

Christmann v BSF Realty LLC
2022 NY Slip Op 33265(U)
September 12, 2022
Supreme Court, Kings County
Docket Number: Index No. 502571
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 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 September, 2022.

P R E S E N T:

HON. KAREN B. ROTHENBERG
Justice.

-----X

DANIEL CHRISTMANN,

Plaintiff,

-against-

Index No.: 502571/18

BSF REALTY LLC, PARAMOUNT FRAMERS, INC., and
PARAMOUNT FRAMERS NY, INC.,

Defendants.

-----X

BSF REALTY LLC,

Third-Party Plaintiff,

-against-

WNW & SONS PLUMBING & HEATING, INC.,

Third-Party Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and Affidavits
(Affirmations) Annexed _____

246-276,283-295, 299-314

Opposing Affidavits (Affirmations) _____

279-282,315, 318-319, 322-
323, 337-340

Affidavits/ Affirmations in Reply _____

320,321,343, 344

Defendant BSF Realty LLC (BSF) moves (M.S.9) for an order, pursuant to CPLR 3211 and 3212, (1) granting summary judgment on its cross claims against defendants

Paramount Framers, Inc. (Paramount Inc.) and Paramount Framers NY, Inc., (Paramount NY); (2) dismissing all cross claims by Paramount Inc. and Paramount NY against BSF; (3) granting summary judgment to BSF on its third-party claims against third-party defendant WNW & Sons Plumbing & Heating, Inc. (WNW); (4) dismissing WNW's counterclaims against BSF; (5) ordering WNW and Paramount Inc. and Paramount NY to each pay BSF's attorney fees; and (6) for an order extending the time to move for summary judgment if Paramount asserts that the hold harmless agreements were fraudulent.

WNW cross-moves (M.S. 10) for an order, pursuant to CPLR 3212(a), granting summary judgment dismissing the complaint of plaintiff Daniel Christmann ("plaintiff"), as well as any and all cross claims and third-party claims against WNW as there exists no triable issue of material fact regarding WNW's liability.

Paramount NY moves (M.S.11) for an order (1) pursuant to CPLR 3212 (a) and Part C, paragraph 6, of this Court's Uniform Civil Term Rules, extending the time to move for summary judgment and (2) pursuant to CPLR § 3212, granting Paramount NY summary judgment dismissing all claims against it, including the cross claims of BSF and Paramount Inc., and counterclaims of WNW.

Facts

On January 2, 2018, while working as a project manager for WNW, plaintiff fell into an unguarded floor opening in the basement of premises located at 1536 52nd Street, Brooklyn, New York (the premises). The premises was owned by BSF and was undergoing renovations converting it into a synagogue/community center. BSF contracted with Paramount Inc. as the general contractor on the project, and Paramount Inc., in turn, hired

WNW to perform the plumbing work in the building. Plaintiff's accident occurred when he entered the mikvah room, proceeded into a closet, and took one step and fell into a pit/opening in the floor. According to plaintiff, prior to his accident, the floor in the closet area had been covered with sturdy plywood, and he never realized that the plywood was merely a temporary cover for the openings in the floor. He could not see the opening prior to falling because there was no lighting in the closet.

Plaintiff commenced an action against BSF to recover damages for his injuries sustained in the fall. He subsequently added defendants Paramount Inc. and Paramount NY to the action. In his amended complaint, plaintiff alleged Labor Law §§ 240(1), 241(6), 200 and common-law negligence claims. BSF subsequently commenced a third-party action against WNW for indemnification.

Discussion

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). If the moving party fails to make a prima facie showing the motion will be denied, regardless of the sufficiency of the non-movant's papers (*see Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]).

BSF's Motion (M.S 9)

BSF seeks summary judgment on its cross claims against Paramount Inc. and Paramount NY, and on its third-party claims against WNW. In its answer BSF asserted cross claims against Paramount Inc. and Paramount NY for common law indemnification, contribution, contractual indemnification and the failure to procure insurance. In its third-party action against WNW, BSF asserted the same claims. However, the court notes that BSF's motion only pertains to its contractual indemnification and breach of contract for failure to procure insurance claims against Paramount Inc., Paramount NY and WNW, and fails to address common law indemnification and contribution. Accordingly, this decision will address only those claims.

