

**99 Wall Dev., Inc. v Consigli & Assoc., LLC**

2023 NY Slip Op 33084(U)

September 1, 2023

Supreme Court, New York County

Docket Number: Index No. 656973/2017

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 41

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99 WALL DEVELOPMENT, INC.,

Index No. 656973/2017

Plaintiff

-against-

DECISION AND ORDER

CONSIGLI & ASSOCIATES, LLC f/k/a  
T.G. NICKEL & ASSOCIATES, LLC,  
DOMESTIC PLUMBING CORP., and HIG  
SERVICES, INC.,

Defendants

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T.G. NICKEL & ASSOCIATES, LLC,

Third Party Plaintiff

-against-

SCHEAR CONSTRUCTION LLC, ASPEN  
AMERICAN INSURANCE COMPANY, CRANES  
EXPRESS, INC., EVEREST SCAFFOLDING,  
INC., NEW YORK HOIST, LLC, CHELSEA  
LIGHTING NYC, LLC, SAFETY AND QUALITY  
PLUS, INC., PAL ENVIRONMENTAL  
SERVICES, INC., NYGLASSMASTER CORP.,  
HIG SERVICES, INC., BRUCE SUPPLY CORP.,  
ALL STAR DUCTWORK, INC., and RISING  
SUN CONSTRUCTION, LLC,

Third Party Defendants

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T.G. NICKEL & ASSOCIATES, LLC,

Second Third Party Plaintiff

-against-

DOMESTIC PLUMBING CORP. and  
THYSSENKRUPP ELEVATOR CORPORATION,

Second Third Party Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff settled its claims against defendants Domestic Plumbing Corp. and HIG Services, Inc., pursuant to a settlement agreement dated September 13, 2022, which converts the cross-claims by defendant Consigli & Associates, LLC, against HIG Services to a third party action. Franklin-Hood v. 80th St., LLC, 138 A.D.3d 609, 609 (1st Dep't 2016); Eddine v. Federated Dept. Stores, Inc., 72 A.D.3d 487, 487 (1st Dep't 2010); Sooklall v. Morisseav-Lafague, 185 A.D.3d 1079, 1080 (2d Dep't 2020). At oral argument, Consigli & Associates discontinued its claims against HIG Services except the claims for breach of a contract to procure insurance and for contractual indemnification of defense expenses. HIG Services moves for summary judgment dismissing both claims. C.P.L.R. § 3212(b). Consigli & Associates cross-moves for summary judgment on both claims. C.P.L.R. § 3212(b) and (e). The parties agree that in their motion and cross-motion "indemnification" refers to Consigli & Associates' defense expenses, including attorneys' fees and experts' fees, incurred from the commencement of this action through October 1, 2020, rather than indemnification for a

judgment or settlement.

HIG Services insists that Consigli & Associates' cross-motion is untimely, but the court may consider the cross-motion since it relates to the issues raised in HIG Services' timely motion. Connor v. AMA Consulting Engineers PC, 213 A.D.3d 483, 484 (1st Dep't 2023); Royland v. McGovern & Co., LLC, 203 A.D.3d 677, 677 (1st Dep't 2022); Jarama v. 902 Liberty Ave. Hous. Dev. Fund Corp., 161 A.D.3d 691, 691 (1st Dep't 2018). The court grants HIG Services' motion in part and denies Consigli & Associates' cross-motion as follows.

## II. PROCUREMENT OF INSURANCE

A subcontract between Consigli & Associates, the construction manager for a construction project at 99 Wall Street, New York County, and HIG Services required it to procure insurance naming Consigli & Associates as an additional insured. Consigli & Associates contends that HIG Services breached the subcontract because HIG Services' insurer, nonparty Harleysville Worcester Insurance Company, did not tender coverage until October 1, 2020, over two years after Consigli & Associates requested a defense. Nevertheless, the undisputed fact that Harleysville Worcester eventually agreed to provide a defense to Consigli & Associates as an additional insured establishes that HIG procured insurance pursuant to the subcontract, as Harleysville Worcester's correspondence

corroborates. Dorset v. 285 Madison Owner LLC, 214 A.D.3d 402, 404 (1st Dep't 2023); Payne v. NSH Community Servs. Inc., 203 A.D.3d 546, 548 (1st Dep't 2022). Therefore the court grants HIG Services summary judgment dismissing Consigli & Associates' claim for breach of the subcontract based on a failure to procure insurance and denies Consigli & Associates' cross-motion for summary judgment on that claim.

Notably, Harleysville Worchester's correspondence also suggests late notice and may entitle Consigli & Associates to pre-tender defense expenses. The court lacks jurisdiction to adjudicate Harleysville Worchester's contractual obligations to Consigli & Associates under HIG Services' policy, however, as Harleysville Worchester is not a party to this action. Were the court to consider Harleysville Worchester's duty to defend, it likely would extend to the entire action because several claims against Consigli & Associates "arguably arise from covered events," despite the complaint also alleging claims that might fall outside the policy. Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co., Inc., 16 N.Y.3d 257, 264 (2011); Town of Massena v. Healthcare Underwriters Mut. Ins. Co., 98 N.Y.2d 435, 443 (2002); Frontier Insulation Contrs. v. Merchants Mut. Ins. Co., 91 N.Y.2d 169, 175 (1997); Port Auth. of N.Y. & N.J. v. Brickman Group Ltd., LLC, 181 A.D.3d 1, 20 (1st Dep't 2019).

### III. CONTRACTUAL INDEMNIFICATION

HIG Services' subcontract with Consigli & Associates, which the parties stipulate is authenticated and admissible, includes a standard indemnification provision:

To the fullest extent permitted by law, in addition to, and not in derogation of, the Subcontractor's responsibility to indemnify as set forth in other Contract Documents, the Subcontractor shall indemnify, defend with counsel reasonably acceptable to the Contractor and Owner, and hold harmless the Contractor, Owner, Claremont 99 Wall, LLC, Claremont Group, LLC, 1, any lender(s) for the Project, Owner's consultants, Architect, Architect's consultants, and the affiliates officers, directors, principals, partners, member, owners and agents and employees of any of them (collectively, the "Indemnitees") from and against all claims, liabilities, damages, losses and expenses, including but not limited to all costs, fees and expenses of such defense . . . (including without limitation all attorneys' fees and expenses, court costs, expert witness fees and expenses, and any resulting settlement, judgment, or award), including but not limited to attorneys' fees, arising out of or resulting from any performance of and/or failure to perform the Work, but only to the extent caused by the acts and/or omissions or a breach of contract of the . . . Subcontractor, a Sub-Subcontractor to Subcontractor, and anyone[,] any person or entity directly or indirectly employed by them or any person or entity for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Aff. of Andrew Culuris Ex. A art. 4.6.1. The parties agree that HIG Services drilled a hole into the roof of the building under construction and that rain flooded inside the building July 29, 2016. Consigli & Associates maintains that HIG Services was responsible for sealing the drilled hole and owes reimbursement for defense expenses incurred through October 1, 2020. HIG Services contends that Conssigli & Associates was responsible for

sealing the drilled hole and that HIG Services does not owe indemnification to Consigli & Associates for either its negligence or any claim unrelated to HIG Services' work. HIG Services also insists it does not owe coverage to Consigli & Associates because plaintiff released HIG Services from liability for all claims related to the flood.

The settlement agreement does not extinguish Consigli & Associates' contractual indemnification claim for reimbursement of its defense expenses. HIG Services still owes indemnification to Consigli & Associates for defending claims arising from the July 2016 flood, even if HIG Services was not at fault, and regardless of plaintiff's release of all claims against HIG Services, because the flood arose from HIG Services' work. Regal Constr. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA, 15 N.Y.3d 34, 38 (2010); Pofi Constr. Corp. v. Rutgers Cas. Ins. Co., 189 A.D.3d 465, 466 (1st Dep't 2020); Fireman's Fund Ins. Co. v. State Natl. Ins. Co., 180 A.D.3d 118, 125 (1st Dep't 2019).

Moreover, the subcontract includes a savings provision that eliminates indemnification for any damages attributable to Consigli & Associates, allowing it to seek indemnification from HIG Services to the extent that Consigli & Associates is not at fault. Brooks v. Judlau Contr., Inc., 11 N.Y.3d 204, 210 (2008); Winkler v. Halmar Intl., LLC, 206 A.D.3d 458, 461-62 (1st Dep't

2022); Payne v. NSH Community Servs., Inc., 203 A.D.3d 546, 548 (1st Dep't 2022). Therefore the court denies HIG Services' motion for summary judgment dismissing Consigli & Associates' claim for contractual indemnification.

The court also denies Consigli & Associates' motion for summary judgment on contractual indemnification. Since HIG Services is not an insurer, HIG Services' "duty to defend its contractual indemnitee is no broader than its duty to indemnify," ACC Constr. Corp. v. Merchants Mut. Ins. Co., 200 A.D.3d 551, 551 (1st Dep't 2021), which requires the trier of fact to determine Consigli & Associates' apportioned liability for the water damage from the July flood, Dejesus v. Downtown Re Holdings LLC, 217 A.D.3d 524, 527 (1st Dep't 2023); Hedges v. Planned Sec. Serv. Inc., 190 A.D.3d 485, 487 (1st Dep't 2021), before Consigli & Associates may recover its defense expenses from HIG Services. Sande v. Trinity Ctr. LLC, 206 A.D.3d 441, 442 (1st Dep't 2022); ACC Constr. Corp. v. Merchants Mut. Ins. Co., 200 A.D.3d at 551; Aurienma v. Biltmore Theatre, LLC, 82 A.D.3d 1, 12 (1st Dep't 2011); Inner City Redevelopment Corp. v. Thyssenkrupp El. Corp., 78 A.D.3d 613, 613 (1st Dep't 2010).

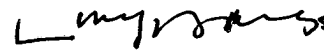
Consigli & Associates alternatively may demonstrate the absence of its fault through its pending motion for summary judgment to establish entitlement to contractual indemnification. Cackett v. Gladden Props., LLC, 183 A.D.3d 419, 422 (1st Dep't

2020). To the extent Consigli & Associates shows its negligence was not the proximate cause of the July 2016 flood, HIG Services must indemnify Consigli & Associates for its defense expenses. HIG Services' indemnification is limited, however, to expenses incurred for defending claims arising from HIG Services' work, reduced by any apportionment for Consigli & Associates' fault. Dejesus v. Downtown Re Holdings LLC, 217 A.D.3d at 527.

IV. CONCLUSION

For the reasons explained above, the court grants the motion by defendant HIG Services, Inc., for summary judgment dismissing Consigli & Associates, LLC's claim for breach of the subcontract based on a failure to procure insurance. C.P.L.R. § 3212(b) and (e). The court denies the remainder of HIG Services' motion and the cross-motion by defendant Consigli & Associates, LLC, for summary judgment. C.P.L.R. § 3212(b). This decision constitutes the court's order.

DATED: September 1, 2023



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C