Newman v New York City Hous. Auth.
2023 NY Slip Op 31941(U)
June 9, 2023
Supreme Court, New York County
Docket Number: Index No. 152547/2018
Judge: James d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **Hon. James d'Auguste** *Justice* **PART 55**

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ANDRE NEWMAN,

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

---X

INDEX NO. 152547/2018

MOTION DATE 10/05/2021, 12/02/2021

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

NEW YORK CITY HOUSING AUTHORITY,

Plaintiff,

-against-

TRIPLE H CONSTRUCTION, INC.,

Defendant.

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Third-Party Index No. 595593/2018

The following e-filed documents, listed by NYSCEF document number (Motion 002) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 110, 112, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 111, 113, 114, 115, 116, 132, 133, 134, 135, 136, 137

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff Andre Newman ("Newman"), a union laborer, sues for damages arising from injuries he sustained on October 6, 2017, in a trip and fall at a worksite located at premises known as the Jackie Robinson Houses, owned by defendant/third-party plaintiff New York City Housing Authority ("NYCHA") (NYSCEF Doc. No. 63). NYCHA hired third-party defendant Triple H Construction, Inc. ("Triple H"), Newman's employer, pursuant to a contract (NYSCEF Doc. No. 64). The work being

performed by Triple H on the project involved demolition of the existing interior staircase and installation of a new staircase.

In Motion Sequence 002 ("MS002"), Triple H seeks summary judgment on the issue of liability dismissing all claims and cross-claims against it. In Motion Sequence 003 ("MS003"), NYCHA seeks summary judgment in its favor against Triple H for contractual indemnification, including defense costs. For the reasons set forth below, Triple H's motion in MS002 is denied and NYCHA's motion in MS003 is denied.

Newman claims he slipped and fell due to a dangerous condition created by a NYCHA employee, identified as non-party Kenyatta Aiken, also known as "Mimi," who spilled stripper fluid on the floor, and subsequently mopped the subject area (NYSCEF Doc. Nos. 63, 64, 76). On the date of the incident, Newman was tasked with removing concrete and steel demolition debris by bagging the debris, placing it on an A-frame cart and pushing it to the elevator lobby for the sixth floor, then taking the debris downstairs to a dumpster outside the building (NYSCEF Doc. Nos. 63, 73 at Tr. 61:15-20).

The accident occurred at approximately 11:00 a.m. as Newman returned to the sixth floor from disposing of debris in the outside dumpster. Newman claims he wheeled an empty A-frame cart to a far wall, took five steps across the lobby to return to his work location, when he slipped, "went up in the air," and landed on his tailbone (NYSCEF Doc. Nos. 63, 73 at Tr. 111:18, 123:13). Newman contends there was no tape, barriers, or safety cones anywhere in the area he was walking transiting (NYSCEF Doc. No. 73 at Tr. 111:2-5). Newman also asserts, while on the ground, he observed his entire back was wet, and smelled an odor from his clothing, which he described as liquid used to strip floors (NYSCEF Doc. Nos. 63, 73 at Tr. 116:18-25, 117:2-4). At his deposition, Newman stated he did not smell anything before the incident occurred, only after (NYSCEF Doc. No. 73 at Tr. 117:5-17). Newman indicated the smell of the stripper fluid was a "chemical smell" (NYSCEF Doc. No. 73 at Tr. 118:19-24,

208:3-5). NYCHA, however, argues Newman's deposition testimony contradicts his testimony at a prior General Municipal Law Section 50-h hearing wherein he stated he neither saw nor smelled anything before or after his incident (NYSCEF Doc. Nos. 119, 121 at Tr. 80:19-20, 104:16-19).