BSF's Cross Claims Against Paramount Inc. and Paramount NY

BSF argues that it entered into an agreement, dated August 3, 2017, pursuant to which it retained Paramount Inc. and/or Paramount NY to serve as general contractor on the project. Although only Paramount Inc.'s name is set forth in the contract, BSF contends that the two Paramount entities not only have similar names, but the principal (Martin Glauber) and corporate registry addresses are the same. BSF contends that it entered into hold harmless agreements with Paramount Framers¹ and that Paramount Framers knew that BSF required it and its subcontractors to enter into these agreements. In support of its motion, BSF submits a sworn affidavit from BSF owner, Yaakov Singer, in which he attests that although he never personally witnessed anyone on behalf of WNW or Paramount

¹ BSF refers to both Paramount Inc., and Paramount NY collectively as Paramount Framers.

Framers sign the hold harmless agreements, as the agreements were already signed when they were provided to him, but he believes both WNW and Paramount Framers agreed to hold BSF harmless and to indemnify BSF. Specifically, the contract between BSF, as the owner, and Paramount Inc., as the contractor, contained the following indemnification provision:

To the fullest extent permitted by law, the contractor [Paramount Framers, Inc.] shall indemnify and hold harmless the Owners [BSF] and managers and employee of either of them as well as any entity the owner it required to indemnify from and against claims, damages, losses and expenses, including but not limited to attorney's fees, *arising out of or resulting from performance of the contractors and Subcontractor's Work*, provided that such claim, damage, loss or expense is attributable to bodily injury . . . *cause in whole or in part by negligent acts or omissions of the contractor or Subcontractor*, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them . . . regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder (emphasis added).

The agreement also required Paramount Inc. to procure general liability and excess insurance (total of \$5,000,000), and name BSF as an additional insured under the primary policy (*id.*).

In opposition, Paramount NY argues that BSF's motion is procedurally defective as it lacks the required statement of undisputed facts pursuant to Uniform Rule 202.8-g. Although there is some authority for that position, there is no evidence that the non-compliance has prejudiced Paramount NY, and the court will excuse this failure under CPLR 2001 (*see Carino v Mertens*, 2022 NY Slip Op 50525(U) [Sup Ct, NY County 2022]; *Bah v City of New York*, 2022 NY Slip Op 31885(U) [Sup Ct, NY County 2022]; *Disarli v TEFAF N.Y., LLC*, 2022 NY Slip Op 30029 [U] [Sup Ct, Kings County 2022]; *Meserole Hub LLC v Rosenzweig*, 71 Misc 3d 1222[A], 2021 NY Slip Op 50463[U] [Sup Ct, Kings

County 2021]). The affirmation in support of the motion submitted by BSF's counsel includes a section entitled "Facts" with paragraphs numbered 19-28 delineating the facts supporting BSF's motion. Accordingly, the "court exercises its discretion to overlook such minor, nonprejudicial defects under CPLR 2001 and CPLR 2101" (*Birds & Bubbles NYC LLC v 100 Forsyth LLC*, 2022 NY Slip Op 50106(U), [Sup. Ct, NY County 2022]).

Paramount NY further argues that BSF's summary judgment motion should be dismissed as against it pursuant to CPLR 3215 (c) since plaintiff failed to seek a default judgment against said defendant within one year after its default in answering plaintiff's amended complaint. To the extent Paramount NY argues that the plaintiff's complaint and BSF's cross claims as against it should be dismissed as abandoned pursuant to CPLR 3215 (c), this issue was previously raised in its prior cross motion (mot. seq. no. 5), which was denied by Justice Knipel's March 23, 2021 order (NYSCEF Doc No. 241). That determination became law of the case thereby precluding this court's consideration of that issue (*see Fudge v North Shore–Long Is. Jewish Health Servs. Plainview & Manhasset Hosps.*, 117 AD3d 783, 785 [2d Dept 2014]; *Carbon Capital Mgt., LLC, v American Express Co.*, 88 AD3d 933, 935–936 [2d Dept 2011]).

