

**63rd & 3rd NYC LLC v Advanced Contr. Solutions,
LLC**

2023 NY Slip Op 31535(U)

May 4, 2023

Supreme Court, New York County

Docket Number: Index No. 656164/2019

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON

PART

37

Justice

-----X

63RD & 3RD NYC LLC, HUDSON MERIDIAN
CONSTRUCTION GROUP, LLC,

Plaintiffs,

INDEX NO. 656164/2019MOTION DATE 12/22/2022MOTION SEQ. NO. 003

- v -

ADVANCED CONTRACTING SOLUTIONS, LLC, TRIDENT
GENERAL CONTRACTING, LLC,

Defendants.

DECISION + ORDER ON MOTION

-----X

TRIDENT GENERAL CONTRACTING, LLC,

Plaintiff,

Third-Party
Index No. 595671/2021

-against-

DOMANI INSPECTION SERVICES, INC., PILLORI
ASSOCIATES, P.A.,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 150, 151, 152, 153, 154, 155, 156, 160, 161, 162, 163

were read on this motion for

SUMMARY JUDGMENT

Upon the forgoing documents, and for the reasons stated hereinbelow, plaintiffs' motion for partial summary judgment for contractual indemnification is granted and defendants' cross-motion for various forms of relief is denied.

Background

This action arises from a hole in the ground located at 1059 Third Avenue, New York, New York (the "Site"). On September 1, 2016, plaintiff 63rd & 3rd NYC LLC ("63rd"), as owner, entered into a "Cost Plus Fee Agreement with or without A GMP" (the "63rd/Hudson Agreement") with plaintiff Hudson Meridian Construction Group, LLC ("Hudson"), as construction manager, to build a 30-plus-story condominium tower (the "Tower") at the Site. NYSCEF Doc. No. 115.

Article 2.6 of the 63rd/Hudson Agreement states that Hudson shall perform various duties including, inter alia, “(s) direct a Subcontractor to cease Work in the event of an emergency, or if a safety hazard is encountered or if [Hudson] deems that a Subcontractor is creating a condition adversely affecting the safety of Work, Owner or other Subcontractors” and “(v) monitor Work of the Subcontractors and require them to perform their obligations under the Subcontracts and complete the Project pursuant to the Contract Documents.” NYSCEF Doc. No. 115.

On September 21, 2016, Hudson entered into a subcontract with defendant Advanced Contracting Solutions (“ACS”) to, inter alia, excavate the Site, support the excavation, do “ground improvement” and foundation work, and build the Tower’s superstructure (the “Subcontract”). NYSCEF Doc. No. 116.

Article 20 Section 1 of the Subcontract states that:

To the fullest extent permitted by law, [ACS] will defend, indemnify and save [Hudson and 63rd] their officers, directors, agents, representatives and employees harmless from and against any and all claims, liens, judgments, damages, losses and expenses, including reasonable attorneys' fees and legal costs, arising in whole or in part and in any manner from the act, failure to act, omission, negligence, breach or default by [ACS] and/or its officers, directors, agents, employees, sub-subcontractors and suppliers in connection with the performance of this Subcontract.

NYSCEF Doc. No. 116.

In October 2016 ACS began working at the Site. NYSCEF Doc. No. 113.

On October 31, 2016, 63rd became aware of issues appearing in the buildings adjacent to the Site and, the next day, November 1, 2016, the New York City Department of Buildings (“DOB”) posted a stop work order at the Site. NYSCEF Doc. Nos. 113 and 124.

On December 23, 2016, non-party Rand Engineering & Architecture prepared a Structural Evaluation Report for one of the Site’s neighbors, non-party 200 East 63rd Street, in response to the stop work order. NYSCEF Doc. No. 118. The report noted that “some deficiencies appear to be the result of the ongoing construction activities” at the Site.

On December 19, 2017, defendant Trident General Contracting, LLC (“Trident”), agreed to purchase ACS’s assets and liabilities. NYSCEF Doc. Nos. 25 and 26. On February 16, 2018, ACS assigned the Subcontract to Trident. NYSCEF Doc. No. 123.

On October 22, 2019, plaintiffs sued ACS and Trident, asserting six causes of action: (1) breach of contract; (2) negligent construction; (3) strict liability; (4) negligent misrepresentation; (5) fraud in the inducement; and (6) damage to reputation, credibility, and loss of goodwill. NYSCEF Doc. No. 106.

On February 18, 2020, ACS and Trident answered with denials and ten and fifteen affirmative defenses, respectively. NYSCEF Doc. Nos. 107 and 108.

On March 2, 2020, non-party Howard L. Zimmerman Architects PC, prepared a Damage Assessment, Repair Recommendations & Cost Estimate for one of the Site's neighbors, non-party 201 East 62nd Street ("201E62"), which noted that the construction at the Site, along with the fact that 201E62's foundations were not supported by bedrock, appeared to have contributed to damage to that building. NYSCEF Doc. No. 119.

On July 26, 2021, defendants, as third-party plaintiffs, impleaded third-party defendants Domani Inspection Services, Inc. ("Domani") and Pillori Associates, P.A. ("Pillori"), alleging that any damages sustained by plaintiffs were caused by third-party defendants' negligence or breaches of contract. NYSCEF Doc. No. 109. Third-party plaintiffs alleged three causes of action: (1) contribution; (2) common law indemnity; and (3) negligence. Id.

On October 8, 2021, third-party defendant Pillori filed an amended answer with denials, 29 affirmative defenses, three-cross claims against third-party defendant Domani, and a counter-claim for breach of contract against ACS/Trident. NYSCEF Doc. No. 111.

On December 30, 2021, and on March 7, 2022, Domani and Pillori respectively moved, pursuant to CPLR 3211(a)(7), to dismiss the third-party complaint. NYSCEF Doc. No. 32 and 44. On April 1, 2022, plaintiffs cross-moved to amend the complaint. NYSCEF Doc. No. 64.

In a Decision and Order dated April 13, 2022, this Court granted third-party defendants' motions solely to the extent of dismissing, without opposition, third-party plaintiff's negligence cause of action, and granted plaintiffs' cross-motion to amend. NYSCEF Doc. No. 70.

On May 3, 2022, third-party defendant Domani answered with denials, four affirmative defenses, and cross-claims against plaintiff and defendant/third-party plaintiff for indemnification, and against Pillori for breach of an insurance procurement obligation. NYSCEF Doc. No. 112.

On November 23, 2022, plaintiffs moved, pursuant to CPLR 3212, for summary judgment granting them contractual indemnification from defendants. NYSCEF Doc. No. 104.

On February 16, 2023, defendants cross-moved, pursuant to CPLR 3211(a)(7), to dismiss plaintiffs' claims for indemnification, or, in the alternative, pursuant to CPLR 3126, to strike plaintiffs' pleadings due to their failure to provide discovery. NYSCEF Doc. No. 129. In the same motion, defendants moved, pursuant to CPLR 3126, to strike the answers of third-party defendants for failure to provide discovery or, in the alternative, pursuant to CPLR 3124, for third-party defendants to comply with all outstanding notices for disclosure. Id.

On February 21, 2023, defendants and Pillori stipulated to withdraw, without prejudice, that part of defendant's cross-motion seeking relief against Pillori. NYSCEF Doc. No. 152.

On February 22, 2023, defendants and Domani stipulated to withdraw, without prejudice, that part of defendant's cross-motion seeking relief against Domani. NYSCEF Doc. No. 153.

Plaintiffs argue that they are entitled to contractual indemnification based on the unambiguous language of the Subcontract, which requires neither negligence on the part of ACS nor a determination of any party's liability. Plaintiffs essentially argue that, as ACS subcontracted to excavate at the Site and to indemnify both the Site's owner and construction manager, defendants are now contractually required to indemnify plaintiffs from the claims and damages that have arisen due to that work.

Defendants argue in opposition, *inter alia*, that: summary judgment on indemnification is premature as outstanding discovery exists and might show negligence on the part of Hudson or third-party defendants and that plaintiffs have failed to show that their own negligence did not cause the underlying damages. In their cross-motion for summary judgment defendants argue that plaintiffs' claims for indemnity are either time-barred or based on voluntary payments that therefore cannot be claimed.

Plaintiffs, in reply, argue, *inter alia*: that the Subcontract, to which Trident is bound pursuant to assignment, is clear that ACS was to indemnify *both* 63rd and Hudson and no amendment or superseding contract has been provided or even alluded to; that any alleged outstanding discovery is outside the scope of the instant motion; that defendants have failed to present evidence that Hudson was actively negligent; that indemnification was triggered once damages occurred as a result of the defendants' work; that plaintiffs indemnity claims are not time-barred as, pursuant to CPLR 213(2), the statute of limitations for an action upon a contractual obligation is six years; and that even if some of plaintiffs' indemnity claims were unenforceable, each claim must be resolved individually.

Discussion

In order to obtain summary judgment, the "movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests' [M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose." Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988) (internal citations omitted).

Here, plaintiffs have established a *prima facie* entitlement to contractual indemnification by submitting, *inter alia*: the Subcontract to excavate the Site, which includes an indemnity clause that complies with GOL § 5-322.1; the DOB's stop work order and reports connecting the excavation work at the Site to the that order; and summonses from related lawsuits against 63rd. Defendants have failed to establish that the Subcontract's indemnity clause was superseded by anything or that Hudson was actively negligent; nor have they shown how any outstanding disclosure would change anything. See Bailey v New York City Tr. Auth., 270 AD2d 156, 157 (1st Dept 2000) ("A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence.") (citations omitted).

Further, the remaining portion of defendants' cross-motion should be denied as the actions for which plaintiffs seek to be indemnified are not time-barred.

This Court has considered the parties other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Therefore, the motion of plaintiffs, 63rd & 3rd NYC LLC and Hudson Meridian Construction Group, LLC, for summary judgment against defendants, Advanced Contracting Solutions, LLC, and Trident General Contracting, LLC, on the issue of contractual indemnification is granted, defendants' cross-motion is denied, and defendants are hereby directed to defend, indemnify, and hold plaintiffs harmless.

5/4/2023

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

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DENIED

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GRANTED IN PART

☐

OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

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REFERENCE