

Holler v Dominion Energy Transmission, Inc.
2022 NY Slip Op 35234(U)
August 4, 2022
Supreme Court, Monroe County
Docket Number: Index No. E2020006378
Judge: Gail A. Donofrio
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STATE OF NEW YORK
COUNTY OF MONROE SUPREME COURT

Donald Holler

Plaintiff,

v.

DECISION & ORDER

Index No.: E2020006378

Dominion Energy Transmission, Inc.; and
LMC Industrial Contractors, Inc.

Defendants

LMC Industrial Contractors, Inc.
Third-Party Plaintiff

v.

O'Connell Electric Company, Inc.
Third-Party Defendants

APPEARANCES:

For Plaintiff: Nicholas M. Warner, Esq.

For Dominion: Lynn Abelson Liebman, Esq.

For LMC: Kevin Federation, Esq.

For O'Connell: Nancy A. Long, Esq.

LMC Industrial Contractors, Inc.'s (LMC) and Dominion Energy Transmission, Inc.'s (Dominion) motions for partial summary judgment against third-party defendant O'Connell Electric Company, Inc. (O'Connell) on the issues of defense and indemnification are granted. Both the subcontract and prime contract, along with O'Connell's insurance certificate, show a clear and unambiguous intent to pay for LMC's and Dominion's defense costs and financially protect LMC and Dominion against any

damages, direct claims and cross-claims. LMC and Dominion have established they are additional insureds and contractual indemnitees under the contracts, and in particular, the allegations of plaintiff's Complaint, LMC's Answer, Dominion's Answer, LMC's Third-Party Complaint, O'Connell's Answer, LMC's Verified Bill of Particulars, O'Connell's Accident Report and O'Connell's December 17, 2021 Safety Meeting Document, are sufficient to trigger these obligations (*BP Air Conditioning Corp. v One Beacon Ins. Grp.*, 8 NY3d 708, 714 - 715 [2007]; *Live Nation Mktg., Inc. v Greenwich Ins. Co.*, 188 A.D3d 422 [1st Dept 2020]; *All State Interior Demolition Inc. v. Scottsdale Ins. Co.*, 168 AD3d 612, 613 [1st Dept 2019]). With regard to indemnification, LMC and Dominion are entitled to a conditional order of indemnification against O'Connell (see *Cuomo v 53rd & 2nd Assocs., LLC*, 111 AD3d 548 [1st Dept 2013]; *Babiack v Ontario Exteriors, Inc.*, 106 AD3d 1448, 1450 [4th Dept 2013]).

However, LMC is not entitled to summary judgment against O'Connell on its breach of contract claim for failure to procure and maintain insurance. LMC's own papers, which were incorporated into Dominion's motion papers, establish that O'Connell has purchased and maintained the required insurance. Accordingly, O'Connell has established that it is entitled to dismissal of any claims alleging breach of insurance procurement.

O'Connell's cross-motion seeking dismissal of Dominion's common-law contribution and indemnification cross-claims is granted. Plaintiff alleges he injured his

left shoulder when he slipped and fell on snow and ice at the construction site owned by Dominion. At the time of the incident, plaintiff was an employee of O'Connell. O'Connell established that plaintiff did not sustain a grave injury under the Workers' Compensation Law. Although plaintiff alleges his injuries are permanent, plaintiff does not allege "permanent and total loss or use" as required under section 11 of the Workers' Compensation Law. Moreover, the medical records submitted by O'Connell in support of its cross-motion do not support the required "total loss of use" of his arm (see *Kraker v Consol. Edison Co.*, 23 AD3d 531, 532 - 533 [2d Dept 2005]; *Aguirre v Castle Am. Const., LLC*, 307 AD2d 901 [2d Dept 2003]). Contrary to Dominion's assertions, O'Connell's cross-motion on this issue is not premature.

O'Connell's cross-motion to compel LMC to provide complete discovery responses is granted. The Court finds that LMC's responses, including those in opposition to this motion, are inadequate and/or incomplete.¹ LMC is ordered to provide any requested documents in the job file from September 2016 through December 17, 2017, relative to and responsive to snow and ice removal at the job site.

Now, upon consideration of NYSCEF DOC #s 15 - 37, 41 - 43, 45 - 55 and 57 - 66, oral argument, due deliberation, and consistent with this Decision and Order, it is hereby

¹ The Court notes LMC's attorney uploaded various discovery responses at NYSCEF DOC # 67, while oral argument was in process. The Court takes no position relative to the sufficiency of these documents.

ORDERED, that LMC's motion for summary judgment is granted in part and denied in part, as specifically set forth herein; and it is further

ORDERED, that Dominion's motion for summary judgment is granted in part and denied in part, as specifically set forth herein; and it is further

ORDERED, that O'Connell agreed to protect LMC and Dominion as its additional insureds from all claims on a primary and non-contributory basis under its primary insurance, and excess/umbrella insurance; and it is further

ORDERED, that O'Connell is required to contractually indemnify LMC and Dominion on a conditional basis; and it is further

ORDERED, that O'Connell must reimburse and pay for all of LMC's and Dominion's past and future defense costs and litigation expenses, including whatever LMC paid to Dominion; and it is further

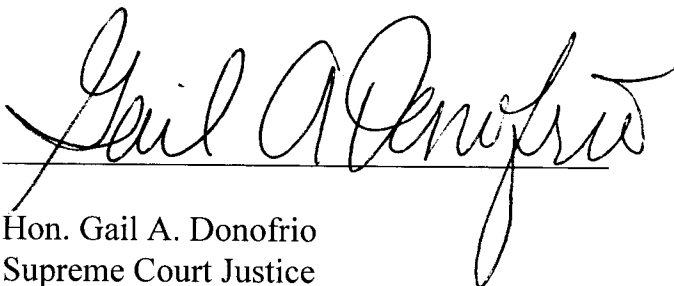
ORDERED, that because LMC and Dominion are additional insureds and contractual indemnitees of O'Connell, O'Connell must financially protect LMC and Dominion on a conditional basis against all damages, cross-claims and counterclaims on a primary and non-contributory basis; and it is further

ORDERED, that O'Connell's cross-motion to compel LMC to produce the requested discovery is granted as specifically set forth herein; and it is further

ORDERED, that O'Connell's cross-motion to dismiss Dominion's claim for common-law contribution and indemnification is granted; and it is further

ORDERED, that O'Connell's cross-motion to dismiss the breach of contract claims for failure to procure insurance is granted.

DATED: August 6 4, 2022


Hon. Gail A. Donofrio
Supreme Court Justice