As to the merits of BSF's motion as against Paramount NY, BSF has failed to establish, as a matter of law, that at the time of the accident, Paramount Inc. and Paramount NY were one and the same entity or were mere alter egos (*see generally Mauro v Zorn Realities, Inc.*, 206 AD3d 645 [2d Dept 2022; *see also Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1218-1219 [2d Dept 2019]; *Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d 594, 595 [2d Dept 2010] [holding that "[a] mere showing that the entities are related is

insufficient [to establish an alter ego relationship] where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other”]; *Salcedo v Demon Trucking, Inc.*, 146 AD3d 839, 841 [2d Dept 2017 [no alter ego relationship found where the entities served different purposes]; *Crespo v Pucciarelli, et al.*, 21 AD3d 1048,1049 [2d Dept 2003]; *Longshore v Paul Davis Sys. of the Capital Dist.*, 304 AD2d 964, 965 [3rd Dept 2003] [holding that “[c]losely associated corporations, even ones that share directors and officers, will not be considered alter egos of each other if they were formed for different purposes, neither is a subsidiary of the other, their finances are not integrated, assets are not commingled, and the principals treat the two entities as separate and distinct”]; *Thompson v Bernard G. Janowitz Constr. Corp.*, 301 AD2d 588, 589 [2d Dept 2003]).

BSF has also failed to establish that Paramount NY entered into any agreement pursuant to which it agreed to indemnify and hold harmless BSF or procure insurance for its benefit, inasmuch as the hold harmless agreement solely lists Paramount Inc. as the contractor that entered into the agreement with BSF. Thus, BSF has failed to establish that it is entitled to summary judgment on its contractual indemnity and breach of contract claims against Paramount NY, and summary judgment on its cross claims against Paramount NY is denied.

Paramount Inc.’s contractual duty to indemnify BSF can only be triggered where the claim arises out of the contracted work and where it was *caused in whole or in part by negligent acts or omissions of Paramount Inc. or its subcontractor*. Thus, Paramount Inc.’s contractual duty to indemnify can only be triggered by an a finding of negligence against it or its subcontractors, namely WNW. Here, the evidence demonstrates that there was no

active negligence on the part of BSF in the happening of the accident, as it had no part in the construction work at the site and any liability imposed upon it would be merely statutory. The agreement here provides that Paramount Inc. is obligated to defend and indemnify BSF for “bodily injury ... cause in whole or part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable.” BSF is entitled to summary judgment on the issue of contractual indemnification, but conditioned on a finding of negligence on the part of Paramount Inc. or one of its subcontractors by the trier of facts (*see Torres v Love Lane Mews, LLC*, 156 AD3d 410, 411 [1st Dept 2017]; *Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 930 [2d Dept 2016]; *Arriola v City of New York*, 128 AD3d 747, 749 [2d Dept 2015]; *Van Nostrand v Race & Rally Constr. Co., Inc.*, 114 AD3d 664, 667 [2d Dept 2014]).

As to that branch of BSF’s motion seeking attorneys’ fees, where, as here, the contract requires a finding of negligence on the part of the indemnifying party, it is premature. Accordingly, that branch of BSF’s motion seeking attorneys’ fees is denied.

Breach of Contract for Failure to Procure Insurance

BSF contends that, pursuant to the terms of the contract entered into between BSF and Paramount Inc., the latter was required to procure comprehensive general liability insurance naming BSF as an additional insured, and that it failed to do so. “A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with” (*Breland-Marrow*,

__ AD3d__ , 2022 NY Slip Op 04946 [2d Dept 2022], quoting *Rodriguez v Savoy Boro Park Assocs. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003]; *Bryde*, 61 AD3d at 909).

