

Fernandez v Sub 412 Assoc., LLC
2022 NY Slip Op 33770(U)
October 28, 2022
Supreme Court, New York County
Docket Number: Index No. 161024/2017
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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JUAN FERNANDEZ,

Plaintiff

Index No. 161024/2017

-against-

SUB 412 ASSOCIATES, LLC, 2398 REALTY
ASSOCIATES, LLC, ARAMIS, INC., DESIGN
REPUBLIC PARTNERS ARCHITECTS, LLP, NUCOR
CONSTRUCTION CORP., and ESTEE LAUDER
COMPANIES, INC.,

Defendants

-----x

NUCOR CONSTRUCTION CORP.,

Third Party

Index No. 595970/2019

Third Party Plaintiff

-against

ANFIELD INTERIORS, INC., and MANHATTAN
FINE CLEANERS INC.,

Third Party Defendants

-----x

ARAMIS, INC.,

Second Third Party

Index No. 595145/2020

Second Third Party Plaintiff

-against-

ANFIELD INTERIORS, INC.,

Second Third Party Defendant

-----x

ESTEE LAUDER COMPANIES, INC.,

Third Third Party Plaintiff

-against

ANFIELD INTERIORS, INC.,

Third Third Party Defendant

-----x

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover for personal injuries sustained September 11, 2017, when a floating ceiling above him collapsed onto him as he worked on the sixth floor of premises at 415 West 13th Street, New York County, owned by defendants Sub 412 Associates, LLC, and 2398 Realty Associates, LLC, and leased by defendant Aramis, Inc., a subsidiary of defendant Estee Lauder Companies, Inc. Plaintiff was working on a construction project for which Estee Lauder Companies hired defendant Nucor Construction Corp. as the general contractor and defendant Design Republic Partners Architect, LLP, as the architect. Third party defendants Anfield Interiors, Inc., and Manhattan Fine Cleaners Inc., plaintiff's employer, also worked as Nucor Construction's subcontractors on the project.

Design Republic moves for summary judgment on Design Republic's cross-claims for contractual indemnification, non-contractual indemnification, and contribution against Nucor Construction. C:P.L.R. § 3212(b) and (e). Design Republic also

moves for summary judgment dismissing the cross-claims for non-contractual indemnification and contribution by Nucor Construction, Aramis, Inc., Estee Lauder Companies, and Anfield Interiors. Id. Design Republic withdraws its motion to the extent it seeks summary judgment on its breach of contract claim against Nucor Construction for failure to procure insurance. Finally, plaintiff has discontinued all claims against Design Republic. C.P.L.R. § 3217.

Nucor Construction, Aramis, Inc., Estee Lauder Companies, and Anfield Interiors oppose Design Republic's motion. The court grants Design Republic's motion in part as follows.

II. CONTRACTUAL INDEMNIFICATION

A. Applicable Legal Principles

To establish that Design Republic is entitled to full indemnification from Nucor Construction, Design Republic relies on a contract between Estee Lauder Companies and Nucor Construction, which expressly defines Design Republic as the project's Architect, and which the parties stipulated is authenticated and admissible. The contract provides:

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, the acts or omissions of the Contractor or Subcontractor or any of their respective agents or employees, or any breach or default by the contractor under the Contract Documents, regardless of whether or not such claim, damage, loss, or expense is

caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 9.15.1.

Aff. of Alex J. Ru Ex. K § 9.15.1, amended by Ex. B to Ex. K ¶ 22. The contract plainly requires Nucor Construction, the "Contractor," to indemnify Design Republic for "claims . . . arising out of or resulting from performance of the Work [or] the acts or omissions of the Contractor or Subcontractor." Id. No party disputes that plaintiff's claims arise from Nucor Construction's work as the project's general contractor and its subcontractor Anfield Interiors' work as the carpenters installing the floating ceiling.

Nucor Construction insists that Design Republic is not entitled to indemnification because Design Republic breached or defaulted on its contractual obligations. Design Republic owed no obligations to Nucor Construction, however, since Design Republic is merely a third party beneficiary of the contract.

