

DiCrescento v FPG CH 350 Henry, LLC
2022 NY Slip Op 33719(U)
October 31, 2022
Supreme Court, Kings County
Docket Number: Index No. 514226/18
Judge: Robin S. Garson
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At an IAS Term, Part 75 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 31st day of October, 2022.

P R E S E N T:

HON. ROBIN S. GARSON,

Justice.

-----X
JOHN DiCRESCENTO,

Plaintiff,

-against-

Index No.: 514226/18

FPG CH 350 HENRY, LLC and FORTIS
PROPERTY GROUP, LLC,

Defendants.

-----X

Decision and Order
Mot. Seq. 14. 15. 16

FPG CH 350 HENRY, LLC and FORTIS
PROPERTY GROUP, LLC,

Third-Party Plaintiffs,

-against-

ICS BUILDERS, INC., BIG APPLE DESIGNERS, INC.
and HEADQUARTERS MECHANICAL, INC.,

Third-Party Defendants.

-----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 _____
Opposing Affidavits/Answer (Affirmations) _____
Affidavits/ Affirmations in Reply _____
Other Papers: _____

556-557, 576, 580-583,
589, 591, 597, 603-604
620, 628, 640, 647
648, 649, 650

Upon the foregoing papers, third-party defendant ICS Builders, Inc., (ICS) moves for an order: (1) pursuant to CPLR 2221, renewing the portion of its prior motion for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the third-party common-law indemnification and contribution claims against it; and (2) pursuant to CPLR 3212, granting it summary judgment dismissing all cross claims as against it (motion [mot.] sequence [seq.] number [no.] 14). Third-party defendant Big Apple Designers, Inc., (Big Apple) moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the third-party complaint and all cross claims as against it (mot. seq. no. 15). Third-party defendant Headquarters Mechanical, Inc., (Headquarters), moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the third-party complaint and all cross claims as against it (mot. seq. no. 16).

ICS's motion (mot. seq. no. 14) is granted, and the third-party common-law indemnification and contribution claims are dismissed as against it and the cross claims are dismissed as against it.

Big Apple's motion (mot. seq. no. 15) is granted and the third-party claims and cross claims against it are dismissed.

Headquarters' motion (mot. seq. no. 16) is granted and the third-party claims and cross claims against it are dismissed.

In view of the foregoing, the action is severed accordingly and the caption is

amended to read as follows:

-----X
JOHN DICRESCENTO,

Plaintiff,

-against-

Index No.: 514226/18

FPG CH 350 HENRY, LLC and FORTIS
PROPERTY GROUP, LLC,
Defendants.

-----X
FPG CH 350 HENRY, LLC and FORTIS
PROPERTY GROUP, LLC,

Third-Party Plaintiffs,

-against-

ICS BUILDERS, INC.,

Third-Party Defendant.

-----X

Background

In this action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6), plaintiff John DiCrescento alleges that he suffered personal injuries on July 2, 2018, when he fell through an opening in a floor of a building under construction to the floor below. Defendant/third-party plaintiff FPG CH 350 Henry, LLC (FPG) was the owner of the premises and defendant/third-party plaintiff Fortis Property Group, LLC (Fortis), a property developer, acted as FPG's representative (FPG and Fortis are collectively referred to as the Fortis Defendants). On July 5, 2016, FPG, with Fortis acting as its representative, hired ICS to act as its construction manager on a project to perform a gut renovation of the building that was formerly part of the Long

Island College Hospital in order to convert it into a residential apartment building. Thereafter, ICS hired Big Apple to perform interior framing/carpentry work and Headquarters to perform plumbing work on the project. At the time of the accident, plaintiff was employed by ICS as a laborer.

According to plaintiff's deposition testimony, at some point on July 2, 2018, an ICS supervisor instructed plaintiff, who had been working for ICS for approximately two weeks, to use a grinder to cut a cable that was wrapped around or coming out of the stairs that went from the 9th floor to the 8th floor. Just before plaintiff started to cut the cable, the ICS supervisor asked plaintiff to move an approximately three-foot by six-foot piece of plywood that was on the floor near the staircase. This piece of plywood was neither painted nor nailed down and there were no warning signs nearby. After lifting the plywood and turning it on its side, plaintiff took a step and fell 12 feet through an opening in the floor to the floor below.