As to Paramount Inc., BSF has failed to submit any evidence that it failed to procure the requisite insurance. BSF's counsel avers in his affirmation that the Paramount entities have not agreed to defend and indemnify BSF, and therefore have violated the terms set forth in the hold harmless agreements. However, BSF has not provided any affidavit or other proof demonstrating that Paramount Inc.'s insurance carrier denied it coverage or that no liability insurance policy, in fact, was obtained. Since BSF has the burden of proof and has failed to demonstrate through the submission of any admissible evidence that Paramount Inc. did not procure insurance, BSF has not shifted the burden to Paramount Inc. to show it procured the requisite insurance. Accordingly, BSF's failure to make a prima facie showing of entitlement to summary judgment dismissing its cross claim for failure to procure insurance, requires a denial of that branch of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez*, 68 NY2d at 324; *Winegrad*, 4 NY2d at 853). Accordingly, that branch of BSF's motion seeking summary judgment on its cross claim against Paramount Inc. for breach of contract for failure to procure insurance is denied.

BSF's Third-Party Claims Against WNW

BSF, in its motion papers it only addresses the contractual claims. This court will only address BSF's contractual indemnification and breach of contract for failure to procure insurance claims asserted against WNW.

BSF contends that its contractual claims against WNW are based upon a two-page agreement between the parties, dated May 2, 2016, which includes the following provision:

Article 1.0: Indemnification: 1.1 To the fullest extent permitted by law, the Subcontractor (WNW) shall indemnify and hold harmless the Contractor and Owner (BSF), their agents and employee of either of them from and against claims, damages, losses, and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work, provided that such claim, damage, loss or expense is attributable to bodily injury, . . . ***cause in whole or in part by negligent acts or omissions of the Subcontractor [WNW]***, the Subcontractor's sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder (emphasis added).

The agreement also states that WNW is to procure general liability and excess insurance and name BSF as an additional insured under the primary policy. BSF acknowledges that WNW's owner, Zev Weintraub, testified that he did not recall signing the two page agreement or ever discussing indemnifying BSF but submits an affidavit from its owner, Singer, in which he affirms that "[w]hile I have no personal knowledge as to whether Weintraub did in fact execute the hold harmless agreement on behalf of WNW, I do know that he did see the hold harmless agreement prior to his deposition and that he did agree to it in writing via WhatsApp messaging between he and I"

BSF also claims that pursuant to an agreement between Paramount Inc. and WNW, denominated "STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND SUBCONTRACTOR", dated May 6, 2016, the WNW agreed to indemnify and hold harmless Paramount Inc. as well as BSF as the Owner and name them as additional insureds. The Agreement names Paramount Inc. as the contractor and WNW as the subcontractor. The language of the indemnity provision in the Standard Form is similar,

but not identical to that contained in the BSF/WNW Agreement. The indemnity provision in the Standard Form, in relevant part, provides:

To the fullest extent permitted by law, the Subcontractor [WNW] shall indemnify and hold harmless the Contractor [Paramount Framers Inc.] and Owner², their agents and employee of either of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work, provided that such claim, damage, loss or expense is attributable to bodily injury . . . cause in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Based upon the foregoing indemnity provisions, BSF maintains that it is entitled to contractual indemnification from WNW.

In opposition, WNW notes that during his deposition, when shown a copy of the hold harmless agreement between WNW and BFS, WNW's President Weintraub, could not recognize the document and was unsure if it was his signature on behalf of WNW. Weintraub also testified that he could not recall any prior discussions with Singer about contracts, agreements or indemnifying BSF and that he never told Singer that he would adopt an agreement for this project. With regard to the Standard Form Agreement between WNW and Paramount Inc., WNW notes that the signatures are not discernible, and further notes that both agreements fail to reference a project location (address) or to set forth the name of the owner. WNW argues that an issue of fact exists as to whether either indemnity

² The court notes that the term "Owner" is not defined or otherwise identified in the BSF/Paramount Framers Inc. agreement.

provision has been triggered as there is no evidence that plaintiff's accident was caused by WNW's negligence.

Here, the court finds that an issue of fact has been raised as to whether WNW entered into an agreement to indemnify BSF. In this regard, BSF's representative and member, Singer conceded that he has no personal knowledge as to whether Weintraub did in fact execute the hold harmless agreement on behalf of WNW, and instead relies upon "WhatsApp" messaging as evidence that Weintraub consented to the hold harmless which conflicts with Weintraub's deposition testimony. The court cannot resolve issues of credibility; they must be decided by the jury who can weigh the evidence. Additionally, the Standard Form agreement does not identify who the "Owner" is and fails to reference any jobsite or ongoing work.

