

Giovanniello v BFC Partners, LP

2023 NY Slip Op 34780(U)

April 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 505307/2019

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At Part 99 of the Kings County Supreme Court of the State of New York, located at 360 Adams Street, Brooklyn, NY 11201 on the ___ day of _____ 2023.

APR 24 2023

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

-----X
THEODORE J. GIOVANNIELLO,

Plaintiff,

-against-

BFC PARTNERS, LP, EMPIRE OUTLET BUILDERS LLC and
ST. GEORGE OUTLET DEVELOPMENT LLC,

Defendants.

-----X
EMPIRE OUTLET BUILDERS LLC and ST. GEORGE
OUTLET DEVELOPMENT LLC,

Third-Party Plaintiffs,

- against -

SCHINDLER ELEVATOR CORPORATION,

Third-Party Defendant,

-----X
EMPIRE OUTLET BUILDERS LLC and ST. GEORGE
OUTLET DEVELOPMENT LLC,

Second Third-Party Plaintiffs,

-against-

DIFAMA CONCRETE INC. and DFC STRUCTURES LLC,

Second Third-Party Defendants.

-----X

**DECISION and
ORDER**

Index No.: 505307/2019
Motion Date: 3/15/23
Motion Cal. No.: 16
Mot. Seq. 11

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-----X
 EMPIRE OUTLET BUILDERS LLC and ST. GEORGE
 OUTLET DEVELOPMENT LLC,

Third Third-Party Plaintiffs,

-against-

CONSTRUCTION RESOURCES CORP OF NEW YORK,

Third Third-Party Defendant.

-----X
 EMPIRE OUTLET BUILDERS LLC and ST. GEORGE
 OUTLET DEVELOPMENT LLC,

Fourth Third-Party Plaintiffs,

-against-

COMMERCIAL PAYROLL, INC.,

Fourth Third-Party Defendant.

-----X
 After oral argument on the record, the following papers were read on this motion pursuant to
 CPLR 2219(a):

Papers	Numbered
Defendants/third-party plaintiffs/second third-party plaintiffs/third third-party plaintiffs and fourth third-party plaintiffs Empire Outlet Builders LLC and St. George Outlet Development LLC's Notice of Motion to Reargue this Courts Decision and Order dated August 28, 2022; Attorney Affirmation of Nicholas Vevante, Esq. in Support, dated 11/14/2022; Exhibit.....	236-238
Third-Party Defendant Schindler Elevator Corporation's Attorney Affirmation of Angela A. Cutone, Esq. in Opposition, dated 12/6/2022.....	239
Attorney Affirmation of Nicholas Vevante, Esq. in Reply, dated 1/31/2032.....	244

Plaintiff commenced this action on March 11, 2019 alleging violations of the Labor Law. Issue was joined on April 26, 2019. Before the court is defendants/third-party plaintiffs/second third-party plaintiffs/third third-party plaintiffs and fourth third-party plaintiffs Empire Outlet Builders LLC and St. George Outlet Development LLC's ("movants") motion to reargue this court's order dated August 28, 2022. That order, *inter alia*, granted third-party defendant Schindler Elevator Corporation's ("Schindler") motion for summary judgment and dismissed all claims against Schindler including common law contribution, indemnity, and contractual indemnity. While movants initially moved to reargue several aspects of that order, at oral argument on the record, movants stated that they were only seeking to reargue the claims for contractual indemnity against Schindler.

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Plaintiff, a Schindler employee, was working to install an elevator. His workstation was the top floor of the parking garage. On the date of the accident, he was returning from his lunch break, which he took off the premises at a restaurant, and headed to a portable bathroom on the bottom floor of the parking garage, prior to returning to his workstation. NYSCEF #116, pgs. 69-76. Plaintiff testified that, while walking on ground floor of the garage on the way to the portable restrooms, he tripped over construction debris, specifically steel rebar, and fell to the ground. *Id.* at pgs. 76, 86-88. Plaintiff identified a photo of the materials he tripped over. NYSCEF #120. Steven Meyer, employed as Schindler's installation adjuster, testified that there was no work being performed on the date of the accident in the area where plaintiff fell. NYSCEF #118, pg. 50.

An employee of defendant BFC Partners, Udo Steudtner, testified that he witnessed the plaintiff's accident. NYSCEF #116, pg. 59. He testified that plaintiff was walking with a group of men down a tunnel to the parking garage. A truck drove down the driveway that separated the tunnel from the parking area. *Id.* at pg. 60. When the truck approached the group of men plaintiff was walking with, all of the men "shifted" to the right, bumping plaintiff causing him to fall. *Id.* Steudtner testified that the men plaintiff were walking with were Schindler employee's and that the only basis this belief was that the individuals were wearing harnesses. *Id.* at pg. 62. However, he further testified that non-Schindler employee's, such as ironworkers, "people working in high equipment", and "man lift employee booms," would also wear harnesses on the job site. *Id.*

Movants argue that Schindler's motion for summary judgment should be denied because they are contractually obligated to indemnify movant. "The right to contractual indemnification depends on the specific language of the contract." *George v. Marshalls of MA, Inc.*, 61 A.D.3d 925, 930 (2d Dep't 2009). The contract at issue (NYSCEF #114) contains the following relevant contractual provisions.