Plaintiff commenced this action against the Fortis Defendants on July 12, 2018, with the filing of the summons and complaint. The Fortis Defendants joined issue with an answer dated August 14, 2018, and thereafter commenced the third-party action on August 13, 2019, which ICS answered on October 15, 2019, Big Apple answered on December 5, 2019 and Headquarters answered on February 18, 2020. Plaintiff first filed a note of issue on December 19, 2019, however, the court, in an order dated January 29, 2020, vacated this note of issue. Although a significant amount of the remaining discovery was completed as of August 2021, depositions of Big Apple and Headquarters and plaintiff's medical examinations had yet to be held. The court, in an order dated

August 26, 2021, directed that the medical examinations be held within 90 days thereafter and extended plaintiff's time to file a note of issue until April 29, 2022. The respective medical examinations took place in late September through mid-October 2021, and plaintiff filed the note of issue on November 8, 2022. In an order dated December 20, 2021, the court denied motions by Big Apple and the Fortis Defendants to vacate the note of issue and extend the time to move for summary judgment but nevertheless directed Big Apple to appear for a deposition to be held on or before January 17, 2022. A witness for Big Apple finally appeared for a deposition on January 24, 2022.

In a decision and order dated July 24, 2020, the court addressed plaintiff's motion for partial summary judgment with respect to liability on his Labor Law §§ 240 (1) and 241 (6) causes of action and a motion by ICS for summary judgment dismissing the third-party complaint. The court granted plaintiff's motion with respect to his section 240 (1) cause of action and on his section 241 (6) cause of action to the extent it was premised on Industrial Code section 12 NYCRR 23-1.7 (b) (1) (i) and granted ICS's motion to the extent that it dismissed the breach of contract for failure to procure insurance claim and, based on the antissubrogation rule, it dismissed the third-party common-law and contractual indemnification claims only to the extent that any award to plaintiff is payable from shared insurance policies. However, the court denied the portion of ICS's motion seeking dismissal of the common-law indemnification and contribution claims based on the exclusive remedy provisions of Workers' Compensation Law §§ 11 and 29. This denial was based solely on a finding that ICS had failed to demonstrate, prima facie, that plaintiff did not sustain a "grave injury" within the meaning of Workers'

Compensation Law § 11. In so finding, the court noted that ICS had relied exclusively on plaintiff's deposition testimony and the injury allegations contained in plaintiff's bill of particulars, which included allegations of brain injury. Additionally, the court noted that no discovery relevant to the third-party action had taken place at that time. Despite the denial, the court made express findings that that ICS had obtained workers' compensation insurance and that plaintiff was an ICS employee who had requested and obtained workers' compensation benefits relating to the accident.

Discussion

ICS's Motion

ICS is entitled to renewal of the portion of its prior summary judgment motion seeking dismissal of the Fortis Defendants' common-law indemnification and contribution claims against it. ICS made its prior motion only eight days after it joined issue in the third-party action and at a time when there had been no discovery in the third-party action. ICS has reasonably explained that it made its initial motion despite the absence of such discovery based on its belief, which proved incorrect, that it could establish its prima facie showing through plaintiff's bill of particulars and his deposition testimony (*see Owens v Jea Bus Co., Inc.*, 161 AD3d 1188, 1190 [2d Dept 2018]; *Maxwell v Rockland County Community Coll.*, 78 AD3d 793, 794 [2d Dept 2010]; *Marshall v Arias*, 12 AD3d 423, 424 [2d Dept 2004]; *cf. Galindo v Dorchester Tower Condominium*, 56 AD3d 285, 286 [1st Dept 2008]; *see also O'Flaherty v Columbo*, 202 AD3d 509, 510 [1st Dept 2022]; *Rampersaud v Hsieh Hsu Mach. Co., Ltd.*, 196 AD3d 609, 612 [2d Dept 2021]). In addition, the affirmed medical examination reports that ICS