Under the circumstances presented herein, questions of fact exist as to whether an agreement was reached whereby WNW agreed to be obligated to indemnify BSF and procure insurance for BSF (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Staub v William H. Lane, Inc.*, 58 AD3d 933,935 [3d Dept 2009]). Moreover, the issue of negligence has yet to be determined and BSF has failed to establish that the accident was caused by any negligence or omission on the part of WNW. Summary judgment, therefore, summary judgment on the third-party claims for contractual indemnification and breach of contract for failure to procure insurance is denied.

Additionally, the court notes that BSF has failed to make a prima facie showing that WNW failed to comply with its obligation to obtain insurance which covered BSF. The blanket additional insured endorsement, which provided coverage to any person or

organization “as required by written contract,” is sufficient to demonstrate that WNW acquired the necessary coverage notwithstanding the fact that the Colony policy did not specifically list BSF’s name in the endorsement (*see 77 Water St., Inc. v JTC Painting & Decorating Corp.*, 148AD3d1092[2dDept2017]; *Perez v Morse Diesel Intern. Inc.*, 10 AD3d 497, 498 [2004]). Moreover, the fact that WNW’s insurance carrier has refused BSF’s tender does not demonstrate that WNW is in breach (*see Arner v RREEF Am., L.L.C.*, 121 AD3d 450 [1st Dept 2014]) Accordingly, that branch of BSF’s motion seeking judgment in its favor on its third-party claims based upon contractual indemnification and breach of contract against WNW is denied.

All Cross Claims and Counter Claims Against BSF

Both WNW and Paramount Inc. have asserted common law indemnity, contribution and contractual indemnity claims against BSF. The cross claims and counter claims by Paramount Inc. and WNW for common law indemnification and contribution against BSF are hereby dismissed as there is no evidence in the record that BSF had the authority to supervise and control plaintiff’s work, or that it had actual or constructive notice of the alleged defective condition (uncovered floor opening) that caused the plaintiff’s injuries. In this regard, Singer, testified that he occasionally visited the site to check on progress and had been in the basement a few weeks prior to the plaintiff’s accident where he observed that the mikvah pit opening was covered with plywood, that a half door made of plywood blocked entrance into the area, and that a locked door prevented random access into the mikvah room. He did not know who removed the plywood floor covering or the half door prior, but the general contractor was responsible for placing same and had the

keys to the door that led to the mikvah area. There is no evidence that BSF either supervised or controlled plaintiff's work or had notice of any alleged dangerous condition at the work site, any claims against BSF for common-law indemnity and contribution are dismissed (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]; *Kanarvogel v Tops Appliance City, Inc.*, 271 AD2d 409, 411 [2d Dept 2000]; *Lipari v AT Spring, LLC*, 92 AD3d 502, 504 [1st Dept [2012]]). In addition, all cross claims and counterclaims for contractual indemnity as against BSF are also dismissed as the record is devoid of any agreement pursuant to which BSF agreed to indemnify either Paramount Inc. or WNW.

WNW'S Cross Motion (M.S. 10)

WNW seeks summary judgment dismissing plaintiff's complaint as well as all cross claims and third-party claims against it. Paramount Inc. asserted cross claims for indemnification, contribution, defense, and reimbursement of attorney fees due to alleged breach of contract, *inter alia*, as against WNW. Also, BSF maintains third-party claims as against WNW for indemnification, contribution, defense, and reimbursement of attorney fees due to alleged failure to procure insurance.

As an initial matter, the court notes that WNW's cross motion is untimely as it was filed on May 19, 2021, which was more than 60 days after the note of issue was filed (February 12, 2021). However, an untimely motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds. Here, except for the branch of WNW's cross motion which

seeks to dismiss plaintiff's complaint in its entirety³, the grounds for the cross motion are "nearly identical" to those in BSF's main motion. Accordingly, the court will consider WNW's cross motion as it pertains to the indemnity, contribution and failure to procure insurance claims. As discussed in detail above, issues of fact exist regarding whether WNW entered into an agreement with BSF requiring it to indemnify BSF and to procure insurance for its benefit. That branch of WNS' cross motion seeking summary judgment dismissing said claims is denied. Similarly, an issue of fact exists regarding whether WNW entered into a hold harmless agreement with Paramount Inc. and whether such indemnity provision was triggered. Accordingly, that branch of WNW's cross motion seeking summary judgment dismissing Paramount Inc's cross claims for contractual indemnity and attorneys' fees is denied. Moreover, even assuming WNW entered into the hold harmless agreements, there has been no showing that said accident was caused by any negligence or omission on the part of WNW.

