

**Brown v City of New York**

2022 NY Slip Op 34271(U)

December 19, 2022

Supreme Court, New York County

Docket Number: Index No. 150757/2019

Judge: John J. Kelley

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

**PRESENT: HON. JOHN J. KELLEY PART 56M**

*Justice*

-----X

CLARENCE BROWN and BETTY BROWN,  
  
Plaintiffs,

**INDEX NO.** 150757/2019

**MOTION DATE** 09/01/2022

**MOTION SEQ. NO.** 003

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY  
DEPARTMENT OF BUILDINGS, THE NEW YORK CITY  
DEPARTMENT OF DESIGN AND CONSTRUCTION, THE  
NEW YORK CITY DEPARTMENT OF EDUCATION, THE  
NEW YORK CITY HOUSING AUTHORITY, and DURANTE  
RENTALS, LLC,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

DURANTE RENTALS, LLC,

Third-Party Plaintiff,

-against-

INNOVAX-PILLAR, INC.,

Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 109, 113, 114, 115, 116, 117, 118, 119, 120, 127, 128, 129, 130, 131, 132, 133, 134, 135, 137, 156, 158, 202, 215

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for personal injuries arising from a construction site accident, alleging common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6), the defendant third-party plaintiff, Durante Rentals, LLC (Durante), moves pursuant to CPLR 3212 for summary judgment (1) dismissing the complaint and all cross claims insofar as asserted against it, and (2) on its third-party cause of action for contractual indemnification against the third-party defendant, Innovax-Pillar, Inc. (Innovax). The plaintiffs oppose the

motion. Innovax also opposes the motion, and the defendants The City of New York, The New York City Department of Buildings, The New York City Department of Design and Construction, The New York City Department of Education, and The New York City Housing Authority (collectively the City defendants) oppose the motion in part. The motion is granted to the extent that Durante is awarded summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and on the issue of liability on its third-party cause of against Innovax for contractual indemnification, limited to the recovery of attorney's fees. The motion is otherwise denied, as the remainder of the contractual indemnification claim has been rendered academic by the dismissal of the claims and cross claims against Durante.

In 2018, the plaintiff Clarence Brown (Brown), was employed by Innovax to work on a construction project at the West End School, located at 227 West 61st Street, New York, New York (the premises). At the time, Innovax was the general contractor for ongoing renovation of the premises. On or about April 4, 2018, Durante contracted with Innovax to lease, to Innovax, a Genie Z-30 articulating boom lift, a wheeled piece of equipment that must be driven to transport it from one location to another. Pursuant to their rental agreement, Durante delivered the lift at the premises by dropping it off just outside the premises on a public roadway. On May 2, 2018, after Innovax finished using the lift for work on the premises, Innovax's superintendent and Brown's supervisor, Christopher Powell, instructed Brown and his co-worker, Giovanni Tarantino, to return the lift to the public roadway just outside the premises for pick-up by Durante. In the course of returning the lift to the drop-off and pick-up location, Tarantino drove and operated the lift, while Brown served as flagger, a task for which he stood on the ground, watched for pedestrians and other vehicles, and directed Tarantino in returning the lift to the drop-off location. While Tarantino was driving the lift, the basket of the lift in front of the driver's window was situated in its lowest position, thus apparently obstructing Tarantino's view, when the basket struck Brown and injured him.

On January 24, 2019, the plaintiff commenced this action. Between March 19, 2019, and May 30, 2019, all of the defendants served their answers. On March 3, 2020, Durante commenced a third-party action against Innovax that included a cause of action for contractual indemnification. On June 5, 2020, Innovax served its answer to the third-party complaint. On January 31, 2022, the plaintiff filed the note of issue and certificate of readiness. On March 31, 2022, Durante timely filed the instant motion. On June 17, 2022, the plaintiffs, the City defendants, and Innovax respectively filed their opposition papers.

In both their complaint and bill of particulars as to Durante, the plaintiffs alleged that Durante was negligent, careless, and reckless in its ownership, operation, supervision, inspection, maintenance, management, and control of the premises. They also alleged that Durante violated Labor Law §§ 200, 240(1), and 241(6), the latter based upon violation of applicable provisions of Rule 23 of the Industrial Code of the State of New York (12 NYCRR), and the rules of the Occupational Safety and Health Administration (OSHA). However, in their opposition to the instant motion, the plaintiffs clarified that they were not asserting any Labor Law claims against Durante but, rather, that Durante was negligent in “knowingly renting an unsafe aerial lift with an inherent, dangerous blind spot, in failing to (adequately) warn of that blind spot, and in undertaking to ‘train’ the operator, . . . and doing so negligently.”

