Abrams v ESRT 112 W. 34th St., L.P.
2023 NY Slip Op 30196(U)
January 13, 2023
Supreme Court, New York County
Docket Number: Index No. 158337/2017
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **32**

Justice

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CHRISTOPHER ABRAMS,

Plaintiff,

- V -

ESRT 112 WEST 34TH STREET, L.P., EMPIRE STATE REALTY TRUST, INC., AMERICON CONSTRUCTION INC.,HITT CONTRACTING, INC,

Defendant.

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INDEX NO. 158337/2017

MOTION DATE ________

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

ESRT 112 WEST 34TH STREET, L.P., EMPIRE STATE REALTY TRUST, INC., AMERICON CONSTRUCTION INC.,HITT CONTRACTING, INC,

Plaintiff,

-against-

PYRAMID FLOOR COVERING, INC., TITAN INDUSTRIAL SERVICES CORP.

Defendant.

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Third-Party
Index No. 565708/2019

The following e-filed documents, listed by NYSCEF document number (Motion 004) 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 170, 172, 181, 184, 185, 186, 188

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

The following e-filed documents, listed by NYSCEF document number (Motion 005) 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 171, 173, 174, 175, 176, 177, 178, 179, 180, 182, 183, 187

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

Upon the foregoing documents, the motions and cross-motion are determined as follows:

Plaintiff commenced this action to recover for injuries allegedly sustained on May 15, 2017, when he tripped and fell at a construction site located at 112 West 34th Street/111 West 33rd Street, New York, New York. On the day of the incident, Plaintiff was employed by non-party Ess and Vee Acoustical as a carpenter. Plaintiff claims he was caused to fall by a rocky, chopped-up floor that was partially covered with sheets of plywood. In the compliant, Plaintiff pled causes of action based upon violations of Labor Law §§240[1], 241[6] and 200 as well as a claim of common-law negligence.

Defendants ESRT 112 West 34TH Street, L.P. ("ERST") and Empire State Realty Trust ("Empire") answered and pled crossclaims against Defendants Americon Construction Inc. ("Americon") and Hitt Contracting, Inc. ("Hitt"), for common-law indemnification and contribution,

contractual indemnification and for breach of contract for failure to obtain insurance. Americon and Hitt answered separately but did not plead any crossclaims.

Thereafter, ERST, Empire, Americon and Hitt jointly commenced a third-party action against Third-Party Defendants Pyramid Floor Covering, Inc. ("Pyramid") and Titan Industrial Services Corp. ("Titan") for, *inter alia*, common-law indemnification and contribution, contractual indemnification and for breach of contract for failure to obtain insurance. Titan answered and pled counterclaims against ERST, Empire, Americon and Hitt for common-law and contractual indemnification. Pyramid answered and pled causes of action for common-law indemnification and contribution against Titan via crossclaims and against ERST, Empire, Americon and Hitt via counter claims. Defendants ERST, Empire, Americon and Hitt later stipulated to discontinue the third-party action against Pyramid.

Plaintiff filed a note of issue on December 17, 2021. By status conference order dated January 28, 2022, this Court extended the time to file dispositive motions until May 28, 2022.

Now, Titan moves (Motion Seq No 4) for summary judgment dismissing the third-party complaint and all crossclaims. Americon and Hitt oppose the motion. ERST and Empire move (Motion Seq No 5) for summary judgment against Americon and Hitt for contractual indemnification and breach of contract for failure to obtain insurance. ERST and Empire also seek summary judgment dismissing all crossclaims and counter claims asserted against them. Americon and Hitt oppose the motion and cross-move for summary judgment dismissing all crossclaims and counter claims against Hitt.

"'[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make the requisite showing requires denial of the motion, regardless of the sufficiency of the opposition papers (*see id.* at 324; *see also Smalls v AJI Industries. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* demonstration has been made, the burden shifts to the opponent to produce evidentiary proof that establishes the existence of a material issues of fact (*see eg Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

On the branch of Titan's motion to dismiss the contractual indemnification claim against it, this cause of action is dependent upon the specific language of the contract (*see Ging v F.J. Sciame Constr. Co., Inc.*, 193 AD3d 415, 418 [1st Dept 2021]; *Anderson v United Parcel* Service, 194 AD3d 675, 678 [2d Dept 2021]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]; *see also Wai Cheung v 48 Tenants' Corp.*, 192 AD3d 503 [1st Dept 2021]). Further, absent a legal duty to indemnify, an agreement containing that obligation must be strictly construed so as not to create an unintended responsibility (*see eg Tonking v Port Auth.*, 3 NY3d 486, 490 [2004]).

Section 4[h] of the terms and conditions of the contract between Americon and Titan which reads, in pertinent part, as follows:

> To the fullest extent permitted by law, Subcontractor shall defend, indemnify and save harmless, Americon and/or any of its parent, affiliated or subsidiary entities. companies. corporations, partnerships, limited partnerships, limited liability partnerships, limited

> liability companies, firms, trusts, partners. officers, directors, members, trustees, agents, employees, successors and/or assigns (collectively "Agents") from and against any and all claims, demands, suits, actions, proceedings . . . on account of bodily or personal injury . . . sustained by any person . . . directly or indirectly arising out of or in connection with or relating to the operations attempted operations, or failure to perform operations in connection with or pursuant to this Agreement, whether or not due or claimed to be due in whole or in part to the active, passive or concurrent negligence or fault of Subcontractor or its Subcontractors or agents or anyone directly or indirectly employed by any of them or anyone else for whose acts any of them may be liable and/or any other person or persons.