While Design Republic's failure to fulfill contractual obligations does not prohibit enforcement of the contract, New York General Obligations Law § 5-322.1 prohibits indemnification of Design Republic for its own negligence. The contract contravenes this prohibition by allowing indemnification of a claim "regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder." Ru

Aff. Ex. K § 9.15.1. The contract remains enforceable, however, because it includes a saving provision, Brooks v. Judlau Contr., Inc., 11 N.Y.3d 204, 210 (2008); Winkler v. Halmar Intl., LLC, 206 A.D.3d 458, 461 (1st Dep't 2022); Madkins v. 22 Little W. 12th St., LLC, 191 A.D.3d 434, 436 (1st Dep't 2021), which limits Nucor Construction's indemnification of Design Republic "to the fullest extent permitted by law." Ru Aff. Ex. K § 9.15.1. Thus Design Republic need not show its own absence of fault to obtain partial contractual indemnification. Brooks v. Judlau Contr., Inc., 11 N.Y.3d at 210; Winkler v. Halmar Intl., LLC, 206 A.D.3d at 461; Madkins v. 22 Little W. 12th St., LLC, 191 A.D.3d at 436; Sanchez v. 404 Park Partners, LP, 168 A.D.3d 491, 493 (1st Dep't 2019). Nevertheless, Nucor Construction's indemnification of Design Republic is limited to the extent that Design Republic was not at fault. Brooks v. Judlau Contr., Inc., 11 N.Y.3d at 210; Payne v. NSH Community Servs., Inc., 203 A.D.3d 546, 546 (1st Dep't 2022); Ramirez v. Almah, LLC, 169 A.D.3d 508, 509 (1st Dep't 2019); Sanchez v. 404 Park Partners, LP, 168 A.D.3d at 493.

B. Evidence of Design Republic's Fault

Design Republic claims entitlement to full indemnification because an unsworn "Eyewitness Statement" by Nucor Construction's President Joseph Pollaci recounts that the collapse of the floating ceiling resulted from "the incorrect installation of the ceiling," and that "the carpenter . . . was responsible for the

installation." Ru Aff. Ex. M. Design Republic insists that installation of the ceiling fell outside its scope of work, relieving Design Republic from any liability. Although Pollaci at his deposition attempted to lay a business record foundation for this report, he prepared it 11 days after, not contemporaneously with, the ceiling collapse. C.P.L.R. § 4518(a); Doe v. Intercontinental Hotels Group, PLC, 193 A.D.3d 410, 410 (1st Dep't 2021); People v. DePalo, 187 A.D.3d 649, 651 (1st Dep't 2020); People v. Bell, 153 A.D.3d 401, 412 (1st Dep't 2017). In the context of Design Republic's motion against Nucor Construction, however, the statement, "the incorrect installation of the ceiling," may constitute an admission, since Nucor Construction did not dispute its President's authentication of the report as Nucor Construction's account. Guevara-Ayala v. Trump Palace/Parc LLC, 205 A.D.3d 450, 451 (1st Dep't 2022); Vitucci v. Durst Pyramid LLC, 205 A.D.3d 441, 445 (1st Dep't 2022). No witness lays a business record foundation or any other foundation for the admissibility of an unsworn "Accident Investigation Report" by Joseph Bono, Nucor Construction's superintendent. Ru Aff. Ex. N.

Even if Pollaci's admission of "the incorrect installation of the ceiling" is admissible to indicate that Design Republic was not at fault, in opposition Anfield Interiors' expert Charles Schaffer, an architect with over 20 years of experience,

demonstrates that Design Republic was at-fault in two principal respects. He attests that Design Republic failed to (1) consider the combined weight of the floating ceiling's materials and (2) provide instructions how to fasten the steel hangers, referred to as pencil rods, with attachments to the building structure to hang the floating ceiling in accordance with the 1968 New York City Building Code. Aff. of Marguerite D. Peck Ex. A ¶¶ 9, 12-16. Design Republic failed to specify the clips or the method to be used in attaching the pencil rods to the structure above.

The other principal deficiency that Schaffer cites in Design Republic's specifications is that they refer to standards for acoustical floating ceilings, with removable panels, that use materials such as acoustical tiles that are lighter than the non-acoustical ceiling installed, which used heavier gypsum board and plywood. Id. ¶¶ 10-11. All these omissions or deficiencies show that Design Republic failed to satisfy its professional standard of care. Id. ¶¶ 16-20.