currently relies upon to demonstrate that plaintiff did not suffer a grave injury were based on examinations that were conducted in late September through mid-October 2021 and only became available not long before the instant motion. Renewal is warranted here because this recently obtained discovery establishes facts that were not available at the time of ICS's initial motion and that could not have been established at that time through alternative evidentiary means (*see Han v Brighthouse Life Ins. Co. of N.Y.*, 192 AD3d 421, 422 [1st Dept 2021]; *Toledo v Ordway*, 178 AD2d 409, 411 [2d Dept 1991]; *see also Colantonio v Mercy Med. Ctr.*, 135 AD3d 686, 689 [2d Dept 2016], *lv denied* 28 NY3d 903 [2016]; CPLR 2221 [e]; *cf. Vinar v Litman*, 110 AD3d 867, 868-869 [2d Dept 2013]).

On renewal, it is undisputed that plaintiff was employed by ICS. While the Fortis Defendants assert that ICS has failed to demonstrate that it obtained the requisite workers' compensation insurance, the court's finding in the July 24, 2020 decision that ICS obtained such coverage was necessary to the portion of the decision that granted ISC summary judgment dismissing the Fortis Defendants' breach of contract claim for failing to procure insurance and thus constitutes the law of the case (*see Ahrorgulova v Mann*, 144 AD3d 953, 955 [2d Dept 2016]; *Tedesco v Tedesco*, 64 AD3d 583, 584 [2d Dept 2009]).

Even if the law of the case did not require this finding, ICS has demonstrated, *prima facie*, that it obtained the requisite insurance coverage. In addition to the affidavit from O'Rourke, ICS's principal in which he asserts that ICS obtained the required workers' compensation coverage and to which he appended a copy of the policy that was

maintained in the regular and ordinary course of ICS's business, ICS has provided plaintiff's deposition testimony in which he stated that he applied for and obtained workers' compensation benefits. The Fortis Defendants have submitted no evidentiary proof demonstrating a factual issue in this respect.

The only remaining issue is whether plaintiff suffered a grave injury within the meaning of Workers' Compensation Law § 11. This court finds that the affirmed medical reports submitted by ICS demonstrate, prima facie, that plaintiff did not suffer a grave injury within the meaning of Workers' Compensation Law § 11.¹ Although plaintiff undoubtedly suffers restrictions in use of some body parts, the reports and plaintiff's own deposition testimony demonstrate that none of the restrictions arise to a total loss of use of an arm, leg, hand or foot. Likewise, while plaintiff, in his bill of particulars, alleges that he suffered a brain injury and while he testified regarding issues relating to that head injury at his deposition, the reports challenge plaintiff's assertion that he suffered a traumatic brain injury, and, more importantly, demonstrate, prima facie, that plaintiff is employable in at least some capacity. As a brain injury only constitutes a "grave injury" if the plaintiff is rendered "unemployable in any capacity" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 417 [2004]), defendants' proof is sufficient to demonstrate, prima facie, that plaintiff did not suffer a grave injury (*Clarke v Empire Gen. Contr. &*

¹ Workers' Compensation Law § 11 states that "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."

Painting Corp., 189 AD3d 611, 612-6123 [1st Dept 2020]; *Grech v HRC Corp.*, 150 AD3d 829, 830-831 [2d Dept 2017]).

In opposition, the Fortis Defendants assert that an affirmed report from plaintiff's psychiatrist, dated October 16, 2018, demonstrates factual issues with respect to whether plaintiff suffered a qualifying brain injury. In the report, the psychiatrist asserted that a neuropsychological screening supported a diagnosis of a traumatic brain injury and the psychiatrist made a finding that plaintiff suffered from a "total psychiatric disability." The psychiatrist, however, did not specifically address whether plaintiff was "unemployable in any capacity," he prepared this report only three months after the accident, and he expressly stated that the permanency of the disability and prognosis were "undetermined at this time." This preliminary report, prepared three years prior to the reports prepared by the doctors retained by defendants and the third-party defendants, fails to demonstrate the existence of a factual issue with respect to whether plaintiff is unemployable in any capacity (*see Clarke*, 189 AD3d at 612-613; *Alulema v ZEV Elec. Corp.*, 168 AD3d 469, 470 [1st Dept 2019]; *Aramburu v Midtown W. B. LLC*, 126 AD3d 498, 501 [1st Dept 2015]). Accordingly, ICS is entitled to dismissal of the common-law indemnification and contribution claims against it based on the exclusive remedy provisions of Workers' Compensation Law §§ 11 and 29 (6) (*see McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1097 [2d Dept 2018]; *Owens*, 161 AD3d at 1190).

