Supreme Court of the State of New York
County of Kings

Part LL1

HUI ZHANG,

Plaintiff,

against

1815 PACIFIC LLC,

Defendant.

1815 PACIFIC LLC,

Third-Party Plaintiff,

against

TRIBOROUGH CONSTRUCTION SERVICES INC.,

Third-Party Defendant.

TRIBOROUGH CONSTRUCTION SERVICES INC.,

Second Third-Party Plaintiff,

against

CRJ BUILDER CORP.,

Second Third-Party Defendant.

Index Number 507249/2018
Seqs. 004, 007

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1, 2
Order to Show Cause and Affidavits Annexed.	
Answering Affidavits	2–4
Replying Affidavits	5
Exhibits	
Other	

Upon the foregoing papers, second third-party defendant CRJ Builder Corp. (CRJ)'s motion for summary judgment dismissing Triborough Construction Services Inc. (Triborough)'s third-party complaint (Seq. 004), and third-party plaintiff 1815 Pacific LLC (1815 Pacific)'s motion for summary judgment on its third-party complaint against Triborough (Seq. 007) are

decided as follows:

Factual Background & Procedural History

The plaintiff commenced this action for injuries he claims he sustained when he tripped and fell on snow and ice while carrying a metal plate on his shoulders with his co-workers. The plate slipped and fell about five feet, pinning the plaintiff's arm. It is undisputed that 1815 Pacific was the owner of 1668 Eastern Parkway, where the plaintiff's accident occurred, and Triborough was the general contractor for the project. CRJ was a sub-contractor retained by Triborough.

Initially, plaintiff claimed at the Workers Compensation hearing that he was an employee of Triborough. The Workers Compensation Board (the Board) required Triborough to be placed on notice in its July 6, 2018 decision, its August 3, 2018 decision, and its September 25, 2018 decision. Then, after a hearing on November 7, 2018, the Board issued a decision discharging Triborough and State Farm and removing them from notice. The Board ultimately determined that plaintiff was an employee of CRJ and ordered the State Insurance Fund (CRJ's insurer) to pay plaintiff's disability benefits (Board decision dated January 22, 2019).

In the court's order dated July 6, 2021, plaintiff was awarded summary judgment on his Labor Law §§ 240 (1) and 241 (6) claims against 1815 Pacific, and plaintiff's Labor Law § 200 claim against 1815 Pacific was dismissed due to the "storm in progress" rule (*Gorbatov v Gardens 75th St. Owners Corp.*, 283 AD2d 551, 552 [2d Dept 2001]). The accident happened at 10:00am, which was within the four-hour period an owner has to clear snow and ice from an abutting sidewalk after the conclusion of a storm (NYC Admin. Code § 16-123 [a]).

The NOI was filed on December 12, 2021. Despite motions to vacate the note of issue, the action remained on the trial calendar (see order of J. Knipel, dated February 1, 2022). CRJ

filed motion sequence 004 on November 16, 2021. Defendant 1815 Pacific filed motion sequence 007 was filed on April 22, 2022.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Summary judgment motions must be timely made in accordance with local rules and court orders (CPLR 3212; *see also Brill v City of New York*, 2 NY3d 648 [2004]). An untimely motion for summary judgment must be accompanied by a showing of "good cause" for the delay in making the motion (*Brill*, 2 NY3d at 652).

As an initial matter, despite statements otherwise in the moving papers (*see* Affirmation in Support at ¶ 14), 1815 Pacific's motion is untimely under the local rules. The CPLR allows courts to promulgate local rules establishing deadlines for filing of summary judgment motions (CPLR 3212 [a]). In Kings County, the local rules require summary judgment motions to "be made no later than sixty (60) days after filing the Note of Issue."[1] Motion sequence 007 was filed on April 22, 2022, 114 days after the December 29, 2021 note of issue filing, and does not contain an explanation for its tardiness. Sequence 007 is therefore denied as untimely.