Brooke Luckock, Associate Principal of Design Republic, admitted at her deposition that Design Republic did not analyze whether its blueprints allowed adequate support for the weight of the floating ceiling's materials. Ru Aff. Ex. E, at 86. She further admitted that Design Republic's specifications did not explain how to fasten the pencil rods with attachments to the structure, id. at 75; Ex. F, at 26, nor distinguish between an

acoustical ceiling with removable panels and the type of ceiling installed. Id. Ex. F, at 44-45.

Luckock also testified that Design Republic conducted walkthroughs of the construction site to inspect whether the floating ceiling was being installed without deviation or departure from design standards. Id. Ex. E, at 12; Ex. F, at 39. Yet neither Luckock nor any other witness ever confirmed, in a deposition or an affidavit, that the installation was progressing as required. In fact she further admitted that, to do so, Design Republic would have had to review the drawings along with documentation of Anfield Interiors' work, a review that Design Republic never conducted. Id. Ex. E, at 87.

Ruairi Duffy, Anfield Interiors' owner, agreed at his deposition that the design for the floating ceiling did not account for the weight of the ceiling's components. Id. Ex. J, at 62. He testified that, based on his observations immediately after the collapse, in the parts of the ceiling that fell the pencil rods ripped out of the sheetrock, as they had not been attached to the concrete building structure underneath the sheetrock. Id. at 64-66.

Design Republic insists that the method of attaching the floating ceiling to the structure was left to Anfield Interiors, which is at fault for using an insecure method, and that, if Anfield Interiors questioned the method to be used, the

subcontractor was to follow the protocol for requesting information. Schaffer's very point, however, is that the architect was negligent in leaving the method of attachment to the carpenters; instead, the architect was responsible for including the method of attachment in the architect's specifications; and omission of the method from the design was a deficiency in the design. Nothing in Design Republic's specifications alerted Anfield Interiors that it needed to ask any questions. Duffy testified that it "constructed the floating ceiling with the components . . . indicated on the architectural diagrams," id. at 35, except to the extent they contradicted the Building Code. Id. at 36. See id. at 80. Consequently, Anfield Interiors and Nucor Construction maintain that they bear no responsibility for carrying out the deficient specifications.

Design Republic also suggests that Schaffer does not attest that its failure to consider the weight of the floating ceiling's materials or to provide instructions how to fasten pencil rods with attachments to the structure to hang the ceiling caused it to collapse. While Schaffer may not explicitly draw a causal connection, he certainly raises a reasonable inference that excessive weight of the ceiling's materials and its insecure attachment to the structure above caused the ceiling to collapse.

Finally, Anfield Interiors presents Nucor Construction's minutes from a meeting among Nucor Construction, Design Republic,

Estee Lauder Companies, and other project participants two days after the floating ceiling collapsed, Peck Aff. Ex. G, and email exchanges primarily between Nucor Construction and Design Republic, but also including other project participants as recipients, from October 4 to 9, 2017. Id. Ex. H. Anfield Interiors claims these unsworn documents suggest that a flood from the sprinklers in the room with the floating ceiling may have caused the ceiling to collapse, even though the testimony by Anfield Interiors' own witness Duffy suggests that the ceiling's collapse caused the sprinklers to burst. Ru Aff. Ex. J, at 27-28. While both documents discuss problems with the sprinklers, neither document mentions a flood, let alone that it caused the ceiling to collapse. Nor did any party elicit a business record foundation from Nucor Construction for its minutes or demonstrate their admissibility as a document produced by their author Nucor Construction in disclosure in response to a demand for such a document. C.P.L.R. § 4540-a. Likewise lacking is any foundation pursuant to C.P.L.R. § 4540-a for the email exchanges. McCarthy v. Hameed, 191 A.D.3d 1462, 1464 (4th Dep't 2021).