WNS' cross moves seeking summary judgment dismissing the cross claims for common law indemnity. "In order to establish a claim for common-law indemnification, a party must prove not only that [it was] not negligent, but also that the proposed indemnitor . . . was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the

³ The court notes that pursuant to this court's order, dated September 24, 2021, summary judgment was granted in plaintiff's favor against BSF and Paramount Inc. as to his Labor Law § 240 (1) cause of action. Plaintiff did not assert claims against WDW, thus this branch of its motion, had it been timely, would have been denied as moot.

injury" (*Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118-1119 [2d Dept 2011]; *see Buffardi v BJ's Wholesale Club, Inc.*, 191 AD3d 833, 834 [2d Dept 2021]).

Workers' Compensation Law §11 prohibits third-party indemnification claims against a plaintiff's employer unless the claim is "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution or indemnification of the [third-party plaintiff]" (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 367, *rearg. denied* 5 NY3d 746 [2005]). Moreover, common law indemnification and contribution claims are statutorily barred against an employer in the absence of a grave injury (*see Workers' Compensation Law § 11; Fleming v Graham*, 10 NY3d 296, 299 [2008]; *Ironshore Indem., Inc. v W&W Glass, LLC*, 151 AD3d 511, 512 [1st Dept 2017]; *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004] Here it is undisputed that plaintiff did not sustain a grave injury. Accordingly, in the absence of a "grave injury", that branch of WNW's cross motion seeking summary judgment dismissing the third-party causes of action seeking common-law indemnification and contribution against WNW is granted and said claims are dismissed.

Paramount NY's Motion (M.S. 11)

Paramount NY moves for an order extending the time to move for summary judgment, and for an order dismissing all claims asserted against it, including the cross claims of BSF and Paramount Inc. and the counterclaims of WNW.

As an initial matter, the court grants that branch of Paramount NY's motion seeking an extension of time to file the instant motion. Plaintiff filed his note of issue on February

12, 2021. Pursuant to Part C, paragraph 6, of this Court’s Uniform Civil Term Rules, the 60-day time period to move for summary judgment expired on April 13, 2021. Here, Paramount NY was not deposed until May 6, 2021, and its answer to plaintiff’s amended complaint was not served until May 21, 2021. Under these circumstances, the court finds that Paramount NY has demonstrated “good cause” for the delay in filing its summary judgment motion (*see Brill v City of New York*, 2 NY3d 648, 652 [2004]; *Khan v Macchia*, 165 AD3d 637, 638 [2d Dept 2018]).

Paramount NY argues that it is not liable for any claims arising out of plaintiff’s accident because it is a separate and distinct entity from Paramount Inc. and was not a signatory to any contracts pertaining to the work being performed at the premises. Paramount NY notes that BSF entered into a contract with Paramount Inc. In support of its motion, Paramount NY submits the affirmation of Martin Glauber, wherein he affirms that he is the President of Paramount NY and that said corporation had no involvement with the jobsite on which plaintiff’s accident occurred as it was neither the owner, general contractor, nor a subcontractor at the site. Although he was at one time affiliated with Paramount Inc., the two Paramount entities are two distinct corporations. Paramount NY has also submitted copies of New York Secretary of State records which indicate that the two Paramount entities were separately formed on different dates.

Here, the court finds that the affidavit by Glauber is sufficient *as prima facie* proof that Paramount NY is a separate legal entity from Paramount Inc. that was not involved with the renovation project at issue, and thus is without a nexus to this accident.

Accordingly, Paramount NY has established its prima facie entitlement to summary judgment dismissing all claims and cross claims asserted against it.

In opposition, BSF argues that Paramount NY's motion should be denied as it is untimely, purports to rely upon a Glauber's deposition transcript, which is not attached to the motion, and that the Glauber affidavit submitted in support of the motion should be disregarded pursuant to Judge Knipel's preclusion order. Additionally, BSF asserts that Glauber's affidavit is devoid of any factual information and is insufficient to support the motion. Moreover, BSF contends that issues of fact regarding the relationship between Paramount NY and Paramount Inc. preclude the granting of Paramount NY's motion.

WNW also opposes the motion, arguing that it should be denied as issues of material fact exist regarding the relationship between the Paramount entities. In this regard, WNW points to Glauber's testimony on behalf of Paramount NY. Specifically, Glauber testified that he has been the President of Paramount NY since 2017, and had also been the President of Paramount Inc., but that he stopped working for Paramount Inc. in August 2017. WNW further points to his testimony that after leaving Paramount Inc. he continued to go to the premises and provide advice on the project to Singer (*id* at p.17, lines 19-25; p.18, lines 2-21). WNW asserts that Glauber was president of Paramount Inc. at the time that it entered into the contract with BSF to serve as the general contractor for the project at issue, and after he ended his relationship with Paramount Inc. and had formed Paramount NY, he continued to visit the site and provide advice to BSF. Thus, WNW maintains that there is a genuine issue of material fact as to whether Paramount NY, through the action of its

President and sole member, Glauber, took over as the general contractor for this project, thereby precluding summary judgment in Paramount NY's favor.

The plaintiff has not opposed Paramount NY's motion, and thus summary judgment dismissing plaintiff's claims against Paramount NY is granted and said claims are dismissed. Additionally, Paramount Inc. has not opposed Paramount NY's motion. However, as Paramount Inc. failed to appear for a court ordered deposition and is precluded from testifying at trial or offering any affidavits in support of or in opposition to a dispositive motions. Accordingly, Paramount NY's motion seeking dismissal of any cross claims asserted against it by Paramount Inc. is granted and said claims are dismissed.

The court finds no merit to BSF's argument that Paramount NY's motion purports to rely upon Glauber's deposition transcript, which is not attached to the motion, as there is no reference in the motion papers to Glauber's deposition testimony and relies solely on Glauber's affidavit. Moreover, Glauber was deposed on behalf of Paramount NY and it was not precluded from offering an affidavit in support of its motion. Neither BFS nor WNS have raised an issue of fact sufficient to defeat the motion. The fact that Glauber was at some point affiliated with both Paramount Framers entities is not evidence that the companies were intertwined or controlled each other and does not warrant denial of the summary judgment motion (*see Mauro*, 206 AD3d at 645; *Salinas*, 170 AD3d at 1218-1219; *Salcedo*, 146 AD3d at 841; *Samuel*, 75 AD3d at 595; *Crespo*, 21 AD3d at 1049; *Longshore*, 304 AD2d at 965; *Thompson*, 301 AD2d at 589). Accordingly, plaintiff's complaint and all cross claims against Paramount NY are dismissed.

Accordingly, it is hereby

ORDERED that branch of BSF's motion seeking summary judgment on the issue of contractual indemnification as against Paramount Inc. is granted conditionally upon on a finding of negligence on the part of Paramount Inc. or one of its subcontractors by the trier of facts; that branch of BSF's motion seeking dismissal of all cross claims and counter claims by Paramount Inc. and WNW for common law indemnification, contribution, and contractual indemnity as against BSF is granted and said claims are dismissed; the remaining branches of BSF's motion are denied; and it is further

ORDERED that the branch of WNW's cross motion seeking summary judgment dismissing BSF's third-party claims for contractual indemnification and breach of contract for failure to procure insurance is denied; that branch seeking summary judgment dismissing all common law indemnification and contribution claims asserted against WNW is granted and said claims are dismissed; that branch of WNW's cross motion seeking summary judgment dismissing Paramount Inc.'s cross claims for contractual indemnity and attorneys' fees against it is denied; and it is further

ORDERED that Paramount NY's motion is granted in its entirety.

The forgoing constitutes the decision, order and judgment of the court.

E N T E R,



Hon. Karen B. Rothenberg
J. S. C.