With respect to the portion of its motion addressed to the cross claims of Big Apple and Headquarters, ICS has demonstrated, *prima facie*, that the contribution and common-law indemnification claims are barred by the exclusive remedy provision of the

Workers' Compensation Law (*see McDonnell*, 165 AD3d at 1097; *Owens*, 161 AD3d at 1190). ICS has also, demonstrated, prima facie, that the contracts between ICS and Big Apple and Headquarters have no indemnification or insurance procurement provisions favoring Big Apple or Headquarters. As such, ICS has demonstrated, prima facie, its entitlement to dismissal of the cross claims for contractual indemnification and breach of contract for failing to procure insurance (*see Desena v North Shore Hebrew Academy*, 119 AD3d 631, 636 [2d Dept 2014]). Since neither Big Apple nor Headquarters opposed ICS's motion, ICS is entitled to dismissal of Big Apple and Headquarters' cross claims.

Big Apple's Motion

Big Apple asserts that it is entitled to dismissal of the third-party complaint and the cross claims because it was a subcontractor with no supervisory authority over the jobsite and because it was not involved in the injury producing work. In support of its assertions, Big Apple submits the deposition testimony of John Kumi, a supervisor who worked for Headquarters, who stated that, approximately a week before the accident, an opening in the floor through which plaintiff later fell was cut in order to allow the installation of a custom shower. Kumi, who was at the jobsite on a daily basis, stated that he observed the work as it was being performed and that it was ICS's workers who performed this work and who placed the piece of plywood over the opening. According to Kumi, this single sheet of plywood, which was not nailed down, which was not marked with any warnings, and which was not surrounded with a barrier or cones, remained the only protection over the hole until the time of the accident. When asked how he knew the workers performing the work were employed by ICS, Kumi stated that he observed that

the workers were wearing vests with “ICS” on them and that he observed them performing this work in the presence of ICS’s supervisors on the jobsite. In addition, Kumi stated that he saw these workers at the jobsite on a daily basis performing cleaning and demolition work, which work is consistent with the duties plaintiff and John O’Rourke, ICS’s president, testified were performed by ICS’s laborers on the project.

Big Apple was undisputedly hired by ICS as a subcontractor to perform framing and carpentry work and nothing in its contract with ICS suggests that Big Apple’s work on the project would have involved the creation or covering of the opening at issue, that Big Apple had any overall supervisory authority at the project or that its site safety responsibilities extended beyond responsibility for safety relating to its own work and workers. Nor does anything in O’Rourke’s testimony suggest that Big Apple had assumed broader responsibilities during the project. Notably, O’Rourke stated that the opening at issue was a modification to the original construction plans based on changes requested by the person purchasing the unit. Although O’Rourke testified that he did not think ICS workers would have performed the work in making the opening and covering it because such work was beyond the skillset of its laborers on the project, this testimony fails to demonstrate a factual issue regarding who performed the work since his testimony also demonstrates that he had no personal knowledge regarding the actual performance of the work relating to the opening. This court finds that this evidence, considered together, is sufficient to demonstrate, prima facie, that Big Apple did not supervise or control the injury producing work, had no safety responsibilities with respect to the opening at issue, and that its work did not relate to the opening or the covering of the opening.