To the fullest extent permitted by law, Subcontractor shall indemnify, defend and hold harmless the Contractor, [and] Owner . . . from and against any and all damages, claims, losses, liabilities, actions, demands, costs or expenses . . . arising out of or resulting from the performance of the Subcontractor's Work under this Subcontract, provided that any such damage, claim, loss, liability, action, demand, cost or expense is in any manner attributable to bodily injury, sickness, disease or death, or to injury to or damage to any property (other than the Work itself), but only to the extent caused in whole or in part by the negligence, acts, errors or omissions of the Subcontractor, its sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may [bc] liable . . .

...

Subcontractor and/or its sub-subcontractors shall indemnify and hold harmless the Indemnitees to the fullest extent permitted by acceptable in the event of a loss (including, but not limited to, any claim, suit, cost or expense arising our out of

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such loss) suffered by an employee of the Subcontractor or its sub-subcontractors, regardless of whether or not such loss is caused in part by an Indemnitee.

...

The Subcontractor shall be solely responsible for the safety of its Work and for the safety of its agents, employees, suppliers, materialmen, sub-subcontractors and any entity working on behalf of the Subcontractor. The Subcontractor, its agents, employees, suppliers, materialmen and sub- Subcontractor will perform all work on the Project in a safe and responsible manner.

Reading these provisions together, the contract requires Schindler to indemnify movants for claims by Schindler employees arising out of Schindler's work under the subcontract, provided that the injuries were caused by the negligence of Schindler. The "Work" is defined under Article 2 of the Contract (NYSCEF #114):

Subcontractor shall perform that part of the Contract Documents assumed by Subcontractor under this Subcontract as follows: Elevators and Escalators (with such work hereinafter referred to as the "Work").

The contract also allows the "Work" to include: "Sales use tax," "Cab Finish Upgrade," "Hotel Elevators," "Nordstrom Vertical Transportation," "H&M Vertical Transportation," and "Maintenance Agreement." (NYSCEF #114).

Here, regardless of what version of events is accepted, this injury did not arise out of the "Work" under the contract. *See generally Pepe v. Ctr. for Jewish Hist., Inc.*, 59 A.D.3d 277, 278, 873 N.Y.S.2d 571 (1st Dep't 2009) (holding that the accident did not "arise out of" and was not "in connection with" the subcontractor's work, because there was no evidence showing that the subcontractor caused the dangerous condition or that the plaintiff's work was even "remotely related" to the subcontractor's work as defined by the contract). Plaintiff was hired to work on elevators at the top floor of the garage. He was injured while returning from lunch, walking with a group of men on the bottom floor of the garage, where no Schindler "Work", as defined under the contract, was being performed. Plaintiff and the group of men he was walking with were not performing "Work" as defined under the contract when the injury occurred.

Movants argue that the language "arising from" is broad and has been interpreted to mean "originating from," "incident to," or "having a connection with," citing *Mack-Cali Realty Corp. v. NGM Ins. Co.*, 119 A.D.3d 905, 906, 990 N.Y.S.2d 253 (2d Dep't 2014). However, under the contract here, the injury must originate from, be incident to, or have a connection with the "Work" as is defined by the contract. It is not enough that plaintiff was injured on the work site or was bumped by someone who may have been a Schindler employee because the injury did not originate from and was not incident to the performance of the "Work" as defined by the contract between movants and Schindler. *See Worth Const. Co. v. Admiral Ins. Co.*, 10 N.Y.3d 411, 416, 888 N.E.2d 1043 (Cl. of Ap. 2008); *see also Fireman's Fund Ins. Co. v. State Nat'l Ins. Co.*, 180 A.D.3d 118, 120, 117 N.Y.S.3d 5 (1st Dep't 2019).

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Based on the foregoing it is,

ORDERED that the defendants/third-party plaintiffs/second third-party plaintiffs/third third-party plaintiffs and fourth third-party plaintiffs Empire Outlet Builders LLC and St. George Outlet Development LLC's motion to reargue is **GRANTED** and, upon reargument, the application to modify the court's previous decision and order dated August 28, 2022 is **DENIED**, and it is further

ORDERED that any other requests for relief requested are **DENIED**.

This constitutes the decision and order of the Court.

ENTER


Hon. Richard J. Montelione



KINGS COUNTY CLERK
FILED
2023 MAY -8 AM 10:15.