a right knee tear and neck and back strains. As such, Plaintiff did not allege a grave injury as defined by the statute. *See Marshall v. Arias*, 12 AD3d 423, 424, 784 N.Y.S.2d 589, 590 [2d Dept 2004]; *Fleischman v. Peacock Water Co.*, 51 A.D.3d 1203, 1205, 858 N.Y.S.2d 421, 423 [3rd Dept 2008]; *Reinoso v. Ornstein Layton Mgmt., Inc.*, 34 AD3d 437, 438, 823 N.Y.S.2d 517, 518 [2d Dept 2006]; *Blackburn v. Wysong & Miles Co.*, 11 AD3d 421, 422, 783 N.Y.S.2d 609, 610 [2d Dept 2004] *see also* Workers' Compensation Law § 11. As such, V&P was not obligated to the movants as a consequence of the grave injury exception.¹

Pertinent sections of the contract between V&P and Pioneer state as follows:

Section 5.2:

To the fullest extent provided by law, the Subcontractor agrees that it will hold the Contractor, its employees, officers and directors, harmless against any and all claims of whatever nature and kind that may be asserted against it by any person or party arising out of the Work covered by this contract.

¹ Pursuant to Workers' Compensation Law § 11 a “grave injury” shall mean “only one or more of the following: death, 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.” N.Y. Workers' comp. Law § 11

Section 5.3:

To the fullest extent provided by law, the subcontractor agrees to indemnify and hold harmless the Contractor, its employees, officers and directors, and such persons and entities as may be required by the *Contract Documents* from all claims against any of them for personal injury or wrongful death or property damages excluding damage to the project itself which is covered by insurance, arising out of the negligent performance or negligent act of the Subcontractor or anyone directly or indirectly employed by the subcontractor including Sub-Subcontractors in the execution or performance of this contract. In addition, the Subcontractor will maintain the following coverage... [emphasis added]

Section 1.2:

The Work will be performed in accordance with this Agreement between the Contractor and General Contractor (the "Trade Contract"), the Project specification and drawings prepared by GFS Partners LLP (the "Project Specifications and Drawings"), the Subcontractor's shop drawings (the "Shop Drawings"). (The aforementioned documents shall be referred to collectively as the "Contract Documents").

V&P argues that the only party that it agreed to indemnify and provide insurance for is Pioneer and that it did not expressly agree to indemnify or procure insurance for the Third-Party Plaintiffs. V&P did establish, as a matter of law, that the agreement between V&P and Pioneer, merely incorporating by reference the agreement between Pioneer and the General Contractor, reflects that V&P did not expressly agree to indemnify or procure insurance to the Third-Party Plaintiffs. *See Pope v. Supreme - K.R.W. Constr. Corp.*, 261 AD2d 523, 524, 690 N.Y.S.2d 632 [2d Dept 1999]. "Under New York law, incorporation clauses in a construction subcontract, incorporating 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." *Persaud v. Bovis Lend Lease, Inc.*, 93 A.D.3d 831, 833, 941 N.Y.S.2d 208, 210-11 [2d Dept 2012], quoting *Waitkus v. Metro. Hous. Partners*, 50 A.D.3d 260, 854 N.Y.S.2d 388 [1st Dept 2008]. Although the word Owner or General Contractor may serve to

incorporate the indemnity obligation to those parties, no such reference is made in the subject contract indemnity provisions. In addition, although the insurance provision references the "General Contractor" it does not specify an obligation to insure the General Contractor. *See Goya v. Longwood Hous. Dev. Fund Co., Inc.*, 192 A.D.3d 581, 582, 146 N.Y.S.3d 59, 62 [1st Dept 2021]. In opposition, the Defendant Owners and GC have failed to raise an issue of fact. Therefore, V&P's motion for summary judgment is granted and the third party complaint is dismissed. In light of this holding Defendant Owners and GC's motion (MS#13) is denied as academic.

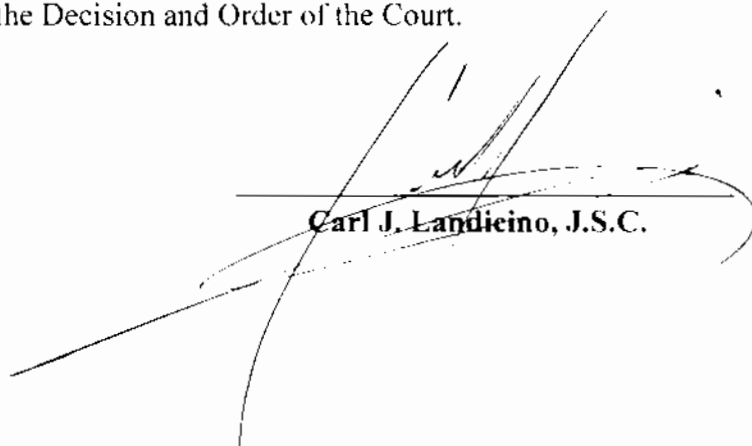
Based upon the foregoing, it is hereby ORDERED as follows:

Third Party Defendant V&P's motion (motion sequence #12) is granted and the Third Party Complaint is dismissed as against V&P.

The motion by Defendants/Third Party Plaintiffs Purves Development LLC, Silvercup Properties LLC and S2 Construction, LLC (motion sequence #13) for summary judgment as to the Third and Fourth Causes of Action of the Third Party Complaint is denied as academic.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino, J.S.C.

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