In view of this showing that it did not supervise or control the injury producing work and that its work did not relate to the opening, Big Apple has demonstrated its prima facie entitlement to dismissal of the common-law indemnification and contribution claims against it (*see Debenedetto v Chetrit*, 190 AD3d 933, 939 [2d Dept 2021]; *Cutler v Thomas*, 171 AD3d 860, 861-862 [2d Dept 2019]; *Kane v Peter M. Moore Constr. Co., Inc.*, 145 AD3d 864, 869 [2d Dept 2016]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]). Based on this evidentiary showing, Big Apple has also demonstrated, prima facie, that it is entitled to dismissal of the contractual indemnification claims of the Fortis Defendants and ICS because plaintiff's injuries cannot be deemed to have been caused by, result from or arise out of or occur in connection with Big Apple's execution of its work within the meaning of the indemnification provision contained in ICS's contract with Big Apple (*see Basile v Legacy Yards Tenant LP*, 205 AD3d 531, 531 [1st Dept 2022]; *Pereira v Hunt/Bovis Lend Lease Alliance II*, 193 AD3d 1085, 1090-1091 [2d Dept 2021]; *Naupari v Murray*, 163 AD3d 401, 402 [2d Dept 2018]).

Big Apple has also demonstrated its prima facie entitlement to dismissal of the breach of contract to procure insurance claims based on its showing that the accident did not arise out of its work. Although the language of the insurance procurement provision of ICS's contract with Big Apple does not expressly limit Big Apple's insurance procurement duties to coverage arising out of its work, such a limitation must generally be deemed applicable to a subcontractor's insurance procurement responsibilities. Indeed, any other reading of such provisions would lead to the absurd result that a

subcontractor with only minimal control over the risks involved in a project would essentially be required to obtain the primary insurance for the entire project (see *Greater N.Y. Mut. Ins. Co. v Mutual Mar. Off.*, 3 AD3d 44, 49-50 [1st Dept 2003]; *Reape v New York News*, 122 AD2d 29, 30-31 [2d Dept 1986], *lv denied* 68 NY2d 610 [1986]; see also *Giray v Ulukaya*, 192 AD3d 453, 453-454 [1st Dept 2021]; *Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170, 171 [1st Dept 2003]; cf. *Kinney v G.W. Lisk Co.*, 76 NY2d 215, 218-219 [1990]). Such an intent to limit the additional insured requirements is also conclusively shown by the language in the contract requiring a “Broad Form additional insured endorsements as Broad CG2010 11/85 or its equivalent.” A “CG2010 11/85” endorsement is a standard additional insured endorsement that provides coverage for the additional insured where the accident arises out of a named insured’s work on a project (see *First Liberty Ins. Corp. v Selective Ins. Co. of the Southeast*, 2022 WL 1557269[U], *1 n1 [ED Pa 2022]; *Krastanov v K. Hovnanian/Shore Acquisitions, LLC*, 2008 WL 2986475[U], *6 [NJ App Div 2008], *cert denied* 198 NJ 311, 966 A2d 1077 [2009]; *Pardee Constr. Co. v Insurance Co. of the West*, 77 CalApp4th 1340, 1356-1360, 92 CalRptr.2d 443, 454-457 [Cal Ct App 2000]). Big Apple has thus demonstrated its prima facie entitlement to dismissal of the insurance procurement claim even though it has submitted no evidence that it obtained the coverage required by the contract since any failure in obtaining such coverage “would not have resulted in any damages, as coverage was not triggered because plaintiff’s claims did not arise out of [Big Apple’s] ‘operations’ or work” (*Nicholson v Sabey Data Ctr. Props., LLC*, 205 AD3d 620, 622 [1st Dept

2022]; see *New York City Hous. Auth. v Merchants Mut. Ins. Co.*, 44 AD3d 540, 542 [1st Dept 2007]).

The Fortis Defendants' assert, however, that the motion must be denied because Big Apple failed to attach all of the pleadings in this action to its motion papers. The court finds this argument unavailing because all of the pleadings are before the court through the motions of ICS and Headquarters. In addition, the Fortis Defendants, cannot be deemed to have been prejudiced because the missing answers of ICS and Headquarters have no bearing on the Fortis Defendants' third-party claims against Big Apple (see *Sensible Choice Contr., LLC v Rodgers*, 164 AD3d 705, 706-707 [2d Dept 2018]; *Mew Equity, LLC v Sutton Land Servs., LLC*, 144 AD3d 874, 877 [2d Dept 2016]; CPLR 2001)).

The Fortis Defendants also assert that Big Apple has failed to demonstrate its prima facie entitlement to summary judgment in this regard, because, among other reasons, Kumi's deposition transcript submitted by Big Apple was unsigned and unsworn. The court, however, finds that Big Apple's submission of the unsigned transcript is not a bar to its consideration here. Notably, since Headquarters, by submitting a copy of the unsigned transcript in support of its own motion, has adopted the transcript as accurate, the transcript may be considered despite the fact that it is unsigned (see *Farquharson v United Parcel Serv.*, 202 AD3d 923, 924 [2d Dept 2022]; *E.W. v City of New York*, 179 AD3d 747, 747-748 [2d Dept 2020]; *Nisanov v Khulpateea*, 137 AD3d 1091, 1094 [2d Dept 2016]). In addition, the transcript may be considered because it has been certified as accurate by the stenographer and its accuracy has not been challenged

(see *Yerry v Whole Food Mkt. Group, Inc.*, 208 AD3d 733, 734 [2d Dept 2022]; *Celestin 40 Empire Blvd., Inc.*, 168 AD3d 805, 808 [2d Dept 2019]; *Thomas v City of New York*, 124 AD3d 872, 873 [2d Dept 2015]).

The court likewise rejects the Fortis Defendants' contention that the copy of Big Apple's contract with ICS may not be considered because it has not been properly authenticated. In this regard, Big Apple has submitted the deposition testimony of O'Rourke, who identified his signature on the contract and identified the document presented to him as the contract between Big Apple and ICS (see *Galeno v Everest Scaffolding, Inc.*, 202 AD3d 433, 435 [1st Dept 2020]; *Global Montello Group Corp. v Bronx Auto Tire, Inc.*, 184 AD3d 494, 495 [1st Dept 2020]; *DeLeon v Port Auth. of N.Y. & N.J.*, 306 AD2d 146, 146 [1st Dept 2003]; *Fields v S&W Realty Assoc.*, 301 AD2d 625, 625 [2d Dept 2003]). Although Big Apple has not submitted evidence regarding signature of the person who signed for Big Apple, by submitting the copy of the contract in support of the motion, Big Apple has conceded the authenticity of the signature of the person who signed on its behalf (see *Farquharson*, 202 AD3d at 924; *E.W.*, 179 AD3d at 747-748). Moreover, the Fortis Defendants have not substantively challenged the authenticity of the document or the signatures therein and, in other papers filed with the court, have identified the same document as the contract between ICS and Big Apple. Indeed, it is the same document on which the Fortis Defendants rely in support of their contractual indemnification and breach of contract for failing to procure insurance claims as against Big Apple (see *Kanska-Kiewit-Ecco v Coastal Environmental Group Inc.*, 2020 WL 7779123[U], *3 [Sup Ct, Queens County 2020]).

As the Fortis Defendants have submitted no evidentiary proof demonstrating a factual issue with respect to Big Apple's prima facie showing, and as ICS and Headquarters have not opposed Big Apple's motion, Big Apple is entitled to summary judgment dismissing the third-party complaint and cross claims against it.

Headquarters' Motion

The Fortis Defendants contend that this court cannot consider Headquarters' motion because Headquarters has failed to demonstrate good cause warranting consideration of the motion. In moving, Headquarters concedes that its motion, which was not made until February 11, 2022, is untimely under Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6 because it was made more than 60 days after the filing of the note of issue on November 8, 2021 (*see Goldin v New York & Presbyt. Hosp.*, 112 AD3d 578, 579 [2d Dept 2013]; CPLR 3212 [a]). Headquarters, however, asserts that it has demonstrated good cause for consideration of its untimely motion because its delay in moving arises from its decision to wait until Big Apple's witness was deposed.

