

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

2023 NY Slip Op 33369(U)

September 26, 2023

Supreme Court, New York County

Docket Number: Index No. 656973/2017

Judge: Lucy Billings

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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., SCHEAR CONSTRUCTION,
LLC, 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 owner of a construction project moves for summary judgment on its first claim, for breach of a contract, and sixth claim, for gross negligence, against defendant construction manager Consigli & Associates, LLC, and dismissing its third and fourth counterclaims for foreclosure of its mechanic's liens against plaintiff's real property at 99 Wall Street, New York County. C.P.L.R. § 3212(b) and (e). Plaintiff has withdrawn its motion seeking relief on other claims originally included in the motion.

Consigli & Associates moves to dismiss or for summary judgment dismissing plaintiff's fifth and sixth claims, for negligence and gross negligence, respectively, which are related to an overflow of a temporary water tank the evening of October 7, 2016, at the project. C.P.L.R. §§ 3211(a)(7), 3212(b) and (e). Consigli & Associates also moves for summary judgment on a cross-claim and third party claim for breach of subcontracts, seeking indemnification from co-defendant HIG Services, Inc., and third party defendant New York Hoist, LLC. C.P.L.R. § 3212(b)

and (e). Consigli & Associates has withdrawn its motion on other claims against these two parties and also seeking relief against co-defendant Domestic Plumbing Corp. originally included in the motion. The court already denied Consigli & Associates' motion for summary judgment on contractual indemnification against HIG Services, leaving open the possibility that Consigli & Associates might obtain that relief through this motion if Consigli & Associates established it was not at fault.

II. PLAINTIFF'S CLAIM FOR GROSS NEGLIGENCE

As set forth above, plaintiff moves for summary judgment on its sixth claim, for Consigli & Associates' gross negligence related to the October 2016 overflow of a temporary water tank, and Consigli & Associates moves to dismiss or for summary judgment dismissing that claim and plaintiff's fifth claim, for negligence, related to that overflow. Consigli & Associates moves for dismissal of both claims on the ground that Consigli & Associates owed only contractual duties to plaintiff. The tort claims, however, may stand independently of plaintiff's breach of contract claim. Through the tort claims, plaintiff does not seek enforcement of the parties' bargain, but seeks a remedy for alleged negligence that caused an "abrupt, cataclysmic occurrence," resulting in a flood throughout the project and significant alleged property damage. New York Univ. v. Turner Constr. Co., 206 A.D.3d 536, 537 (1st Dep't 2022) (quoting Sommer

v. Fed. Signal Corp., 79 N.Y.2d 540, 552 (1992)):

Alternatively, Consigli & Associates moves for summary judgment on plaintiff's fifth and sixth claims on the ground that plaintiff does not show that Consigli & Associates failed to take reasonable measures to correct a prior overflow in the temporary water tank in August 2016 or otherwise caused the October 2016 overflow. Consigli & Associates does not dispute that it purchased the temporary water tank and thus approved the tank's design. The parties dispute whether Consigli & Associates was involved in the tank's installation. Plaintiff does not dispute, however, that Consigli & Associates was uninvolved in the tank's operation, inspection, and maintenance and did not purchase its plumbing and electrical components essential to its operation in pumping water and regulating the water flow. Consigli & Associates claims those components' malfunction caused the tank to overflow and flood the construction project.

Plaintiff claims its contract with Consigli & Associates required the construction manager to supply a temporary water system for the project. According to plaintiff, Consigli & Associates in turn did not require its plumbing subcontractor Domestic Plumbing and electrical subcontractor HIG Services to install a system with a booster pump; a high water or leak detection system; a system in compliance with state and city plumbing and electrical codes; and a drainage system. Even with

a deficient system in place, had Consigli & Associates or a subcontractor shut off the water flow at the end of each work day, the overnight flood beginning October 7, 2016, never would have occurred.

Plaintiff fails to specify any act or omission related to the tank that constitutes negligence, let alone gross negligence, and caused the overflow. Plaintiff never articulates how a booster pump would have prevented the flood; how code violations, even if evidence of negligence, caused the flood; or why Consigli & Associates, rather than the plumbing subcontractor, was responsible for installing a high water detection, leak detection, or drainage system or shutting off the water flow each evening. Moreover, given plaintiff's description of the cascading water in October 2016, a drainage system might have reduced the water damage, but it is difficult to conclude that drainage would have prevented the damage altogether.

To the extent plaintiff relies on a res ipsa loquitor theory, it requires that the malfunctioning instrument of harm, here the temporary water tank, be in Consigli & Associates' exclusive control. Kamara v. L.A. Fitness Intl., LLC, 217 A.D.3d 451, 451 (1st Dep't 2023); Maldonado v. Liberty El. Corp., 213 A.D.3d 493, 494 (1st Dep't 2023). Plaintiff fails to establish that Consigli & Associates exclusively controlled the temporary tank.

On the other hand, Consigli & Associates admits that it purchased and approved the temporary water tank that the plumbing subcontractor Domestic Plumbing installed and operated and fails to establish conclusively that the cause of the flood was not due to the tank or its installation, as opposed to its plumbing and electrical components for which subcontractors were responsible. Nor does Consigli & Associates show that it took any measures to assure that the prior overflow in August 2016 did not recur, except to point to the absence of an overflow between the August 2016 and October 2016 floods. Therefore the court denies both plaintiff's and Consigli & Associates' motions for summary judgment regarding plaintiff's negligence claims. C.P.L.R. § 3212(b); Cackett v. Gladden Props., LLC, 183 A.D.3d 419, 420 (1st Dep't 2020); Arias v. Recife Realty Co., N.V., 172 A.D.3d 631, 632 (1st Dep't 2019); Frank v. 1100 Ave. of Americas Assocs., 159 A.D.3d 537, 537 (1st Dep't 2018); Pchelka v. Southcroft, LLC, 178 A.D.3d 836, 838 (2d Dep't 2019).

III. REMAINDER OF PLAINTIFF'S MOTION

Plaintiff also seeks summary judgment on plaintiff's breach of contract claim against Consigli & Associates for failing to perform its work, suspending its efforts, and finally terminating their contract when plaintiff had paid Consigli & Associates fully for its work up to that point. Plaintiff admits, however, that it did not pay Consigli & Associates all the compensation

contemplated by the contract and its amendments for two principal reasons. First, plaintiff withheld payments for defective work until Consigli & Associates corrected the defects. Second, Consigli & Associates never billed plaintiff for other unpaid costs with signed and notarized payment requisitions as the contract required.

Consigli & Associates disputes that plaintiff was not obligated to pay any of these amounts and claims that plaintiff breached the contract by failing to pay. Therefore Consigli & Associates, in response, stopped work as permitted by the contract. Plaintiff then actually terminated the contract by replacing Consigli & Associates.

To establish breach of a contract, a party must demonstrate a contract, that party's performance, another party's breach, and damages from the breach. Alloy Advisory, LLC v. 503 W. 33rd St. Assocs., Inc., 195 A.D.3d 436, 436 (1st Dep't 2021). The above summary illustrates that factual issues remain whether plaintiff performed and whether Consigli & Associates breached the contract. Although plaintiff presents evidence that it fully paid for the work that Consigli & Associates completed and for which it billed plaintiff, Consigli & Associates raises questions whether it was in fact fully paid for that work. Therefore the court denies plaintiff's motion for summary judgment on the breach of contract claim. C.P.L.R. § 3212(b). It remains an

issue for trial.

Finally, plaintiff moves for summary judgment dismissing Consigli & Associates' fourth and fifth counterclaims for foreclosure of two mechanic's liens and seeks damages pursuant to New York Lien Law §§ 39 and 39-a for Consigli & Associates' willful exaggeration of the liens. Consigli & Associates does not contest that the liens include duplicative amounts and non-lienable costs that were not for labor or materials, but demonstrates that plaintiff owed Consigli & Associates at least part of the lien amounts and denies that any exaggeration of the liens was willful. Consigli & Associates thus raises factual issues as to the amount plaintiff owed to Consigli & Associates and thus whether, how much, and with what intention it overstated the lien. On the Level Enters., Inc. v. 49 E. Houston LLC, 104 A.D.3d 500, 500 (1st Dep't 2013). See Wang Jia v. Kang, 161 A.D.3d 463, 464 (1st Dep't 2018); Mulberry Dev. LLC v. Peak Performance NYC, LLC, 148 A.D.3d 583, 583 (1st Dep't 2017). Therefore the court also denies this part of plaintiff's motion. C.P.L.R. § 3212(b).

IV. CONSIGLI & ASSOCIATES' CROSS-CLAIMS AND THIRD PARTY CLAIMS

Consigli & Associates also moved for summary judgment on cross-claims and third party claims for breach of subcontracts and declaratory judgments seeking indemnification from co-defendants Domestic Plumbing and HIG Services and third party

defendant New York Hoist. At oral argument on the record February 2, 2023, however, Consigli & Associates discontinued all cross-claims except its breach of contract claims against HIG Services. Plaintiff's settlement of its claims against HIG Services pursuant to a settlement agreement dated September 13, 2022, converts the cross-claims by Consigli & Associates 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). Against New York Hoist, Consigli & Associates moves for summary judgment only on the third party claim for contractual indemnification.

The indemnification provisions in Consigli & Associates' subcontracts with HIG Services and with New York Hoist, which the parties stipulate are authenticated and admissible, are identical:

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 Sean Payton Exs. C and E, NYSCEF Docs. 638 and 640, art.

4.6.1. Contractual indemnification thus does not require the subcontractor's fault in causing the injury complained of, but requires only that the injury arose from the subcontractor's performance of work or failure to perform work under the subcontract.

A. HIG Services

HIG Services opposes this motion for summary judgment on the ground that, while HIG Services drilled a hole in the roof of plaintiff's building that caused a leak in July 2016, HIG Services did so at Consigli & Associates' direction. Consigli & Associates knew about the hole and was responsible for sealing the hole; sealing it was not HIG Services' responsibility; and another subcontractor had sealed all prior roof penetrations. HIG Services thus raises factual issues as to who was responsible for sealing the hole in the roof that led to the July 2016 leak and whether HIG breached its subcontract with Consigli & Associates for safe and workmanlike performance of electrical

services. Nevertheless, HIG Services still may owe indemnification to Consigli & Associates for defending claims arising from the July 2016 leak, even if HIG Services was not at fault, because the leak 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). If HIG Services had not drilled the hole in the roof, the leak would not have occurred.

The subcontract includes a savings provision, however, that eliminates indemnification for any damages attributable to Consigli & Associates, allowing it to seek indemnification from HIG Services only to the extent that Consigli & Associates was not at fault for the July 2016 leak. 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). Thus, unless Consigli & Associates shows its total absence of fault, HIG Services' duty to defend its contractual indemnitee requires the trier of fact to determine Consigli & Associates' apportioned liability for the water damage from the July leak, 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). As in the prior motion, Consigli & Associates again fails to make that showing. If Consigli & Associates had sealed the hole in the roof, the flood would not have occurred.

Nor does Consigli & Associates show that, even if the July 2016 leak arose from HIG Services' work, HIG Services was at fault, and therefore Consigli & Associates was not solely at fault for the July 2016 leak, to establish HIG Services' liability for any amount of contractual indemnification. HIG raises factual issues that drilling the hole in the roof was part of its scope of work, but sealing the hole was not, and HIG Services' responsibility was only to notify Consigli & Associates that HIG Services had drilled the hole, so Consigli & Associates could direct a roofer to seal the hole.

Consequently, the court again denies Consigli & Associates' motion for summary judgment on its contractual indemnification claim against HIG Services. C.P.L.R. § 3212(b). To the extent Consigli & Associates shows at trial that its negligence was not the proximate cause of the July 2016 leak, HIG Services'

indemnification of Consigli & Associates for its defense expenses still will be limited 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.

B. New York Hoist

Consigli & Associates claims that New York Hoist's delayed installation of a hoist for project personnel and materials delayed the construction project and seeks indemnification under these parties' subcontract. Again, to obtain contractual indemnification, Consigli & Associates must show that the delay in the project's completion arose from New York Hoist's delayed installation of the hoist. New York Hoist painstakingly demonstrates that, even if it delayed in installing the hoist, so many other factors delayed the project's completion that the overall delay was not attributable to New York Hoist. Even had New York Hoist installed the hoist timely, the other delays would have caused the same length of delay in the project as plaintiff claims.

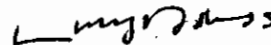
Even more significantly, Consigli & Associates for its part does not dispute any of the other delays and makes no prima facie showing that the overall delay was attributable to New York Hoist. The emails that Consigli & Associates presents recounting New York Hoist's insufficient manpower and its employees sleeping

on the job are inadmissible hearsay and in any event are unconnected to the delay in project completion. Therefore the court also denies Consigli & Associates' motion for summary judgment on its contractual indemnification claim against New York Hoist. C.P.L.R. § 3212(b).

V. CONCLUSION

For the reasons explained above, the court denies both plaintiff's motion for partial summary judgment and defendant Consigli & Associates' motion for partial summary judgment. Id. This decision constitutes the court's order.

DATED: September 26, 2023



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.