The above contract language obligated Titan to indemnify Americon not only in the case of their negligence, but also for acts "arising out of or resulting from any work and caused in whole or in part by any act or omission of Subcontractor" (*see Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 490-491 [1st Dept 2018]). Titan established with the deposition testimony of Plaintiff and Carl Casalino, Titan's Principal, that Americon Hitt created the condition that Plaintiff claims caused him to fall less than a week before the accident. The testimony also demonstrated that Americon Hitt, the general contractor on the project, was responsible for placing plywood over the rocky floor. Contrary to Americon's assertion, Casalino's testimony does not create an issue of fact. Casalino only acknowledged, when show a photograph of the condition, that Titan had performed that "type of demolition work" at the premises. But he also averred that Titan employees were last at the project three months before the accident. Since the testimony demonstrates Plaintiff's accident was entirely unrelated to Titans actions, the claim for contractual indemnification against it fails (*see DeGidio v City of New York*, 176 AD3d 452, 454 [1st Dept 2019]).

A claim for common-law indemnity can only be sustained by a non-negligent party whose liability is purely vicarious (*see Broyhill Furniture Indus., Inc. v Hudson Furniture Galleries, LLC*, 61 AD3d 554, 556 [1st Dept 2009]). Contribution is an apportionment of rights among wrongdoers who share responsibility for an injury (*see* CPLR §1401; *Garrett v Holiday Inns, Inc.*, 58 NY2d 253, 258 [1983]). Therefore, a *prima facie* case for dismissal of the indemnification and contribution claims requires the moving party to establish it was not negligent or that the claims are otherwise inviable as a matter of law (*see Higgins v TST 375 Hudson, L.L.C.*, 179 AD3d 508, 511 [1st Dept 2020]; *CONRAIL v Hunts Point Terminal Produce Coop. Ass'n*, 11 AD3d 341, 342 [1st Dept 2004]).

Based on the foregoing deposition testimony, Titan established that it was neither negligent nor responsible for the creation of the condition at issue (*see eg Padron v Granite Broadway Dev. LLC*, 209 AD3d 536, 537 [1st Dept 2022]) and Americon and Hitt failed to raise an issue of fact.

The claims against Titan for failure to procure insurance are also not viable. Section 4[c] of the terms and conditions of the subcontract provides Titan was to insure Americon from "claims arising out of or resulting from Subcontractor's operations". As the accident did not relate to Titan's work, the section is not triggered. In any event, Titan demonstrated that it obtained a general liability policy that contained a blanket additional insured endorsement, thus satisfying its contractual obligation (*see Georges v Resorts World Casino New York City*, 189 AD3d 1549, 1551 [2d Dept 2020]; *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1098 [2d Dept 2018] *citing Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]).

Turning to motion by ERST and Empire[1] (Motion Seq No 5), at the time it was filed, May 31, 2022, Uniform Rules for Trial Courts §202.8-g[a] [22 NYCRR] provided as follows:

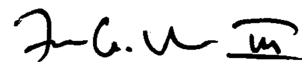
> Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

As no such document filed with Defendants' moving papers, the motion is defective on its face (*see Avamer 57 Fee LLC v Gorgeous Bride, Inc.*, ____Misc3d____, 2022 NY Slip Op 31453 [Sup Ct NY Cty 2022]). As to Americon and Hitt's cross-motion, this Court set a deadline of May 28, 2022, for dispositive motions and they proffered no justification for filing same nearly three months late (*see* CPLR §3212[a]; *Brill v City of New York*, 2 NY3d 648 [2004]; *Muqattash v Choice One Pharmacy Corp.*, 162 AD3d 499 [1st Dept 2018]). Americon and Hitt's assertion that good cause exists as prior motions on purportedly identical grounds was made by other Defendants is misplaced. Plaintiff is correct that an untimely motion or cross-motion for summary judgment can be considered "because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion" (*see eg Filannino v. Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 282 [1st Dept 2006]). The court's search of the record, however, is limited to those causes of action or issues that are "nearly identical" to those in raised in timely motion (*see Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 628 [1st Dept 2015]; *Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp.*, 161 AD3d 691 [1st Dept 2018]). The issue of Hitt's liability for indemnification/contribution is not such an issue (*see Rubino v 330 Madison Co., LLC*, 150 AD3d 603, 604 [1st Dept 2017]).

Accordingly, it is

ORDERED that the motion (Mot Seq No 4) by Third-Party Defendant Titan for summary judgment is granted and the third-party complaint and all crossclaims against it are dismissed, and it is

ORDERED that the motion by ERST and Empire as well as the cross-motion by Americon and Hitt (Mot Seq No 5) are denied.



1/13/2023
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III 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

[1] This motion is curious as the parties filed a stipulation dated January 3, 2018, which stated the "defendants', ESRT 112 WEST 34th STREET, L.P., and EMPIRE STATE REALTY TRUST, INC., claims, cross claims and causes of action against AMERICON CONSTRUCTION INC. and HITT CONTRACTING, INC. are discontinued" (NYSCEF Doc No 11).