Of note in this respect, the court, in the above noted December 20, 2021 order, denied motions by the Fortis Defendants and Big Apple to vacate the note of issue or, alternatively, to extend the time for moving for summary judgment. Nevertheless, the court required Big Apple to appear for its deposition on January 17, 2022. This court finds that it was reasonable for Headquarters to await the deposition of Big Apple before moving because Big Apple has a cross claim (which is erroneously identified as a counterclaim in Big Apple's answer) against Headquarters for contribution or common-

law indemnification, and that it was not unreasonable for Headquarters to believe that Big Apple's witness would likely provide relevant testimony regarding who performed what work on the project (*see Fuczinski v 144 Div., LLC*, ___ AD3d ___, 2022 NY Slip Op 05151, *2 [2d Dept 2022]; *see also Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]). That the witness ultimately produced by Big Apple was unable to provide any relevant testimony should not be held against Headquarters, which was entitled to have a full understanding of the case before moving (*see Pena v Women's Outreach Network, Inc.*, 35 AD3d 104, 108-109 [1st Dept 2006]; *see also Fuczinski*, 2022 NY Slip Op 05151, *2; *Rotante v Advance Tr. Co., Inc.*, 148 AD3d 423, 424-425 [1st Dept 2017]; *Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]; *cf. Tower Ins. Co. of N.Y. v Razy Assoc.*, 37 AD3d 702, 703 [2d Dept 2007]). This court thus finds that Headquarters, which promptly moved after Big Apple's deposition, has demonstrated good cause for its late motion and will consider same despite its untimeliness.

On the merits, Headquarters has submitted the deposition testimony of its supervisor, Kumi, who stated that Headquarters did not perform any work relating to the creation of the opening or its covering. Kumi's testimony, in conjunction with other evidence, including Headquarters' contract with ICS and O'Rourke's deposition testimony, demonstrates that Headquarters was a subcontractor that did not have supervisory authority over the work on the project. This evidence shows, *prima facie*, that Headquarters' work was unrelated to the accident and that it did not supervise or control the injury producing work. For essentially the same reasons as discussed above with respect to Big Apple, Headquarters has thus demonstrated its *prima facie* entitlement

to the dismissal of the cross claims and third-party claims against it for common-law indemnification and contribution (*see Debenedetto*, 190 AD3d at 939; *Cutler*, 171 AD3d at 861-862; *Kane*, 145 AD3d at 869; *see also McCarthy*, 17 NY3d at 377-378), contractual indemnification (*see Basile*, 205 AD3d at 531; *Pereira*, 193 AD3d at 1090-1091; *Naupari*, 163 AD3d at 402), and breach of contract to procure insurance (*see Nicholson*, 205 AD3d at 622; *New York City Hous. Auth. v Merchants Mut. Ins. Co.*, 44 AD3d at 542).

For reasons discussed above with respect to Big Apple’s motion, this court rejects the Fortis Defendants’ assertion that Kumi’s deposition transcript may not be considered because it is unsigned.

With regard to the Fortis Defendants’ assertion that Headquarters failed to authenticate its contract with ICS, the court notes that O’Rourke, although he identified a document as the contract between ICS and Headquarters, the copy of the document shown to him was an unexecuted document version of the contract. Nevertheless, the court finds that the contract submitted by Headquarters may be considered because the Fortis Defendants have not substantively challenged the authenticity of the document or the signatures therein and, in other papers filed with the court, have identified the same document as the contract between ICS and Headquarters. Moreover, this contract is the same document on which the Fortis Defendants rely in support of their contractual indemnification and breach of contract for failing to procure insurance claims as against Headquarters (*see Kanska-Kiewit-Ecco*, 2020 WL 7779123[U], *3).

As the Fortis Defendants have submitted no evidentiary proof demonstrating a factual issue with respect to Headquarters' prima facie showing, and as ICS and Big Apple have not opposed Headquarters' motion, Headquarters is entitled to summary judgment dismissing the third-party complaint and cross claims against it.

This constitutes the decision and order of the court.

ENTER

10/31/22

Robin S. Garson

J.S.C.