Since the parties present conflicting evidence regarding Design Republic's satisfaction of its architectural responsibilities, a factual question remains whether Design Republic negligently created the condition that caused plaintiff's injury, Kuhfeldt v. New York Presbyt./Weill Cornell

Med. Ctr., 205 A.D.3d 480, 481 (1st Dep't 2022); Salcedo v. City of New York, 201 A.D.3d 607, 608 (1st Dep't 2022); Venezia v. LTS 711 11th Ave., 201 A.D.3d 493, 495 (1st Dep't 2022); Williams v. Forward Realty Corp., 198 A.D.3d 503, 504 (1st Dep't 2021), which limits Nucor Construction's indemnification of Design Republic to only partial indemnification at this juncture. Inasmuch as any negligence by Design Republic was not the sole proximate cause of plaintiff's injuries, the court grants partial contractual indemnification to Design Republic. C.P.L.R. § 3212(b) and (e).

III. NON-CONTRACTUAL INDEMNIFICATION

The court denies Design Republic's motion for summary judgment awarding non-contractual or implied indemnification against Nucor Construction. C.P.L.R. § 3212(b). Although Nucor Construction admits it supervised the installation of the floating ceiling, Design Republic does not establish its own lack of fault in the installation as explained above. Nicholson v. Sabey Data Ctr. Props, LLC, 205 A.D.3d 620, 622 (1st Dep't 2022); Vitucci v. Durst Pyramid LLC, 205 A.D.3d 441, 444 (1st Dep't 2022); Balcazar v. Commet 380, Inc., 199 A.D.3d 403, 405 (1st Dep't 2021); Spielmann v. 170 Broadway NYC LP, 187 A.D.3d 492, 494 (1st Dep't 2020).

Design Republic's failure of proof similarly precludes summary judgment dismissing the cross-claims by Nucor Construction, Aramis, Inc., Estee Lauder Companies, and Anfield

Interiors against Design Republic for non-contractual indemnification. C.P.L.R. § 3212(b); McCarthy v. Turner Const., Inc., 17 N.Y.3d 369, 377 (2011); Vasquez v. City of New York, 200 A.D.3d 482, 482 (1st Dep't 2021); Mollette v. 111 John Realty Corp., 194 A.D.3d 614, 615 (1st Dep't 2021); Cackett v. Gladden Properties, LLC, 183 A.D.3d 419, 421 (1st Dep't 2020). Design Republic also makes no showing of fault on the part of Aramis, Inc., or Estee Lauder Companies. Nor does Design Republic eliminate the factual issues raised by Nucor Construction that it simply supervised the implementation of Design Republic's instructions.

IV. CONTRIBUTION

For similar reasons, the court denies Design Republic's motion for summary judgment awarding contribution against Nucor Construction. C.P.L.R. § 3212(b). Although Design Republic need not establish its lack of fault, its failure to make any showing of fault by Nucor Construction and eliminate the factual issue that Nucor Construction simply supervised the implementation of the architect's instructions precludes a conclusion that Nucor Construction owes contribution to Design Republic. Pimentel v. DE Frgt. LLC, 205 A.D.3d 591, 594 (1st Dep't 2022).

Design Republic's failure of proof again defeats summary judgment dismissing the cross-claims by Nucor Construction, Aramis, Inc., Estee Lauder Companies, and Anfield Interiors

against Design Republic for contribution. C.P.L.R. § 3212(b). Since Design Republic does not establish its own lack of fault in the installation of the floating ceiling, this open factual question precludes a conclusion that Design Republic owes no contribution to Nucor Construction, Aramis, Inc., Estee Lauder Companies, and Anfield Interiors for plaintiff's injuries. C.P.L.R. § 3212(b); Vitucci v. Durst Pyramid LLC, 205 A.D.3d at 444; Royland v. McGovern & Co., LLC, 203 A.D.3d 677, 677 (1st Dep't 2022); Goya v. Longwood Hous. Dev. Fund Co., Inc., 192 A.D.3d 581, 585 (1st Dep't 2021); Madkins v. 22 Little W. 12th St., LLC, 191 A.D.3d at 435.

V. CONCLUSION

For the reasons explained above, the court grants the motion by Design Republic Partners Architects, LLP, for summary judgment awarding Design Republic partial contractual indemnification to the extent that Design Republic was not at fault. C.P.L.R. § 3212(b) and (e). The court denies the remainder of Design Republic's motion. C.P.L.R. § 3212(b). This decision constitutes the court's order.

DATED: October 28, 2022



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C