Triple H's onsite supervisor, Jeffrey Liranzo ("Liranzo"), testified he observed a liquid spill on the sixth floor, and saw Mimi, who admitted the spill was caused by stripper fluid that originated from her cleaning cart (NYSCEF Doc. Nos. 63, 64, 76 at Tr. 67:19-23; 77 at Tr. 14:2). Liranzo also stated 15 minutes before learning of Newman's accident, he was on the sixth floor to check on the progress of the work and observed the elevator lobby floor was damp (NYSCEF Doc. Nos. 63, 76 at Tr. 52:10-23). Further, Liranzo testified that upon arriving on the scene after Newman's accident and observing the floor still damp, he saw a "caution, wet floor" sign (NYSCEF Doc. Nos. 76 at Tr. 51:21-25). Yet, Liranzo confirmed there were never spills created by Triple H as they did not use any liquid materials for their work on the floor (NYSCEF Doc. Nos. 63, 76 at Tr. 102:16-22).

NYCHA points out that Liranzo stated he saw the sign on the floor located approximately one to two feet from where Newman fell, and also saw the sign 15 to 30 minutes before the incident when he was on the sixth floor to check on the progress of the work (NYSCEF Doc. Nos. 84, 117, 119). In fact, NYCHA notes Liranzo observed the wet condition on the floor prior to the incident yet failed to warn the Triple H workers—who were all allegedly in a trailer together at the time for lunch (NYSCEF Doc. Nos. 84, 117). In response, Liranzo, at his deposition, stated as Mimi was a NYCHA worker, was aware of the spill, and was in the process of mopping it, he did not think it was necessary to tell anyone or contact anyone else from NYCHA (NYSCEF Doc. No. 76 at Tr. 130-132).

Non-party witness Mohammed Iqbal ("Iqbal"), the security guard working at the project site on the day of the accident, testified he observed a female worker mop the elevator lobby near the site Newman fell. Iqbal stated the woman, a NYCHA employee, spilled some type of liquid from her

cleaning cart, exclaimed, "oh damn," and mopped the area (NYSCEF Doc. No. 75 at Tr. 87: 9-22). Thereafter, Iqbal saw that the floor was wet, but he did not recall the woman placing any wet floor signs in the area (NYSCEF Doc. Nos. 63, 75 at Tr. 39-42). Iqbal also stated Newman fell, approximately 15 to 20 minutes later, in the area the woman mopped (NYSCEF Doc. Nos. 63, 75 at Tr. 40:17-21).

NYCHA's Supervisor Caretaker, non-party Terrence Robinson, confirmed Mimi was a "caretaker J" for the subject site – responsible for cleaning community centers, mopping, and stripping, among other things (NYSCEF Doc. Nos. 63, 77 at Tr. 8:4-6, 14:2). Robinson also noted on the floor where Newman's incident occurred was a locked janitorial closet containing a slop sink for water access, but only the caretaker for the building had access to that area (NYSCEF Doc. No. 63, 77 at Tr. 73:18-19). However, Robinson also stated that stripper fluid was not used at the subject premises on or before Newman's accident (NYSCEF Doc. Nos. 77 at Tr. 43:8-22; 119). Robinson further testified, in contrast to Newman's claims of smelling stripper fluid with a chemical smell (NYSCEF Doc. No. 73 at Tr. 118:19-24), that a micro bio-wash was used to clean the floors, that had a "pleasant, flowery smell" (NYSCEF Doc. Nos. 77 at Tr. 44:5-6, 79:16-17).

Further, Newman's counsel submitted an Affirmation of No Position to Triple H's motion seeking summary judgment on liability and dismissal of the third-party action (NYSCEF Doc. No. 82). Newman asserts there are no claims that Triple H caused or created the alleged dangerous condition upon which he fell and sustained injuries; rather, it is uncontroverted the condition was caused and created by actions of NYCHA's employee, Mimi (NYSCEF Doc. No. 82). As such, Newman agrees with the recitation of facts concerning NYCHA's liability, stating that the recitation cannot then serve as a basis for contractual indemnification against Triple H. Thus, plaintiff has no opposition and takes no position relating to the third-party claims (NYSCEF Doc. No. 82).

NYCHA, in its response to Triple H's Statement of Material Facts, does not admit that the underlying incident even took place. NYCHA also contests Triple H's assertion that it had no duty to clean any debris or spills at the site that were not generated by their work. Further, NYCHA contests the statement that Mimi admitted to Triple H that the liquid Newman slipped and fell on was caused by stripper fluid spilling from her cleaning cart. NYCHA argues such statements are contrary to the evidence, and refer to and rely on self-serving testimony by and on behalf of Triple H (NYSCEF Doc. No. 125).

Triple H asserts several reasons why NYCHA's third-party complaint should be dismissed, including that there is no evidence suggesting any negligence on the part of Triple H. Indeed, Triple H claims that the accident occurred solely out of NYCHA's own negligence (NYSCEF Doc. No. 65). Triple H contends it was the negligence of NYCHA's own employee, Mimi, who admitted that stripper fluid spilled from her cleaning cart, and she mopped the subject area which left the floor damp, according to witnesses, including Iqbal and Liranzo (NYSCEF Doc. Nos. 63, 64, 75, 76).

Newman claims his accident arose out of the actions of a NYCHA employee, Mimi. Yet, NYCHA argues negligence should be attributed to Triple H for Liranzo's failure to warn Newman of the alleged dangerous condition despite having actual prior knowledge of it at the work site, which allegedly caused Newman's accident. However, there appears no evidence indicating Newman ever saw Liranzo or spoke with him in the time between Newman departing the floor to dispose of the debris and the time immediately before his accident (NYSCEF Doc. No. 114). Additionally, security guard Iqbal also noted he only saw Mimi on the floor at the time the liquid spilled from her cleaning cart, during the time she mopped the area and the 15 to 30 minutes later when Newman fell (NYSCEF Doc. No. 114). Such inconsistencies in testimonies and timelines raise questions of fact that preclude the granting of summary judgment.

To the extent that NYCHA is found negligent for the actions of its employees, it cannot be indemnified. Here, NYCHA construes the phrase "to the fullest extent permitted by applicable law" in the parties' contract to mean the provision excludes indemnification for NYCHA only where NYCHA is found to be solely at fault (NYSCEF Doc. No. 117). The Court in *Dutton v. Charles Pankow Builders Ltd.*, 296 A.D.2d 321 (1st Dep't 2002) found the indemnification clause called for partial, not full, indemnification of the general contractor therein for personal injuries if they were partially caused by the general contractor's negligence. Thus, the general contractor would be indemnified for the percentage of negligence not attributed to it.

While Newman alleges his fall and ensuing injuries were caused by the sole negligence of NYCHA as owner, NYCHA disputes whether the incident occurred, and whether the alleged dangerous condition upon which Newman slipped and fell was caused by a NYCHA employee. However, multiple witnesses testified that they observed the wet condition, including seeing the stripper fluid spill from NYCHA employee Mimi's cart, and Mimi's admission of the spill from her cart. Also, these witnesses observed Mimi mopping the spill immediately after its occurrence. Further, it is uncontested that only NYCHA's caretaker, Mimi, has access to the locked janitorial closet containing a slop sink. As such, it cannot be reasonably contested that the wet, dangerous condition was caused and created by NYCHA via one of their employees.

Additionally, while conflicting testimonies exist whether there were warnings signs posted around the area of the subject incident—Triple H's supervisor Liranzo claimed he saw a warning sign in the damp area, yet, security guard Iqbal, and plaintiff Newman contended neither saw any caution signs or safety cones in or around the area of the wet floor—"the mere placement of wet floor signs does not automatically absolve a defendant of negligence." *Zubillaga v. Findlay Teller Housing Development Fund Corp.*, 197 A.D.3d 428 (1st Dep't 2021). Yet, the presence of at least one warning sign was found

sufficient to raise an issue of fact if defendant had actual notice of a hazardous condition causing a plaintiff's fall. *Felix v. Sears, Roebuck and Co., 64 A.D.3d 499* (1st Dep't 2009).

NYCHA argues negligence should be attributable to Triple H for Liranzo's failure to warn Newman of the alleged condition despite Liranzo's actual prior knowledge of it at the work site shortly before Newman's alleged incident. However, while awareness of a dangerous condition does not negate a duty to warn of a hazard, same only goes to the issue of comparative negligence. *Francis v. 107-145 W. 135th Street Association Ltd. Partnership*, 70 A.D.3d 599 (1st Dep't 2010). Moreover, Triple H asserts that, on the one hand, NYCHA claims its employee placed warning signs near the mopped area, therefore, complied with its duty to warn Newman, but on the other hand argues Liranzo should have warned Newman of the condition. Triple H notes such claim undermines NYCHA's own argument that the alleged warning signs were sufficient because if they were sufficient to warn Newman, then Liranzo would have no need to do so. Yet, if NYCHA alleges Liranzo, in fact, needed to warn Newman, then NYCHA's own actions caused the alleged dangerous condition, resulting in Newman's accident. As such, NYCHA could not be indemnified for its own negligence, nor indemnified under the parties' contract for its defense costs.

Regardless, as questions of fact are raised with conflicting testimonies of whether or not a warning sign was posted at the subject wet area where Newman fell, as well as whether NYCHA utilized stripper fluid—one that smelled like chemicals, versus a micro bio-wash with a "flowery smell," to wash its floors—summary judgment is inappropriate. *Zhong v. Matranga*, 208 A.D.3d 439 (1st Dep't 2022). Such questions of fact are best addressed by the trier of fact, and summary judgment is inappropriate. Thus, Triple H's motion for summary judgment on liability and dismissal of claims and cross-claims against it in MS002 is denied.

In response to NYCHA's motion, in MS003, for summary judgment in its favor against Triple H for contractual indemnification, including defense costs, Triple H argues that NYCHA's claim for common law contribution and indemnification must be dismissed as barred by Section 11 of the Workers' Compensation Law (NYSCEF Doc. No. 65). Further, Triple H claims that the accident occurred solely out of NYCHA's own negligence, noting NYCHA cannot be indemnified for its negligence. Triple H argues there is no reasonable explanation of the facts herein that would trigger the parties' contract's indemnification provision (NYSCEF Doc. No. 115).

There are no allegations herein that Newman sustained a grave injury that would qualify for one of the narrow exemptions to the Workers' Compensation Law ("WCL"). Even Newman's claim of sustaining injury to his lumbar spine, necessitating surgery, is not the type of injury contemplated by WCL Section 11. *Cassese v. SVJ Joralemon, LLC*, 168 A.D.3d 667 (2d Dep't 2019). Thus, NYCHA's third-party complaint asserting claims for indemnification or contribution against Triple H are improper as barred by WCL Section 11. Additionally, even if the WCL did not apply herein, there is no evidence Triple H was negligent in any manner as the accident arose from the actions of a NYCHA employee who spilled stripper fluid on the elevator lobby floor, and mopped the area just before Newman entered the vicinity, resulting in his slip and fall.

NYCHA, as owner of the subject premises, has a non-delegable duty to maintain its premises in a reasonably safe condition, taking into account the foreseeability of injury to others. *Basso v. Miller*, 40 N.Y.2d 241 (1976). Also, it is well settled that a party may not obtain common law indemnification unless it has been held to be vicariously liable without proof of any negligence on its own part. *Ramirez v Almah, LLC*, 169 A.D.3d 508 (1st Dep't 2019). NYCHA contends Liranzo's own testimony shows that Mimi mopped up the spill in the wet area and left a caution sign.Thus, NYCHA claims its employee took all necessary and required action to remedy the condition, and NYCHA discharged its duty to

maintain its property in a reasonably safe condition (NYSCEF Doc. No. 106; see *Basso*, *supra*, at 233). However, as previously noted, questions of fact are raised concerning negligence, and no definitive finding of negligence or liability has been made at this juncture.

The contract entered into between NYCHA and Triple H contains indemnification provisions (NYSCEF Doc. Nos. 117, 123 at Exh. D) that provide for the following:

> (c) **Indemnification** - If any person sustaining injury or death, or Loss or damage to property occurs, resulting directly or indirectly from the Work of the Contractor, or its subcontractors, in the performance of this Contract, or from the contractor's failure to comply with any of the provisions of this Contract or of law, or for any other reason whatsoever, the Contractor, to the fullest extent permitted by applicable law, shall indemnify and hold the Authority and its members, officers, agents and employees harmless from any and all claims and judgments for damages and from costs and expenses to which the Authority or its members, officers, agents and employees may be subjected or which it may suffer or incur by reason thereof (emphasis added).

Here, Newman's claim does not arise from the work being performed—demolition of the interior staircases— nor any negligence on Triple H's part, but a simple negligence action against NYCHA and the claimed dangerous condition that caused Newman's fall and injuries—the wet elevator lobby floor—caused and created by NYCHA employee, Mimi. In order for a claim to arise out of a party's work, there must be a specific showing that a "particular act or omission in the performance of such work was causally related to the accident." *Urbina v. 26 Court Street Associates, LLC*, 46 A.D.3d 268 (1st Dep't 2007).

Even where, as here, an indemnification provision is broadly drafted, such provision is not triggered where a party's acts or omissions did not specifically cause the accident. *Worth Constr. Co. Inc. v. Admiral Ins. Co.*, 10 N.Y.3d 411 (2008). Here, Triple H argues no showing has been made that any act or omission by Triple H specifically caused Newman's accident to warrant triggering the indemnification provision.

NYCHA argues the Court of Appeals has held indemnity clauses, as the one herein, are enforceable. *Brown v. Two Exchange Plaza Partners*, 76 N.Y.2d 192 (1990). NYCHA also notes the indemnity provision of its contract with Triple H is broader than language interpreted by the Court of Appeals in *Drzewinski v. Atlantic Scaffold & Ladders*, 70 N.Y.2d 774 (1987), in that Triple H agreed to indemnify NYCHA not merely for claims resulting directly or indirectly from its work, but for any reason whatsoever (NYSCEF Doc. No. 117).

NYCHA claims Newman's alleged accident arose out of work performed under Triple H's contract with NYCHA, noting Newman was performing work in the scope of his employment with Triple H, and the incident took place at the worksite where Triple H kept its tools and equipment during the day (NYSCEF Doc. No. 117). Yet, Triple H contends the condition Newman slipped on was not created by Triple H, nor did the condition arise out of any of the ongoing work at the location—taking place in the stairwell— or negligence on Triple H's part (NYSCEF Doc. No. 115). Indeed, Triple H asserts the condition causing Newman to slip and fall was solely caused by actions of NYCHA's employee (NYSCEF Doc. No. 115).

However, the Court of Appeals examined the phrase, "to the fullest extent permitted by law," and addressed the issue in *Brooks v. Judlau Contracting Inc.*, 11 N.Y.3d 204 (2008). There, the Court found "that the language contemplates partial indemnification and is intended to limit…contractual indemnity obligations solely to the subcontractor's own negligence." (*Id.* at 209). The Court additionally noted the Legislature's enactment of General Obligations Law Section 5-322.1, stating its purpose was to:

> "prevent a prevalent practice in the construction industry of requiring subcontractors to assume liability by contract for the negligence of others. The Legislature concluded that such 'coercive' bidding requirements unnecessarily increased the cost of construction by limiting the number of contractors to obtain the necessary hold harmless insurance, and unfairly imposed liability on subcontractors for the negligence of others over whom

> they had no control. The agreements also created expensive double coverage for hold harmless or general liability insurance." *Id.*, quoting *Itri Brick & Concrete Corp. v. Aetna Cas & Sur. Co.*, 89 N.Y.2d 786 (1997).

The prevailing case law holds that an owner may not be indemnified for its own negligence. *Farrugia v. 1440 Broadway Associates*, 163 A.D.3d 452 (1st Dep't 2018). Further, the limitation "to the fullest extent permitted by law" only obligates an employer to indemnify an owner to the extent the owner is free from negligence. Additionally, it is well settled that a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified. *Cava Construction Co. Inc. v. Gealtec Remodeling Corp.*, 58 A.D.3d 660 (2d Dep't 2009). This standard prevents such indemnification provisions from running contrary to the limitations of GOL Section 5-322.1, as required by *Brooks*, *supra*.

NYCHA argues it is entitled to contractual indemnification and defense from Triple H to the extent it is found not to be negligent, claiming if NYCHA is absolved of negligence or liability, Triple H would be obligated to reimburse NYCHA for costs and attorney fees incurred in its defense of the underlying claim and lawsuit. NYCHA further asserts that if both Triple H and NYCHA are found to be negligent, NYCHA is still entitled to indemnification for the portion of the negligence which is not attributed to it. NYCHA contends the plain language of the indemnification provision in the parties' contract does not require a finding of fault against Triple H to establish an entitlement to indemnity, arguing all that is required for the provision to be triggered is that Newman's claims "arose out of" or in any way "connected to" Triple H's work (NYSCEF Doc. Nos. 106, 132).

While an owner seeking contractual indemnification under a contract is barred by GOL Section 5-322.1 from obtaining indemnification for its own negligence, the extent of indemnification of an owner depends on the extent to which the owner's negligence is found to proximately cause the accident. *Cackett v. Gladden Properties, LLC*, 183 A.D.3d 419 (1st Dep't 2020). NYCHA's and Triple

H's views on whether Newman's claims "arose out of" or are in any way "connected to" Triple H's work at the subject premises are vastly different. NYCHA asserts the sixth-floor hallway, wherein Newman's accident occurred, was a work site where Newman, and other Triple H employees would be walking in the course of performing their work. Alternatively, Triple H contends, Newman's claims for the slip and fall, and his ensuing injuries did not arise out of the work Triple H was performing under its contract with NYCHA—demolition of the interior staircase.

Case law may indicate that a court may render a determination that NYCHA is entitled to contractual indemnification before resolution of the main action. *Di Perna v. American Broadcasting Companies, Inc.,* 200 A.D.2d 267 (1st Dep't 1994). However, questions of fact remain whether NYCHA, Triple H or both are negligent in causing the accident, and whether the accident arose out of the work Triple H was contracted to perform, or occurred in the scope of Newman's employment for Triple H, thus triggering the indemnification provision under the contract.

Therefore, while evidence and testimony appear to indicate that NYCHA was the responsible party that created the condition on which Newman slipped and fell, injuring himself, for which NYCHA cannot be indemnified, and Triple H may be free from any liability for the subject incident, genuine questions of fact remain, and a conclusive finding of negligence has not been made. A party seeking contractual indemnification does not need to be free of negligence, it merely cannot be indemnified to the extent it is found to be negligent (NYSCEF Doc. No. 134). Hence, as no such finding of negligence, or an absence thereof, has been made, a determination of indemnification, even partial indemnification, is premature, and inappropriate. As such, NYCHA's MS003 seeking summary judgment in its favor against Triple H for contractual indemnification, including defense costs, is denied.

Finally, "the Court need not address, in its decision, every argument raised by a party." *Ctr. For Jud. Accountability, Inc. v. Cuomo*, 167 A.D.3d 1406 (3d Dep't 2018). Remaining arguments were considered and found to be without merit.

Accordingly, it is

ORDERED that Triple H's motion for summary judgment on liability and dismissal of all claims and cross-claims as against it in MS002 is denied; and it is

ORDERED that NYCHA's motion for summary judgment in its favor against Triple H for contractual indemnification, including defense costs in MS003 is denied.

This constitutes the decision and order of this Court.

6/9/2023
DATE

James d'Auguste, 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**