

**Chachipanta v Astoria Crescent Owner LLC**

2023 NY Slip Op 32175(U)

June 27, 2023

Supreme Court, Kings County

Docket Number: Index No. 525771/2021

Judge: Karen B. Rothenberg

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failure to procure insurance.

The underlying complaint alleges that on August 13, 2021, the plaintiff was injured while working for third-party defendant StructureTech New York Inc. [StructureTech], at a construction site owned by defendant/third-party plaintiff Astoria Owner Crescent LLC [Astoria], located in Queens, New York. The plaintiff alleges that he was caused to be injured “when his hand was caught in a ladder being pulled from the 2<sup>nd</sup> floor to the 3<sup>rd</sup> floor and then caused to trip and fall over debris in the work area.” The project’s construction manager, defendant/third-party plaintiff New Line Structures and Development LLC [New Line] had entered into a contract with CRSG, wherein CRSG agreed to provide a licensed construction superintendent “for the purposes of identifying hazards, and non-compliant conditions” at the site. It was also agreed that the inspections CRSG performed would involve “visual observations, photographs, and a written narrative report that will be delivered within one business day.”

Plaintiff commenced this action against, among others, Astoria and New Line, alleging violations of Labor Law §§ 200, 240(1), 241(6), and common-law negligence. Astoria and New Line commenced a third-party action against CRSG for contribution, common-law and contractual indemnification, and breach of contract for failure to procure insurance.

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, “the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*see JDI Display America, Inc. v Jaco Electronics Inc.*, 188 AD3d 844, 845 [2d Dept 2020]). When evidentiary material is considered in determining a motion to dismiss pursuant to CPLR 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether plaintiff states one (*Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). A motion to dismiss pursuant to CPLR 3211(a)(1) to dismiss a cause of action on the ground that a defense is founded on documentary evidence may be granted only when the documentary evidence submitted by the defendant “utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

CRSG’s submission of its contract with New Line demonstrate that its role at the construction site was limited to that of a safety consultant for the construction project, and that it did not have control over the worksite or the authority to supervise the work performed or the safety precautions taken by New Line and plaintiff’s employer StructureTech, which is insufficient to impose liability on a safety consultant under the Labor Law (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). The parties’ consulting agreement provided that “CRSG does not guarantee or insure ...

the methods or means of construction, or the safety of the site, and CRSG is not responsible for the elimination or correction of unsafe conditions at the project site, in the equipment or machinery, in the means of construction or the adequacy of the safety measure and equipment used at the construction site.” The agreement further states that the “Client recognizes that CRSG has no relationship with other persons working at the project site and that the Client has the sole right and authority to instruct its employees and subcontractors to correct any deficiencies in their work.”

“To sustain a third-party cause of action for contribution, a third-party plaintiff is required to show that the third-party defendant owed it a duty of reasonable care independent of its contractual obligations, or that a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries” (*Guerra v St. Catherine of Sienna*, 79 AD3d 808, 809 [2d Dept 2010]). Here, the third-party complaint does not allege that CRSG owed Astoria and New Line a duty of care independent of CRSG’s contractual obligations. Moreover, CRSG in submitting its consulting contract also establishes that it owed no duty of care to the plaintiff, and the submission of its work logs demonstrate that it was not even at the site at the time of the plaintiff’s accident (*see Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694 [2d Dept 2016]). Therefore, the evidentiary submissions conclusively establish a defense as a matter of law as to the claim for contribution, and CRSG is entitled to dismissal of such claim insofar as asserted against it.

Furthermore, as the evidentiary submissions demonstrate that CRSG did not supervise or control the injury-producing work, CRSG also establishes a defense as a matter of law to the claim for common-law indemnification, and is entitled to dismissal of such claim insofar as asserted against it (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369 [2011]).

However, the evidentiary submissions, including the work logs, fail to conclusively establish a defense as a matter of law with respect to the cause of action for contractual indemnification asserted against in in the third-party complaint. Under the consultant agreement, CRSG had an obligation to report any safety hazards to New Line so that New Line could act upon the findings reported by CRSG and take any action necessary to correct the reported issues. CRSG’s evidentiary submissions fail to conclusively establish that it was not in breach of its contractual obligations with respect to reporting any safety issues at the site where plaintiff was working (*see Marquez* at 700). As such, dismissal of the third-party claim for contractual indemnification is not warranted.

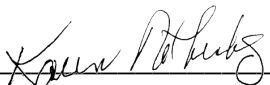
Finally, CRSG submits no documentation to show that it complied with its contractual obligation to procure insurance naming Astoria and New Line as additional insureds under its commercial liability policy. As such, dismissal of the third-party claim for breach of contract for failure to procure insurance is also denied.

Accordingly, CRSG's pre-answer motion to dismiss is granted solely to the extent of dismissing the third-party claims for contribution and common-law indemnification asserted against it. The motion is otherwise denied.

This constitutes the decision/order of the Court

Dated: June 27, 2023

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Karen B. Rothenberg, J.S.C.