

<b>Baptiste v City of New York</b>
2022 NY Slip Op 32709(U)
August 10, 2022
Supreme Court, Kings County
Docket Number: Index No. 11654/09
Judge: Larry D. Martin
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At an IAS Term, Part 41 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 10<sup>th</sup> day of August, 2022.

PRESENT: **Larry D. Martin, J.S.C.**

No. 11654/09

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SCOTT BAPTISTE and ELIZABETH BAPTISTE,

*Plaintiffs,*

-against-

THE CITY OF NEW YORK and A.J. PEGNO  
CONSTRUCTION CORP./TULLY CONSTRUCTION  
COMPANY INC., a Joint Venture,

*Defendants.*

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A.J. PEGNO CONSTRUCTION CORP./TULLY  
CONSTRUCTION COMPANY, INC., a Joint Venture,

*Third-Party Plaintiff,*

-against-

HAZEN AND SAWYER, P.C. MALCOLM PIRNIE,  
INC., Individually and HAZEN AND SAWYER, P.C./  
MALCOLM PIRNIE, INC., a Joint Venture,

*Third-Party Defendants.*

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HAZEN AND SAWYER, P.C. MALCOLM PIRNIE,  
INC., Individually and HAZEN AND SAWYER, P.C./  
MALCOLM PIRNIE, INC., a Joint Venture,

*Second Third-Party Plaintiffs,*

-against-

CSM ENGINEERING P.C.

*Second Third-Party Defendant.*

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THE CITY OF NEW YORK,

*Third Third-Party Plaintiff,*

-against-

CSM ENGINEERING P.C.,

*Third Third-Party Defendant.*

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HAZEN AND SAWYER, P.C., MALCOLM PIRNIE,  
INC., Individually and HAZEN AND SAWYER, P.C./  
MALCOM PIRNIE, INC., A Joint Venture,

*Fourth Third-Party Plaintiffs,*

-against-

BIDWELL ENVIRONMENTAL, L.L.C.,

*Fourth Third-Party Defendant.*

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THE CITY OF NEW YORK,

*Fifth Third-Party Plaintiff,*

-against-

FIVE STAR ELECTRIC CORP. and WDF, INC.,

*Fifth Third-Party Defendant.*

**Procedural History**

Plaintiff Scott Baptiste slipped and fell off a ladder at a construction site located at Newtown Creek, W.P.C.P., Greenpoint Avenue, Brooklyn, New York (the "Premises"). Second and Third Third-Party Defendant, CSM Engineering, P.C. ("CSM"), now moves for an Order, pursuant to CPLR 3211(a)(1), 3211(a)(7), and 3212, to dismiss all claims and cross claims against it with prejudice (MOTION 18). Specifically, CSM argues that: (i) First, Second, and Fourth Third-Party Plaintiffs, Hazen and Sawyer, P.C./Malcolm Pirnie, Inc. ("HSMP"), and Third and

Fifth Third-Party Plaintiffs, City of New York (the "City"), failed to state a cause of action against it; and (ii) all claims, counter claims, or cross claims for contribution, indemnification, or failure to procure insurance are not viable. By Order dated February 20, 2020, this Court granted motions by Fifth Third-Party Defendants, WDF and Five Star Electric Corp., to sever the Fifth Third-Party action from the main action. The parties should amend the caption accordingly.

### BACKGROUND

Plaintiff alleges that the slip and fall at the Premises occurred on November 28, 2008. In this labor law action, the City hired all of the contractors for the underlying construction project (the "Project"), including its construction manager, HSMP. HSMP, in turn, retained CSM to provide "Resident Engineering Inspection" services pursuant to a September 15, 19991 written agreement (the "Agreement"). At the time of the accident, CSM employed Plaintiff as one of its construction inspectors.

Under the Agreement, CSM was required to "provide sufficient personnel to adequately and competently perform the requirements of the Agreement," indemnify HSMP, and obtain "Additional Insured" coverage for HSMP. HSMP directed Plaintiff as to the work that needed inspection on any given date, but HSMP did not manage his inspections. As Plaintiff testified, it was his choice to use the specific ladder involved in his fall and he did not examine it to ensure it was safe. Inconsistent with its duty to supply the means of access for inspections, HSMP never provided CSM, Plaintiff, or any other employees with ladders. Thus, at the time of his fall, Plaintiff was inspecting pipes installed by WDF using a ladder owned by Five Star Electric.

After the incident, an incident report was filed that, together with a post-accident investigation, revealed that Plaintiff had improperly used the top half of an extension ladder instead of a complete ladder. Discovery is ongoing and Plaintiff has not filed a Note of Issue in this action.

## DISCUSSION

CSM argues that the claims against it should be dismissed since: (i) neither plaintiff in the actions wherein CSM is a defendant—HSMP nor the City—asserts direct claims against it; (ii) CSM did not have an ownership interest in the Premises; and (iii) the Agreement evidences the parties' understanding that CSM did not have control over the Project or the Premises and was not dutybound to ensure Plaintiff's safety. In support, CSM argues that its services were limited to supplying its employee—Plaintiff—to perform inspections at HSMP's sole direction; Plaintiff thus took his assignments from HSMP's project manager; CSM neither provided, nor was responsible for, training Plaintiff for the Project. CSM further argues that other parties were specifically tasked with Plaintiff's safety at the Premises for the Project's duration.

In opposing the motion, HSMP correctly notes that its breach of contract claims do not require proof of negligence. Pursuant to its contractual obligation to obtain insurance, that which CSM ultimately procured excluded coverage for claims arising from "professional services." Given that HSMP retained CSM specifically and solely to provide just that—professional services, CSM arguably failed to comply with the Agreement's terms. Likewise, to the extent that CSM was contractually obligated to provide "sufficient personnel to adequately and competently perform the requirements of the Agreement," there is, at least, an issue of fact as to whether providing an employee who misused the ladder, constitutes breach of its obligation to supply competent personnel to perform under the Agreement.

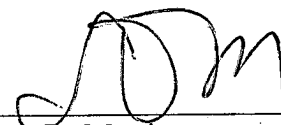
Additionally, HSMP correctly notes that CSM is vicariously liable under the doctrine of *respondeat superior* for Plaintiff's negligent acts or omissions in the scope of his work for CSM. It is well-established that an employer is vicariously liable for its employees' torts, even where the offending employee's conduct was intentional, if the acts were committed while the employee was acting within the scope of his or her employment. *Carnegie v. J.P. Phillips, Inc.*, 28 AD3d 599,

600 (2d Dept 2006); *Elmore v. City of New York*, 15 AD3d 334, 335 (2d Dept 2005); *Judith M. v. Sisters of Charity Hosp.*, 93 NY2d 932, 933 (1999). It would thus be premature to find that CSM was not negligent prior to Plaintiff's Labor Law § 240 being dismissed.

Moreover, while the City is currently covered under insurance obtained by one of the other parties, it remains primarily self-insured. Because, as a matter of law, a contract's insurance procurement clause is independent of its indemnification provision, *Kinney v Lisk Co.*, 76 NY2d 215, 219 (1990), a final determination of liability for failure to insure "need not await a factual determination as to whose negligence, if anyone's, caused the plaintiff's injuries," *Kennelty v. Darlind Constr.*, 260 AD2d 443, 445 (1999). Where the party for whom insurance was to be obtained is self-insured, the proper measure of damages remains indemnity and defense costs. See, e.g., *Occhino v. Citigroup Inc.*, CV-03-5259 (CPS), 2005 WL 2076588 (EDNY Aug 26, 2005); *Spector v. Cushman & Wakefield, Inc.*, 100 AD3d 575 (1st Dept 2012). However, where the party entitled to additional insured coverage is self-insured and did not procure insurance from an outside source, "[d]amages for breach of contract are intended to put the aggrieved party in the same economic position he would have been in if the contract had been performed." Accordingly, the City may be entitled to resulting damages from CSM's breach of contract including any liability found against the City and in favor of the plaintiffs.

Accordingly, MOTION 18 is **denied**.

Dated: August 10, 2022



Hon. Larry D. Martin  
Supreme Court of the State of New York

HON. LARRY MARTIN  
JUSTICE OF THE SUPREME COURT