SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS **PART** 57TR

Justice

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ROSA ELENA GALLEGOS,

Plaintiff,

- v -

WC 28 REALTY LLC,PIZZAROTTI, LLC,

Defendant.

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INDEX NO. 161238/2020

MOTION DATE 06/01/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

WC 28 REALTY LLC, PIZZAROTTI, LLC

Third-Party Plaintiffs,

-against-

PCC CLEANING SERVICES, INC., PCC CLEANING SOLUTIONS, INC, OPUS CLEANING SOLUTIONS INC., ACE-ATLAS CORP., R&S UNITED SERVICES, INC.

Third-Party Defendants.

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Third-Party
Index No. 595866/2021

PCC CLEANING SOLUTIONS, INC

Second Third-Party Plaintiff,

-against-

SCL SERVICES CORP.

Second Third-Party Defendant.

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Second Third-Party
Index No. 595993/2021

The following e-filed documents, listed by NYSCEF document number (Motion 002) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 108, 109, 110, 111, 112, 113

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

BACKGROUND

Plaintiff commenced this action seeking damages for personal injuries allegedly sustained on June 28, 2019, when while in the course of her employment with SCL Services Corp. ("SCL") on the third floor of the premises located at 527 West 27th Street, New York, New York 10001 (the "Subject Premises"), Masonite boards fell and struck her in the knee. Plaintiff sued WC 28 Realty LLC ("WC 28"), the owner of the premises, and Pizzarotti, LLC ("Pizzarotti"), the general contractor on the project, alleging violations of New York Labor Law §§ 240(1), 241(6) and 200, and common law negligence.

In turn, WC 28 and Pizzarotti commenced a third-party action against R&S United Services Inc. ("R&S") and other subcontractors. R&S now moves for summary judgment alleging there is no basis for any liability against it. R&S also seeks costs based on a contractual indemnification agreement and sanctions.

The motion is granted to the extent set forth below.

ALLEGED FACTS

On June 28, 2019, at approximately 10:50 a.m. on the third floor of Subject Premises, while Plaintiff was working in the course of her employment with SCL Services Corp. ("SCL") at the Subject Premises, Masonite boards fell and struck various parts of her body, causing her to sustain injury.

Plaintiff began working for SCL in June 2019. Plaintiff was interviewed and hired by SCL supervisor Mr. Pantoja ("Pantoja"). Pantoja provided Plaintiff with instructions on what work to do at the project site. Plaintiff was also supervised and received instructions on what work to perform from Pizzarotti.

Pantoja was present on site every day and would provide plaintiff with her assignments and direct her where to work. Plaintiff's duties on the project consisted of cleaning the apartments being constructed and picking up debris.

On the day of the accident, Pantoja instructed Plaintiff and another SCL employee, Gladys, to clean the sixth and seventh floors. At about 10:00 am, Plaintiff and Gladys began working on the third floor, and that was the first-time Plaintiff had been on the third floor that day.

Plaintiff was instructed by Pantoja to place Masonite Boards on the ground of the third floor to protect the flooring. When she arrived at the third floor, she noticed a pile of approximately 25 Masonite boards in one of the rooms on the third floor. Plaintiff and Gladys removed the first board from the pile, and Gladys carried the board to the other room and secured it to the ground.

Each Masonite board was approximately two meters in length and one and a half meters in width, about one inch thick and weighed approximately twenty-five pounds.

As Gladys carried the first Masonite board to the other room, Plaintiff began pulling out another Masonite board from the pile. Plaintiff attempted to lift a board closest to her, but several boards lifted at once because the boards were stacked on top of one another. She then pulled the Masonite boards upward, and all the boards fell on her. The Masonite boards struck her left leg, arms, and part of her right leg.

At the time of the accident, Plaintiff was wearing a hardhat, work boots, knee protectors and gloves. She purchased all the personal protective equipment herself, except for the gloves, which she received from SCL.

Prior to the accident, on or around June 18, 2019, Pizzarotti retained R&S as the HVAC subcontractor for the project to replace another contractor. R&S and Pizzarotti entered into an indemnification agreement, under which Pizzarotti and WC 28, agreed to indemnify R&S, from any claims arising out of its work on the project. R&S never entered into any contract or agreement to indemnify WC 28 or Pizzarotti for any claims related to the instant project.

R&S was not responsible for managing the Masonite boards used at the project, did not direct or control Plaintiff's work, and there is no evidence in the record that R&S was working on the same location as Plaintiff at the time of her accident.

Mr. Avi Polischuk ("AP") has been the owner of R&S since 2003. On the date of Plaintiff's accident, R&S employees were performing work on the seventh eighth and ninth floors. A daily log was maintained regarding the work performed by R&S. All tools and materials used on the project were provided to R&S workers by the company. The materials and tools used by R&S would generally be stored where they were to be installed.

R&S never used Masonite boards on the project for any purpose. R&S never ordered or stored Masonite boards for the subject project. R&S never had any interactions with Plaintiff on this project nor did it provide any instruction to any worker other than workers employed by R&S on the project.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be

denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]).

However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324).

"[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]).

Third-Party Plaintiffs' Contractual Claims Must Be Dismissed Since No Contract Exists That Provides Relief Being Sought

WC 28 and Pizzarotti's contractual indemnification and breach of contract claims must be dismissed since they are not entitled to indemnity from R&S, nor was R&S required to procure insurance for the benefit of WC 28 and Pizzarotti under the agreement entered between the parties.

"It is elementary that the right to contractual indemnification depends upon the specific language of the contract." *Gillmore v. Duke/Fluor Daniel*, A.D.2d 938, 939 (4th Dep't 1995). "A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." *Karwowski v. 1407 Broadway Real Estate, LLC*, 160 A.D.3d 82, 87 (1st Dep't 2018) (*quoting Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774, 777.) A party is not entitled to contractual indemnification where the language of the contract does not provide same. *See Cahn v. Ward Tricking, Inc.*, 100 A.D.3d 548 (1st Dep't 2012).

WC 28 and Pizzarotti do not submit any opposition to this portion of the motion.

Based on the foregoing, the fifteenth cause of action, for contractual indemnity, and the sixteenth cause of action, for failure to procure insurance, asserted against R&S in the third-party complaint are dismissed.

WC 28 and Pizzarotti's Claims for Common Law Indemnification and Contribution Are Dismissed

In a Labor Law action, the party seeking common law indemnification must prove (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was negligent or exercised actual or supervision or control over the injury-producing work. *Naughton v. City of New York*, 94 A.D.3d 1, 10 (1st Dep't 2012) (citing McCarthy, 17 N.Y.3d at 377-78); *Martins v. Little 40 Worth Associates, Inc.*, 72 A.D.3d 483 (1st Dep't 2010).

There is no evidence in the record of any negligence on the part of R&S. Plaintiff testified that she was instructed by her supervisor, employed by SCL, to move and place the Masonite boards involved in her accident. Plaintiff denied ever receiving instruction regarding her work from anyone other than her supervisor and Pizzarotti.

Plaintiff's accident occurred on the third floor of the Subject Premises. The daily log prepared by Pizzarotti for the date of the accident and the time sheets prepared by R&S demonstrate that R&S did not perform any work on the third floor on the date of the accident.

Furthermore, AP testified that R&S never ordered nor stored Masonite boards on the project for any purpose, and further affirmed that R&S did not own, maintain, inspect or provide the Masonite boards involved in Plaintiff's accident.

The only issue that is raised in opposition is that there are some discrepancies about where some of R&S's workers might have been on that day. This is nothing more than speculation or conjecture and is insufficient to raise a question of fact and defeat the *prima facie*

case for summary judgment established by R&S. (*Grullon v City of New York* 297 AD2d 261, 264).

WC 28 and Pizzarotiti's claim for common law contribution is dismissed for essentially the same reasoning . R&S did not cause the accident and did not control the means and methods of plaintiff's work. To maintain a claim for contribution against R&S, there would have to be evidence that R&S owed and breached a duty either to plaintiff or to the various other defendants. *Jehle v. Adams Hotel Associates*, 264 A.D.2d 354 (2d Dep't 1999).

Plaintiff alleges violations of Labor Law §§ 240, 241(6) and 200. R&S is not responsible for contribution as to Plaintiff's Labor Law claims. Labor Law §§ 240(1) and 241(6) applies to "[general] contractors, owners and their agents." *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311 (1981). To establish a defendant is a "statutory agent" of the owner or general contractor, it must be shown that the defendant had the "authority to supervise and control" the injury-producing work. *Santos v. Condo 124 LLC*, 161 A.D.3d 650, 653 (1st Dep't 2018) (*citing Walls v. Turner Constr. Co.*, 4 N.Y.3d 861, 864 (2005)). Where the owner or general contractor delegates to a third-party the duty to conform to the requirements of the Labor Law, that third party becomes a statutory agent. *See Walls*, 4 N.Y.3d at 863-64.

It is undisputed that R&S is not an owner or general contractor, but instead worked as the HVAC subcontractor on the project. There are no allegations that R&S was provided with authority to supervise and control the injury-producing work. The contract entered between the parties does not delegate any responsibilities for R&S to supervise or control the work of SCL Corp. employees.

Plaintiff's Labor Law § 200 claim applies to owners and contractors who exercise control or supervision over the work or had actual or constructive notice of the unsafe condition. *See*

Balbuena v. 395 Hudson New York, LLC 214 AD3d 586 (1st Dept, 2023). Arguably, Plaintiff's accident occurred both from the method and manner of her work and due to an alleged defective premises condition, namely the pile of Masonite boards. R&S did not exercise control over the means and methods of Plaintiff's work, nor did they create the alleged defective condition and did not have a duty to correct same.

Based on the foregoing, the thirteenth and fourteenth causes of action for common law contribution and indemnity are dismissed.

Summary Judgment on R&S' Contractual Indemnification Claim is Denied

R&S moves for summary judgment on its contractual indemnification claim, asserting that the obligation was triggered by the mere fact that WC 28 and Pizzarotti "asserted" that Plaintiff's injury was caused by or arose out of R&S's work on the project, breach of contract and acts or omissions.

R&S relies on the holding in *Vitucci v. Durst Pyramid LLC*, 205 A.D.3d 441, 445 (1st Dep't 2022). In *Vitucci*, the Appellate Division held:

> … the subcontract requires Geller to indemnify Durst/Hunter for any claims that "arise out of or are connected with ***or are claimed*** *to* arise out of or be connected with the performance of Work by [Geller], or any act or omission of [Geller] including . . . any work previously performed by [or] on behalf of [Geller] at the [s]ite," to the extent the liability is "not caused in whole or in part by an indemnitee's own negligence" (emphasis added). Thus, the obligation was triggered by plaintiff's mere allegation that Geller's negligent installation or maintenance of lighting contributed to the accident. Durst/Hunter are therefore entitled to conditional summary judgment on their contractual indemnification claim against Geller, to the extent the accident was not caused by their own negligence (*see Gonzalez v G. Fazio Constr. Co., Inc.*, 176 AD3d 610, 611 [1st Dept 2019]).

Vitucci v. Durst Pyramid LLC, 205 A.D.3d 441, 445 (2022).

There is no such language in the agreement between R&S and Pizzarotti which provides for an indemnity for claims "… arising out of or in connection with or as a consequence of the

performance of the Work of the Subcontractor under this agreement (contract) …" (NYSCEF Doc No 101).

> Words in a contract are to be construed to achieve the apparent purpose of the parties. Although the words might "seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view" (*Robertson v. Ongley Elec. Co.,* 146 N.Y. 20, 23, 40 N.E. 390). This is particularly true with indemnity contracts. When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed (*Levine v. Shell Oil Co.,* 28 N.Y.2d 205, 211, 321 N.Y.S.2d 81, 269 N.E.2d 799; *Kurek v. Port Chester Hous. Auth.,* 18 N.Y.2d 450, 456, 276 N.Y.S.2d 612, 223 N.E.2d 25)

Hooper Assocs., Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 491(1989).

It is conceded by R&S that Pizzarotti's claim did not arise out of any work Pizzarotti did on the project and the language extending the indemnity to claims alleged to have arisen out of such work is not in the indemnity agreement in this case as it was in *Vitucci*.

Based on the foregoing, the motion for R&S for summary judgment on this claim is denied.

The Court Declines to Impose Sanctions

Finally, the court declines to impose sanctions against Pizzarotti and WC 28 based on their failure to discontinue the action. For most of the claims, the court finds that the third-party plaintiffs made good faith arguments.

There is however, one glaring exception to this. which pertains to the contractual indemnification claims and the breach of contract claims which third-party plaintiffs do not even address in their opposition papers. While the court declines to issue a sanction at this time, counsel is cautioned that in the future if counsel is aware that there are no good faith arguments

to make, or that no such contract exists, counsel should acknowledge this to the court in its opposition papers rather than simply ignoring the claims and forcing a ruling.

WHEREFORE it is hereby:

ORDERED that the motion of R&S United Services, Inc. for summary judgment is granted and the third-party complaint is dismissed as to R&S United Services, Inc.; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that, within 20 days from entry of this order, R&S United Services, Inc. shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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6/21/2023
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE