At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of August, 2023.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

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MARLON PETGRAVE, MAVERLYN WILLIAMS, GEORGE W. KENNEDY and CORY A. WADE,

Plaintiffs,

- against - Index No. 529857/21

DELTA AIRLINES, INC., SATTERFIELD & PONTIKES CONSTRUCTION, INC., STV CONSTRUCTION, INC., ABC CORP. 1-10 and JOHN DOES 1-10,

Defendants.

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DELTA AIRLINES, INC., SATTERFIELD & PONTIKES CONSTRUCTION, INC., STV CONSTRUCTION, INC.,

Third-Party Plaintiffs,

-against-

CREATIVE CONSTRUCTION SERVICES CORP.,

Third-Party Defendant.

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| The following e-filed papers read herein: | NYSCEF Doc Nos. |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) | 26-30 |
| Opposing Affidavits (Affirmations) | 65-67 |

Upon the foregoing papers in this action for employment discrimination on the basis of race, color, sex and/or age, third-party defendant Creative Construction Services Corp.

(Creative) moves (M.S. 1) for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the amended third-party complaint, directing that judgment be entered in its favor and awarding it costs and disbursements.

**Background**

On November 20, 2021, plaintiffs Marlon Petgrave (Petgrave), Maverlyn Williams (Williams), George W. Kennedy (Kennedy) and Corey Wade (Wade) commenced this action by filing a summons and a complaint verified by counsel, which alleges that Plaintiffs were discriminated against by defendants, Delta Air Lines, Inc. (Delta), Satterfield & Pontikes Construction, Inc. (Satterfield) and STV Construction, Inc. (STV) (collectively, Defendants and Third-Party Plaintiffs), who, along with Creative, jointly employed them (*id.*). The complaint alleges that:

> "[t]his is an action for money damages to remedy discrimination on the basis of race, color, sex and/or age in the terms, conditions and privileges of employment, disparate treatment, hostile work environment, retaliation and wrongful termination under the New York State Human Rights Law, New York State Exec. Law, § 296 et seq. ('NYSHRL'), New York City Human Rights Law as contained in the Administrative Code of the City of New York, § 8-101 et seq. ('NYCHRL') against the Defendants.
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> "This . . . action arises from the same and/or similar set of facts and circumstances evidencing the violation of the human rights of Plaintiffs, who are all African American laborers and/or carpenters *by Defendants* DELTA AIR LINES, INC., SATTERFIELD & PONTIKES CONSTRUCTION ('SATTERFIELD'), INC., STV CONSTRUCTION, INC. ('STV'), *who individually and jointly discriminated against, interfered with and adversely affected Plaintiffs' terms of employment because of their race, color and/or age*. Plaintiffs were treated less than their white male coworkers and were

> deprived wages and other benefits in violation of the NYS and NYC Human Rights Law which entitle them to compensatory and punitive damages.
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> "Specifically, Plaintiffs allege that while working on a Delta Airlines Project, at La Guardia Airport, Defendant DELTA, by its construction managers, SATTERFIELD and STV (collectively 'CMA'), they were subjected to a racially hostile work environment, racially derogatory and offensive comments, microaggressions, ridicule and insult, were denied equal treatment under the law as to pay, assignment of work, breaks, performance, and discipline in comparison to white male workers on the jobsite and were targeted for termination without justification for their skin color and replaced by white workers which interfered with their ability to work and cost them their job" (*id.* at ¶¶ 1-3 [emphasis added]).

The complaint contains the following allegations about Creative:

> "[a]t all relevant times, Creative . . . is a minority owned and operated contracting firm that employs minority workers, laborers, and carpenters.
>
> "Defendants hired Creative to supply labor for the Delta LaGuardia Project. Most of the laborers and employees supplied by Creative for Defendants' jobsite were African American.
>
> "At all relevant times, Defendants supervised Creative's labor, including and in particular, the Plaintiffs.
>
> "At all relevant times, Defendants employed, supervised, managed and/or controlled the work and work conditions of the Plaintiffs during the course of their employment on the Delta project at LaGuardia airport" (*id.* at ¶¶ 35-38).

The complaint further alleges that Defendants sought to replace Creative's African American workers. In November 2018, Delta allegedly directed Creative's owner, Hanson James (James), to terminate Williams and other African American employees in email

correspondence. In addition to Williams, Delta allegedly directed Creative to terminate Wade and Kennedy from the Delta LaGuardia Project.

The complaint asserts = ten causes of action against Defendants: (1) violation of NYSHRL for creating a hostile work environment on the basis of race; (2) violation of NYCHRL for creating a hostile work environment on the basis of race; (3) disparate treatment based on race in violation of NYSHRL; (4) disparate treatment based on race in violation of NYCHRL; (5) disparate impact based on race in violation of NYSHRL; (6) disparate impact based on race in violation of NYCHRL; (7) violation of NYSHRL basis on William's gender; (8) violation of NYCHRL based on William's sex; (9) disparate treatment based on William's and Kennedy's age in violation of NYSHRL; and (10) disparate treatment based on William's and Kennedy's age in violation of NYCHRL.

On April 25, 2022, Defendants collectively answered the complaint and denied the material allegations therein. On the same date, Defendants/Third-Party Plaintiffs also filed a third-party summons and complaint against Creative asserting claims for contractual and common law indemnification, contribution, equitable estoppel and unjust enrichment.

On May 5, 2022, Defendants/Third-Party Plaintiffs filed an amended third-party summons and complaint alleging that:

> "[a]t all times relevant to the Individual Plaintiffs' Complaint, the Individual Plaintiffs were employed by Creative. Defendants neither employed Plaintiffs nor had the authority to supervise, manage, direct, or control Plaintiffs in the performance of their work".

The first third-party claim asserted against Creative is for contractual indemnification and alleges that:

> "[p]ursuant to Section 4.18 of the Construction Agreement, Creative is required to release, indemnify, defend, and hold the [Third-Party Plaintiffs] harmless, to the fullest extent permitted by law, for any claims, damages, and other losses 'that arise out of or result from or are alleged to arise out of or result from any act(s) or omission(s) by [Creative] in the performance of the Work or other obligations for or on the Project . . . or in connection with the performance or nonperformance of any other obligations of [Creative] under the Contract or Applicable Law, including, but not limited to, Losses arising out of or resulting from [a]ny violation of federal, state and local laws, regulations, rules, codes and ordinances'" (*id.* at ¶ 13).

The second claim asserted for common law indemnification alleges that:

> "[t]o the extent that the Individual Plaintiffs sustained injuries and damages in the manner alleged in their Complaint against the [Third-Party Plaintiffs], such injuries and damages *were caused by reason of the negligence of Creative* and/or its employees during the scope of their employment" (*id.* at ¶ 16 [emphasis added]).

The third claim asserted against Creative for contribution alleges that:

> "[b]y reason of the foregoing, the [Third-Party Plaintiffs] are entitled to contribution from Creative, and to have judgment over and against Creative, for all or part of any verdict, judgment, award, or relief claimed or obtained by the Individual Plaintiffs against the [Third-Party Plaintiffs] in this action" (*id.* at ¶ 19).

The fourth claim asserted for equitable estoppel seeks restitution and alleges that:

> "[t]he [Third-Party Plaintiffs] reasonably relied upon representations made by Creative that it would fully indemnify them for any liability associated with Creative's own employees, and Creative was aware or reasonably should have

> been aware of its representations as to indemnification [in the Construction Agreement]" (*id.* at ¶ 21).

The fifth claim asserted for unjust enrichment seeks restitution and alleges that:

> "[t]o the extent that the [Third-Party Plaintiffs] are deemed to be liable for all or part of any verdict, judgment, award, or relief claimed or obtained by the Individual Plaintiffs against the [Third-Party Plaintiffs] in this action, Creative will have been enriched at the expense of the [Third-Party Plaintiffs].
>
> "Such enrichment is contrary to equity and good conscience, because Creative was the Individual Plaintiffs' employer during the relevant time period" (*id.* at ¶¶ 24-25).

***The Instant Pre-Answer Dismissal Motion***

On August 12, 2022, Creative filed this pre-answer motion to dismiss the amended third-party complaint. In support, Creative submits an affidavit from Hanson James, its President, who attests that Creative entered into a Construction Agreement with Delta in February 2018. James submits emails between him and Delta and explains:

> "On November 20, 2018, Delta directed me, in my capacity as President of Creative Construction, to immediately terminate five (5) of Creative Construction's black employees, three (3) of whom are Plaintiffs in the instant action: Corey Wade, Maverlyn Williams, George Kennedy . . .
>
> "I did not want to fire these employees. On November 24, 2018, I told Third-Party Plaintiffs that 'I am very worried about doing this. This is not right it could backfire on both creative and delta if theses [sic] guys go and complain. Like I said to you, they think they are targeted because they work for creative. All the things that is been said is coming to pass and they very upset.'
>
> "Third-Party Plaintiffs continued to demand that I replace the workers, telling me they have the right to replace workers that are not performing under the contract . . .

> "I responded by telling Third-Party Plaintiffs the employees had been working for over one year and there had been no issues. Moreover, I told them that I was concerned they will go to a labor lawyer or the union . . .
>
> "Third-Party Plaintiffs refused to give up and I eventually was forced to terminate the employees a[t] their directive.
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> "However, I transferred the employees I was forced to terminate to another project on which Creative . . . was working as Creative . . . did not condone Third-Party Plaintiffs' discriminatory conduct" (*id.* at ¶¶ 4-9).

Creative submits a memorandum of law arguing that "Third-Party Plaintiffs now have the gall . . . to attempt to shift onto Creative . . . the cost of defending the lawsuit and potential liability that the Third-Party Plaintiffs solely caused".

Regarding the first claim for contractual indemnification, Creative argues that "the provision in the Construction Agreement upon which they rely is triggered only if Creative . . . engaged in any 'act(s) or omission(s)' in the performance of the Work, but there are no allegations in the Third-Party Complaint that Creative . . . engaged in any acts or omissions in the performance of the Work". Creative alternatively contends that, even if triggered, "the indemnification provision is barred by public policy". Creative asserts that indemnification of punitive damages and intentional misconduct both violate public policy. Creative also argues that "section 4.18 of the Construction Agreement does not permit Third-Party Plaintiffs to seek indemnity from Creative . . . for active negligence, gross negligence or willful misconduct".

Creative asserts that the second cause of action for common law indemnification is subject to dismissal because "a party seeking common law indemnification must show that it may not be held responsible in any degree, and here, Third-Party Plaintiffs are the only parties alleged to have engaged in discrimination". Creative asserts that if "the party seeking to be indemnified is alleged to have engaged in discrimination under the NYSHRL and NYCHRL, courts routinely dismiss common law indemnification claims".

Creative argues that the third claim for contribution fails because "there is no allegation that Creative . . . actually participated in, or aided and abetted, the discriminatory conduct". Creative argues that "in discrimination cases brought under the NYSHRL and NYCHRL, courts have applied it only when the third party actually participated in, or aided and abetted, the discriminatory conduct" and the complaint contains no such allegations about Creative.

Creative contends that the fourth claim for equitable estoppel is subject to dismissal because the amended third-party complaint does not allege that Creative said or did anything upon which the Third-Party Plaintiffs justifiably relied.

Creative argues that the fifth claim for unjust enrichment fails due to the terms of the Construction Agreement arguing that a cause of action under a quasi-contractual theory only applies in the absence of an express agreement.

Third-Party Plaintiffs, in opposition, submit an attorney's affirmation arguing that "[a]t this early stage, Third-Party Plaintiffs' allegations meet the lenient standard afforded to Plaintiffs asserting claims for indemnification, contribution, equitable estoppel, and

unjust enrichment" and a memorandum of law in opposition arguing that Creative's motion is premature because there has been limited discovery.

Regarding the contractual indemnification claim, Third-Party Plaintiffs argue that "[t]he express contractual language [in Section 4.18 of the Construction Agreement] provides for a broad indemnification provision encompassing a wide array of potential claims" (*id.* at 8). Third-Party Plaintiffs suggest that Creative "misreads the text of the indemnification clause" because it provides that Creative must indemnify them for "any acts or omissions by 'anyone directly or indirectly employed by any [Contractor or Subcontractor]'" (*id.*). They argue that "Creative glosses over another crucial fact — its own actions precipitated this lawsuit" because "Creative removed the . . . Plaintiffs from the LaGuardia Project[,]" even if it did so at Defendants'/Third-Party Plaintiffs' direction.

They argue that the provision of the Construction Agreement that precludes contractual indemnification for active negligence, gross negligence or willful misconduct does not preclude indemnification for other types of claims, such as the disparate impact claims asserted by Plaintiffs (the fifth and sixth causes of action) (*id.* at 10). They explain that indemnification agreements only violate public policy "to the extent that they purport to indemnify a party for damages flowing from the intentional causation of injury" and "Plaintiffs allege discrimination under theories that do not require a finding of intent[,]" such as the disparate impact claims.

They argue that it is "premature" to dismiss either their second or third causes of action for common law indemnification and contribution because "there has not been an

opportunity to investigate and apportion fault through discovery". They argue that Plaintiffs' underlying allegations of wrongdoing asserted against them do not require dismissal of their common law indemnification claim if it is "plausible" that Creative was responsible for the alleged harm. Third-Party Plaintiffs assert that their third-party claim for contribution states a cause of action because "the harm in this case stems from Creative's action".

Third-Party Plaintiffs assert that their fourth cause of action against Creative for equitable estoppel "should proceed" because "Creative does not cite any case suggesting dismissal at this stage is appropriate on these facts[,]" "Creative is jumping the gun" and "Creative does not provide a legal basis for dismissal" (*id.* at 16-17). While arguing that their equitable estoppel claim is not "duplicative" of their indemnification claim, Third-Party Plaintiffs assert that "[b]y signing the Construction Contract without intent to abide by the same, Creative concealed material facts that, had the [Third-Party] Plaintiffs known, [they] would never have agreed to enter into a relationship with Creative" (*id.* at 17).

Regarding the fifth cause of action for unjust enrichment, Third-Party Plaintiffs argue that "[a]t the pleadings stage, an unjust enrichment claim is permitted as an argument *in the alternative* to an indemnification claim and must not be dismissed" (*id.* at 17 [emphasis added]). Finally, Third-Party Plaintiffs argue that the James affidavit and the emails submitted therewith should be disregarded because they do not constitute "documentary evidence" within the meaning of CPLR 3211 (a) (1) and are improper to "bolster" a pre-answer dismissal motion (*id.* at 19).

Creative, in reply, submits a memorandum of law arguing that it cannot be held accountable through indemnification, or any other legal theory, for Defendants' alleged discrimination of Plaintiffs "because there is no allegation that Creative . . . engaged in any discriminatory conduct against the Plaintiffs".

They quote paragraphs of the underlying complaint, all of which allege *intentional* conduct by Defendants/Third-Party Plaintiffs (*id.* at 2-3). They argue that "Plaintiffs' allegations in support of their disparate impact claims assert intent; therefore, these claims are, in reality, disparate treatment claims (which require intent) incorrectly couched as disparate impact claims".

Creative reiterates that "[i]n the absence of allegations by Plaintiffs that Creative . . . also discriminated against them, there will be no finding that Creative . . . discriminated against Plaintiffs.

**Discussion**

"A motion to dismiss made pursuant to CPLR 3211 (a) (1) will fail unless the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim[s]" (*Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 37 [2006]; *see also 1911 Richmond Ave. Assocs., LLC v G.L.G. Cap., LLC*, 60 AD3d 1021, 1022 [2009]). "In order for evidence submitted in support of a CPLR 3211 (a) (1) motion to qualify as documentary evidence, it must be unambiguous, authentic, and undeniable" (*Feldshteyn v Brighton Beach 2012, LLC*, 153 AD3d 670, 670-671 [2017] [internal quotations omitted]).

The Second Department has held that *affidavits, emails* and letters *are not* "documentary evidence" within the meaning of CPLR 3211 (a) (1) (*Phoenix Grantor Tr. v Exclusive Hosp., LLC*, 172 AD3d 923, 924 [2019] [holding "in support of their motion, the appellants submitted affidavits, emails, and letters, none of which are considered 'documentary evidence within the intendment of CPLR 3211 (a) (1)'"] [emphasis added]).

In considering a motion to dismiss a third-party complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action "the pleadings must be liberally construed" and "[t]he sole criterion is whether from [the amended third-party complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Gershon v Goldberg*, 30 AD3d 372, 373 [2006], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "The facts as alleged in the [amended third-party] complaint are accepted as true, with the [third-party] plaintiff accorded the benefit of every favorable inference (*Ginsburg Development Companies, LLC v Carbone*, 85 AD3d 1110, 1111 [2011]; *see also Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2010]).

"A party's right to contractual indemnification depends upon the specific language of the relevant contract" (*Forbes v Equity One Ne. Portfolio, Inc.*, 212 AD3d 780, 782 [2023]; *see also Khan v 40 Wall Ltd. P'ship*, 205 AD3d 789, 791 [2022] [same]).

Section 4.18.1 of the Construction Agreement between Creative and Delta contains an express indemnification provision, which broadly provides that:

> "To the fullest extent permitted by law, [Creative] shall release, indemnify, defend and hold harmless [Third-Party Plaintiffs]

> from and against any and all claims, damages, losses, fines, penalties, liabilities, judgments, costs and expenses of any kind or nature whatsoever . . . that arise out of or result from or are alleged to arise out of or result from *any act(s) or omission(s) by Contractor*, any Subcontractor, or any Sub-subcontractor (or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable) *in the performance of the Work or other obligations for or on the Project* that arise out of or result from or are alleged to arise out of or result from any act(s) or omission(s) by [Creative] in the performance of the Work or other obligations for or on the Project . . . or in connection with the performance or nonperformance of any other obligations of [Creative] under the Contract or Applicable Law, including, but not limited to, Losses arising out of or resulting from [a]ny violation of federal, state and local laws, regulations, rules, codes and ordinances" (NYSCEF Doc No. 11 at 26 [emphasis added]).

More pertinent, however, is Section 4.18 which provides, in relevant part, that:

> "This Section 4.18.1 shall apply regardless of whether the Loss was caused in part by, an Indemnified Party. However, *nothing contained in this Section 4.18.1 shall be construed as a release or indemnity by [Creative] from or against any loss, liability or claim to the extent caused by* ***the active negligence, gross negligence or willful misconduct of [Third-Party Plaintiffs]***" (*id.* [emphasis added]).

Here, under the plain and unambiguous terms of Section 4.18 of the Construction Agreement, Creative agreed that it *would not indemnify* Delta and the Third-Party Plaintiffs for any loss, liability or claim to the extent they were caused by Defendants'/Third-Party Plaintiffs' own active negligence, gross negligence *or willful misconduct*. The complaint in this action asserts various employment discrimination claims on the basis of race, color, sex and/or age against Defendants/Third-Party Plaintiffs under the New York State and New York City Human Rights Laws (NYSHRL and NYCHRL), all of which involve

specific allegations of *willful misconduct by Defendants*, individually and jointly, including alleged disparate treatment, a hostile work environment, retaliation and wrongful termination.

"The principle of common-law, or implied, indemnification permits a party who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages the party paid to the injured party" (*Arrendal v Trizechahn Corp.*, 98 AD3d 699, 700 [2012]). "Common-law indemnification may be pursued by parties who have been held vicariously liable for the party that actually caused the negligence that injured the plaintiff" (*Cobblestone Foods, LLC v Branded Concept Dev., Inc.*, 200 AD3d 845, 847 [2021] [internal quotation marks omitted]).

Here, Plaintiffs are not trying to hold Defendants/Third-Party Plaintiffs vicariously liable for anything that Creative allegedly did to them, and thus, common law indemnification is inapplicable. For that reason, the second cause of action for common law indemnification is subject to dismissal.

"A claim for contribution may be established, among other ways, where the party from whom contribution is sought owed a duty to the injured plaintiff, and a breach of this duty contributed to the plaintiff's alleged injury" (*Razdolskaya v Lyubarsky*, 160 AD3d 994, 997 [2018]). An "essential requirement" of a contribution claim is that the parties contributed to the same injury (*Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]).

Here, as Defendants/Third-Party Plaintiffs argue, the complaint specifically alleges that Creative's President, James, ultimately terminated three of the Plaintiffs' employment on the Delta LaGuardia Project at Delta's direction. Because Creative jointly employed Plaintiffs and was admittedly involved in Plaintiffs' termination from the Delta LaGuardia Project, there is an issue of fact regarding the extent to which Creative could have refused Delta's seemingly improper directive. Consequently, dismissal of the third cause of action in the amended third-party complaint for contribution is not warranted at this juncture of the litigation, especially since there has been limited discovery regarding the details of the termination.

The Court of Appeals has held that "the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter" (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]).

Here, the Construction Agreement between Creative and Delta contains a merger clause at Section 7.10 providing that it represents the entire agreement between the parties, it "supersede all prior negotiations, representations or agreements, either written or oral . . ." and that "[i]n entering into the Contract Documents, neither party has relied upon any statement, representation, warranty, or agreement by or from the other party except for those expressly contained in the Contract Documents" (*see* NYSCEF Doc No. 11 at § 7.10). Consequently, the amended third-party complaint fails to state a cognizable cause of action against Creative for equitable estoppel, since Third-Party Plaintiffs could not have justifiably relied on any extra-contractual representations by Creative. Similarly, the

existence of the Construction Agreement between Creative and Delta precludes Third-Party Plaintiffs' fifth cause of action in the amended third-party complaint for unjust enrichment under a quasi-contract theory of recovery. Accordingly, it is hereby

**ORDERED** that Creative's dismissal motion is granted to the extent that the first, second, fourth and fifth causes of action are hereby dismissed, pursuant to CPLR 3211 (a) (1) and (a) (7); the motion is denied as to the third cause of action in the amended third-party complaint for contribution as there remains a question of fact regarding the extent to which Creative could have denied the directive to terminate the Plaintiffs. Lastly, Creative's request for an award of costs and disbursements is denied; and it is further

**ORDERED** that Creative shall answer the third-party complaint within fifteen days of this decision and order's upload to NYSCEF with notice of entry.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.