CRJ's Motion for Summary Judgment (Seq. 007)

To prevail on its claim for contractual indemnification, the sub-contractor must show that they are not liable for indemnification in this instance based on the "specific language of the

[1] https://ww2.nycourts.gov/courts/2jd/kings/civil/KingsCivilSupremeRules.shtml

contract" (*Dos Santos v Power Auth. of State of New York,* 85 AD3d 718, 722 [2d Dept 2011]; quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). "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 therefor" (*Hirsch v. Blake Hous., LLC*, 65 AD3d 570, 571 [2nd Dept. 2009]).

In seeking summary judgment against Triborough on Triborough's contractual indemnification claim, CRJ provides a certified Chinese-to-English translation of the handwritten contract between CRJ and Triborough describing the work to be performed. The contract contained neither an indemnification provision nor a requirement that CRJ obtain insurance and name Triborough as an additional insured. Triborough's argument, pursuant to CPLR 3212 (f), that this motion is premature because further discovery may reveal an additional contract is without merit. Triborough does not demonstrate that an additional contract would be "exclusively within the . . . control of the movant," especially given that Triborough itself is the general contractor who retained CRJ (*see Shah v MTA Bus Company*, 161 NYS3d 311 [2d Dept 2022] [explaining the standard for CPLR 3212 (f)]). In any event, the potential existence of an additional contract containing an indemnification clause in favor of Triborough is merely speculation inadequate to resist summary judgment (*Morales v Amar*, 145 AD3d 1000 [2d Dept 2016]). CRJ is also entitled to summary judgment on Triborough's breach of contract claim based on failure to procure insurance for the foregoing reasons.

CRJ also seeks summary judgment against Triborough on the latter's common law indemnification and contribution claims. CRJ contends that it was the plaintiff's employer and in the absence of a grave injury it cannot be required to indemnify Triborough (Workers Comp. Law § 11; *Spiegler v Gerken Bldg. Corp.*, 35 AD3d 715 [2d Dept 2006]). CRJ's argues that the

Workers Compensation Board determined that CRJ was the plaintiff's employer, and that it was indeed the plaintiff's employer. Collateral estoppel can apply to agency determinations, including the Workers Compensation Board (*see Lennon v 56th and Park(NY) Owner*, 199 AD3d 64 [2d Dept 2021]).[2]

In opposition, Triborough argues that it was discharged from the previous action, and therefore did not have an opportunity to fully litigate the issue of whether CRJ was the plaintiff's employer during the agency proceeding. However, Triborough benefitted from its discharge from the underlying action—it was determined not to be plaintiff's employer and not obligated to pay plaintiff Workers Compensation benefits. Because Triborough received a favorable determination in the underlying proceeding, it is estopped from arguing the opposite in the instant action (*see Rosario v. Montalvo & Son Auto Repair Center, Ltd.*, 76 AD3d 963, 964 [2d Dept 2010]). By contrast, CRJ did not receive a favorable determination at the agency level, as it was found to be plaintiff's employer. Therefore, contrary to Triborough's argument, CRJ is not estopped from making an argument here that is contrary to the position it took before the Board. Triborough does not provide any evidence indicating that CRJ was not the plaintiff's employer.

Accordingly, CRJ's motion is granted.

Conclusion

Motion sequence 004 is granted, and CRJ is awarded summary judgment on Triborough's third-party complaint.

Motion sequence 007 is denied.

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[2] Irrespective of potential retroactivity, the recent promulgation of Worker's Compensation Law § 11 (2) does not impact the outcome of this case, as the statute explicitly permits collateral estoppel on the issue "of the existence of an employer employee relationship."

This constitutes the decision and order of the court.

June 19, 2023
DATE

DEVIN P. COHEN
Justice of the Supreme Court

[Final page of decision and order granting motion sequence 004 and denying motion sequence 007 in *Zheng v 1815 Pacific LLC*, Index 507249/2018, and related third-party actions.]