In support of its motion, Durante submitted the initial bill of particulars directed towards it, the City defendants’ response to the plaintiffs’ notice for discovery and inspection, the affidavit of Anthony Durante, who was Durante’s chief executive officer (CEO) in 2018 and its current executive chairman, the rental agreement between Durante and Innovax, and the May 2, 2018 incident report prepared by Durante’s truck operator, Brian Lochan. Durante also submitted the deposition transcripts of Brown, Lochan, Tarantino, Powell, and Devenand Singh, the Durante driver who delivered the lift to Innovax. As discussed below, Tarantino explained in detail the extent of his training and experience with boom lifts such as the Genie equipment provided to him on the subject job. In opposition, the plaintiffs submitted the expert affidavit and curriculum

vitae of the managing director and principal consultant of Occupational Safety & Environmental Assoc., Inc., John P. Conoglio, along with the CPLR 3101(d) statement referable to Conoglio that they had exchanged one week prior to filing their opposition papers. In papers that they submitted in partial opposition to the motion, the City defendants included the summons and complaint, the rental agreement between Durante and Innovax, Brown's deposition transcript, Brown's phone records from May 2, 2018, and the expert affidavit of licensed professional engineer and engineering consultant, William Meyer, P.E.

Conoglio opined, within a reasonable degree of professional certainty, that Tarantino was not a properly trained or competent person capable of safely operating the aerial lift with a known, "dangerous" blind spot. He explained that Tarantino's prior on-the-job experience and the 5-to-10-minute discussion that he had with the Durante driver was not sufficient to qualify him as trained or competent. He noted that Tarantino's failure to read and understand the user manual disqualified him from being properly trained or competent. He also explained that Brown was not a properly trained or competent person capable of safely acting as a flagman for the operator of the lift. He concluded that Brown had no training in connection with wheeled power equipment that exhibited a known blind spot, and that he was not provided with proper equipment such as a high-visibility vest or flags.

Conoglio opined that Durante was negligent in failing to be aware of the "dangerous" blind spot associated with the aerial lift, and concluded that Durante provided inadequate instructions when delivering the lift. He explained that, when Durante undertook measures to provide instructions, they should have provided full and complete instructions including, but not limited to, specifically warning of the known blind spot, advising that a flagman should be employed, advising that the lift should only be operated by a trained and competent person, advising that the lift operator should study the user manual prior to using the lift, and advising that the discussion between the Durante driver and the person receiving the lift did not qualify as the complete and full training needed to safely operate the lift. Conoglio further explained

that the training required to become a competent operator and associated flagman included classroom study, operational review, and testing, none of which was provided to Tarantino or Brown. Conoglio also concluded that, had Tarantino and Brown been properly trained and competent, the accident would not have occurred. He also concluded that all of the errors and omissions committed by all of the defendants individually and collectively caused the accident.

In opposition papers submitted on behalf of the City defendants, expert engineer Meyer, essentially responding to the plaintiffs' CPLR 3101(d) statement referable to Conoglio, opined, within a reasonable degree of engineering certainty, that, upon his inspection of the lift employed during Brown's accident, the lift was in good condition and well maintained. He concluded that the lift was sound, operable, and in good working order. He also concluded that the lift was free of operational defects and/or malfunctions, and was safe and suitable for its intended function, explaining that, when the lift's aerial platform is in its lowest position, it is situated behind the chassis-mounted housing of the machine, and thus creates a blind spot for the driver of the lift. Meyer noted that the creation of this blind spot is inherent in the proper operation of the lift, and that the operator's manual warns of the blind spot. Finally, he explained that employment of a "spotter" is an appropriate measure to remediate any putative hazard or risk created by the lift's blind spot.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see CPLR 3212*). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in

favor of the nonmoving party and should not pass on issues of credibility” (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

“The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even ‘arguable’” (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; see *Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (see *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

Labor Law §§ 200, 240(1) and 241(6) apply only to owners, general contractors, and their statutory agents (see Labor Law §§ 200; 240[1]; 241[6]; *Medina v R.M. Resources*, 107 AD3d 859, 860 [2d Dept 2013]; *Hartshorne v Pengat Tech. Inspections, Inc.*, 112 AD3d 888, 889 [2d Dept 2013]). Since Durante was neither an owner, nor a general contractor, nor a statutory agent of an owner or contractor, it cannot be held liable under those provisions of the Labor Law. Similarly, to the extent that the plaintiffs' common-law negligence claim against Durante was premised upon a breach of duty to maintain a safe place to work, Durante also may not be held liable. Thus, to hold Durante liable for common-law negligence, the plaintiffs must prove that Durante owed Brown a duty of care unrelated to any common-law duty to provide a safe workplace, breached that duty by some affirmative act or omission, and

proximately caused his injuries by virtue of that breach (see *Solomon v City of New York*, 66 NY2d 1026 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301 [1st Dept 2001]).

With respect to the plaintiffs' contentions, as set forth in their initial bill of particulars as to Durante, Durante established, prima facie, that its only role was as a lessor of the subject lift, and that it was not negligent in that role. The plaintiffs' complaint and initial bill of particulars did not assert that Durante had any other role apart from being a lessor. There were no allegations that the lift was defective, that Durante failed to inspect the lift, or that Durante otherwise failed to provide a safe and functional lift. In fact, neither the complaint nor the initial bill of particulars described, with particularity, Durante's purported breaches of duty in any context. Rather, only in opposition to the instant motion did the plaintiffs set forth, with any specificity, the alleged basis for their claims against Durante. Durante established that it did not provide a defective lift, that its employees were not on the premises at any point prior to, during, or after the accident, that it was not negligent in its delivery and pick up of the lift, and that the lift did not need maintenance during the time that it was leased to Innovax. In opposition to these showings, the plaintiffs failed to raise a triable issue of fact.

In connection with the plaintiffs' newly raised claim of negligent training, the court notes that a plaintiff may not, after filing a note of issue, serve an amended bill of particulars adding new theories of recovery without leave of court (see *Stovall v Lenox Hill Hosp.*, 200 AD3d 570, 571 [1st Dept 2021]; *Gaisor v Gregory Madison Ave., LLC*, 13 AD3d 58, 59-60 [1st Dept 2004]). A "new theory of liability that was not pleaded in the complaint and is raised for the time in opposition to a motion for summary judgment should not be considered" (*Stovall v Lenox Hill Hosp.*, 200 AD3d at 571). It was only after the plaintiffs served an unauthorized, post-note of issue, amended bill of particulars on June 23, 2022, and thus several days after they submitted their opposition to the instant motion, that they provided particulars of their allegations of Durante's failure to train Tarantino, so as to include allegations of a failure to warn of the known blind spot, failure to advise that a properly trained and competent spotter/flagman should be

used, failure to advise that the operator of the lift should study the user manual before operating the lift, and failure to advise Innovax, as Tarantino's employer, that the discussion between Durante's driver and Tarantino did not constitute a complete training session sufficient to deem Tarantino competent enough to operate the lift. Since the plaintiffs' contention that Durante was negligent in failing to provide Innovax's employees with proper training in the operation of the lift was not set forth in their initial bill of particulars, and was raised for the first time in opposition to this motion, and thus after the note of issue was filed, the court needn't consider the contention.

The court notes, however, that on July 22, 2022, the plaintiffs also moved for leave to serve a proposed amended bill of particulars as to Durante, under Motion Sequence 006, so as to add a claim of negligent training. That motion remains pending. While the court need not grant leave to amend (*see* CPLR 3025[b]; *McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp.*, 59 NY2d 755 [1983]; *360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552 [1st Dept 2011]; *Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809 [1st Dept 2008]), even if the proposed amended bill of particulars were allowed to be served, and the new claim therein could be asserted, Durante has still established its prima facie entitlement to summary judgment in connection with that claim, and the plaintiffs nonetheless failed to raise triable issues of fact in opposition.

With respect to the proposed negligent training claim, Durante, in its memorandum of law, asserted that "it is anticipated that Plaintiff's counsel may argue that Durante was negligent in failing to provide adequate training to Innovax and/or its employees when renting the subject Genie Z-30 lift." Durante thus adduced evidence in connection with such an anticipated claim. In this regard, it established that it provided proper training to Tarantino, adverting to Tarantino's deposition testimony, in which he stated that any training provided by Durante's driver during the drop-off of the lift was sufficient, and that he was competent enough to operate the lift at the time. Tarantino testified that, in the nearly 20 years that he had worked for Innovax, he had operated boom lifts whenever it was needed for a job, which was approximately once per year.

He testified that, over the years, he had gained experience working with boom lifts like the one at issue, and “even bigger” lifts on occasion. He also testified that, each time a boom lift was delivered to a work site, he received a training lecture from the person delivering the lift, and that, over the years, the trainings were the same, since the various lifts operated in a similar fashion. He explained that, on each such occasion, he and the delivery driver would climb onto the lift, and that the driver would show him “all the buttons, the joystick, the up and down, the alarms, the safety button. Basics on the machine, he teaches me.” Moreover, Tarantino testified that, on the day that the lift in question was delivered, he climbed into the basket of the lift with Durante’s delivery driver, and the driver provided him with 5 to 10-minutes of training. He testified that he did not have any problems understanding the person giving the instructions, that the instructions were like those he received over the 20 years he spent operating similar lifts, and that he did not ask any questions at the end of the training because “everything was clear.” Finally, Tarantino testified that, from the time that the lift arrived until the day of Brown’s accident, he operated the lift almost every day without complaint.

Durante also established, by way of an affidavit from its CEO, that while it is in the regular course of business for its delivery drivers to provide a brief presentation to familiarize the person receiving the machinery with its operation, Durante had a separate department that was responsible for providing more extensive and specific training and certification, upon request of the customer and the payment of an additional fee. Durante showed that, based on its rental contract with Innovax and upon a search of its records, Innovax did not request or pay for a more extensive or specific training or certification for its employees in connection with the lift in question. Hence, Durante established that it was Innovax’s own choice to decline additional training for Innovax’s employees, such as Brown and Tarantino, and not the industry standard to provide such extensive training without such a request or payment of the fee.

In opposition to Durante’s showing, the plaintiffs failed to raise a triable issue of fact as to whether Tarantino was not sufficiently trained or whether the absence of proper training

caused or contributed to the accident. While the plaintiffs' expert provided several reasons as to why Tarantino may not have been properly trained, there are no facts supporting this opinion. Rather, the opinion is premised upon pure speculation and is contrary to the facts in the record. Tarantino unequivocally testified that he received sufficient training, both on the day the lift was delivered, and in his prior years on the job. He unequivocally established that he was competent to operate the lift, and that he competently operated it for several days prior to the accident. Although the plaintiffs' expert claimed that Tarantino's training should have been more extensive, and included classroom instruction and testing components, neither the expert nor the plaintiffs made a showing that that was Durante's duty or that it didn't offer such training. Additionally, Durante established, and Tarantino testified similarly, that, at the time of Durante's delivery of the lift to Innovax, there were no requirements, apart from those promulgated by OSHA, to have a special license, certification, or training to operate machinery such as the lift in question. Both Tarantino and Brown testified that they each possessed their required OSHA certificates at the time of the accident. The plaintiffs also failed to raise a triable issue of fact regarding whether Innovax in fact paid for and requested additional training for its employees, but that neither Tarantino nor Brown received it, or whether industry standards required it.

Moreover, even if the court were to accept the opinions of the plaintiffs' expert that Tarantino was not sufficiently or appropriately trained in the use of the lift, and that Durante owed a duty to Brown adequately to train his coworker, the expert presented only speculation that the insufficiency of Tarantino's training caused or contributed to the accident, as Tarantino essentially testified that he knew of the creation of a blind spot immediately in front of a lift driver when the bucket was in the lowest position. In other words, Tarantino effectively conceded that it was his own negligence in operating the lift that caused him to strike Brown, and that no additional amount of training would have prevented the accident.

Consequently, even if the court analyzed the record in light of the new allegations in the plaintiffs' proposed amended bill of particulars, which seeks to add a claim of negligent training

against Durante, the result would be the same. Thus, Durante must be awarded summary judgment dismissing the complaint and all cross claims insofar as asserted against it on the ground that it was not negligent in its capacity as lessor of the lift, or in its training as to the use of the lift.

With respect to Durante's claim for contractual indemnification against Innovax, the court recognizes that a construction-related indemnification agreement that purports to indemnify a party for its own negligence is void and unenforceable (see General Obligations Law § 5-322.1; *Giangerra v Pav-Lak Contr., Inc.*, 55 AD3d 869, 870 [2d Dept 2008]). As relevant here, the rental agreement provided that

“[T]essee agrees to safely use the equipment in accordance with all laws and regulations and assumes all liability and indemnifies and holds the Lessor harmless as to ALL Court costs, attorney costs, fines, penalties, tickets, tolls, personal injury, negligence, loss, property damage, accident, product liability claims or any other claims in relation to items leased, sold, repaired or handled, by the Lessor.”

Where an agreement authorizes indemnification “to the fullest extent permitted by law,” it does not violate General Obligations Law § 5-322.1 (see *id.* at 871; *Farrugia v 1440 Broadway Assoc.*, 157 AD3d 565, 569 [1st Dept 2018]), as the law itself permits indemnification where the indemnitor itself is shown to be negligent, or the indemnitee's liability arises solely because it violated a statute that does not require a finding of negligence, provided that there is no evidence of negligence on the part of the indemnitee. Under those circumstances, an indemnification clause is enforceable (see *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; see also *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795, n 5 [1997]). In fact, the courts have found that that statute also permits a partially negligent general contractor to seek contractual indemnification “so long as the indemnification provision does not purport to indemnify the general contractor for its own negligence” (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 207 [2008]).

The court rejects Innovax's contention that the provision at issue here violated General Obligations Law § 5-322.1 for failure expressly to include a "savings clause," namely, the language limiting indemnification "to the extent permitted by law." In reading the relevant paragraph of the rental agreement as a whole, this court finds that Durante did, in fact, limit the indemnification provision only to instances in which Innovax was negligent, that is, where it did not "safely use the equipment in accordance with all laws and regulations" (see *Intl. Flavors & Fragrances, Inc. v Royal Ins. Co. of Am.*, 46 AD3d 224, 233 [1st Dept 2007] [holding that unless ambiguous, construction of a contract is a matter of law for the courts]). Thus, the provision here is not void and unenforceable by virtue of General Obligations Law § 5-322.1.

Durante thus has established, prima facie, that the indemnification provision in its rental agreement with Innovax is enforceable, and that its negligence did not cause or contribute to the happening of Brown's accident. In opposition, Innovax failed to raise a triable issue of fact.

Nevertheless, since the court is awarding Durante summary judgment dismissing the claims and cross claims asserted against it, it cannot be indemnified for any damages it may owe to the plaintiff or any other party, as it will not owe any such damages. Hence, so much of the contractual indemnification claim as seeks to recover damages that may be owed by Durante to the plaintiff or to the City defendants has been rendered academic, and the only loss remaining for which Durante can be indemnified is its costs and attorney's fees. Inasmuch, however, as Durante has not made a showing of the amount of fees that it has incurred, or the reasonableness thereof, the court is constrained to grant only that branch of the motion seeking indemnification on the issue of liability for attorney's fees, without prejudice to a separate application upon a proper showing as to the amount to be awarded.

In light of the foregoing, it is

ORDERED that the motion of the defendant Durante Rentals, LLC, for summary judgement dismissing all claims and cross claims insofar as asserted against it, and on its third-party cause of action for contractual indemnification against Innovax-Pillar, Inc., is granted to the

extent that it is awarded summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and on the issue of liability on so much of its third-party cause of action for contractual indemnification against Innovax-Pillar, Inc., as seeks to recover costs and attorney’s fees, and the motion is otherwise denied; and it is further,

ORDERED that the complaint and all cross claims are dismissed insofar as asserted against Durante Rentals, LLC; and it is further,

ORDERED that, on the court’s own motion, the main action is severed as against the defendant Durante Rentals, LLC; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint and all cross claims insofar as asserted against the defendant Durante Rentals, LLC; and it is further,

ORDERED that, on the court’s own motion, the third-party action is severed from the main action, and shall proceed under the Index Number for the main action, 150757/2019, without the necessity of assigning a new Index Number or the payment of an additional filing fees.

This constitutes the Decision and Order of the court.

12/19/2022  
DATE

  
\_\_\_\_\_  
JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE