

**Cando v Laight St. Fee Owner II, LLC**

2022 NY Slip Op 32741(U)

August 15, 2022

Supreme Court, New York County

Docket Number: Index No. 152413/2014

Judge: James d'Auguste

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JAMES D'AUGUSTE** PART **55**

*Justice*

-----X

EDWIN CANDO,

Plaintiff,

- v -

LAIGHT STREET FEE OWNER II, LLC, SCIAME  
CONSTRUCTION, LLC,

Defendant.

-----X

SCIAME CONSTRUCTION, LLC

Plaintiff,

-against-

TRI STATE DISMANTLING CORP.

Defendant.

-----X

Third-Party  
Index No. 595044/2015

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 169, 170, 171, 178, 179, 180, 181

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

Defendants/third-party plaintiffs Laight Street Fee Owner II LLC (“Laight Street”) and Sciame Construction, LLC (“Sciame”) (collectively “movants”) seek: (1) summary judgment on their third-party claims for contractual defense and indemnification, and breach of contract against third-party defendant Tri-State Dismantling Corp. (“Tri-State”); (2) summary judgment dismissing all of Tri-State’s counter claims; and (3) striking Tri-State’s answer and/or an order prohibiting Tri-State from producing certain evidence at trial. The motion is granted to the extent set forth below and otherwise denied.

As an initial matter, Tri-State's procedural opposition to that branch of the motion seeking summary judgment on the ground that the motion is untimely is denied. The basis for Tri-State's opposition is a preliminary conference order, which states that summary judgment motions are required to be served within 60-days of the filing of a note of issue. However, the motion was filed well after this action was re-assigned to Part 55, which has an express part rule stating: "Motions for summary judgment shall be made no later than 120 days after the filing of the note of issue, except with leave of the Court for good cause shown pursuant to CPLR 3212(a). This rule shall supersede any case scheduling order." In *Mercado v. City of New York*, 2016 WL 6038429 [N.Y. Sup Ct, New York County 2016], this very argument was rejected and, as such, it should not surprise Tri-State that the instant dispositive motion was required to be served within 120 days of the filing of the note of issue. Thus, the procedural argument that the motion is untimely is without merit.

Moving to the primary issue in dispute, Tri-State argues that the sub-contract was not in force (specifically, dated approximately three weeks after the subject accident), and the indemnity agreement is silent as to whether it covers accidents pre-dating the agreement. Contrary to Tri-State's arguments, the admissible evidence supports movant's contention that the contract was in force at the time of the accident and the "3/7/2014" notation on the first page of the contract is merely a scrivener's error. Notably, this Court permitted additional discovery on this issue and supplemental submissions during the pendency of this motion. Movants submitted the affidavit of Peter Cincu, Director of Information Technology for Sciame, verifying that Tony Cruz of Tri-State sent a copy of the contract signed by Tri-State to Sciame, and Sciame received this email at 6:54am on February 12, 2014.

Moreover, Sciame's failure to sign the contract itself is immaterial, as the parties ratified the contract through performance. *See Allen v Riese Org., Inc.*, 106 AD3d 514 [1st Dept 2013] [showing that "[r]atification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it" (internal citations omitted)]. Since the subject accident occurred on February 20, 2014, after Tri-State began performing under the contract, the contract was in effect and movants are entitled to contractual indemnification and defense. Indeed, Tri-State's insurer agreed to defend and indemnify Laight Street and Sciame in this accident (NYSCEF Doc. No. 124). Further, movants are entitled to attorneys' fees and defense costs associated with their defense of the underlying litigation. As this Court is finding that insurance existed at the time of the accident, Tri-State is entitled to dismissal of the failure to procure insurance claim. If the Court reached a different conclusion, Tri-State would not be entitled to the dismissal of this claim.

Next, as Tri-State failed to oppose movants' application seeking dismissal of its counter-claims for common-law indemnification and contribution this relief is granted.

Finally, the application seeking to strike Tri-State's answer and prohibit Tri-State from producing certain evidence at trial is denied as academic. If the Court was to reach the merits of the application, the motion would be denied as movants failed to demonstrate that Tri-State's conduct was "willful, contumacious, or in bad faith" that granting a motion pursuant to CPLR 3126 requires. *Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492 (1st Dept 2010).

Accordingly, it is hereby,

ORDERED that Defendants/Third-Party Plaintiffs Laight Street Fee Owner II LLC's and Sciame Construction, LLC's motion for summary judgment on defendants' claims for

contractual defense and indemnification against third-party defendant Tri-State Dismantling Corp. is granted, and it is further,

ORDERED that Defendants/Third-Party Plaintiffs Laight Street Fee Owner II LLC's and Sciame Construction, LLC's motion for summary judgment on defendants' breach of contract claim against third-party defendant Tri-State Dismantling Corp. is denied, and it is further,

ORDERED that Defendants/Third-Party Plaintiffs Laight Street Fee Owner II LLC's and Sciame Construction, LLC's motion for summary judgment, dismissing all of third-party defendant Tri-State Dismantling Corp.'s cross-claims and counter claims against defendants is granted, and it is further,

ORDERED that Defendants/Third-Party Plaintiffs Laight Street Fee Owner II LLC's and Sciame Construction, LLC's motion pursuant to CPLR 3126 to strike Tri-State's answer and prohibit Tri-State from producing certain evidence at trial is denied.

This constitutes the decision and order of the Court.



<u>8/15/2022</u> DATE					<u>JAMES D'AUGUSTE, J.S.C.</u>	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input checked="" type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	REFERENCE
					<input type="checkbox"/>	FIDUCIARY APPOINTMENT