

Andrade v 120 Fulton Invs. LLC

2024 NY Slip Op 30659(U)

February 20, 2024

Supreme Court, New York County

Docket Number: Index No. 156501/2018

Judge: Shlomo S. Hagler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHLOMO S. HAGLER PART 17

Justice

-----X

ADRIAN ANDRADE,

Plaintiff,

- v -

120 FULTON INVESTORS LLC,CP V TS FULTON OWNER,
LLC,AND TIME SQUARE CONSTRUCTION, INC.,

Defendant.

-----X

CP V TS FULTON OWNER, LLC

Plaintiff,

-against-

U.S. CRANE & RIGGING, LLC

Defendant.

-----X

CP V TS FULTON OWNER, LLC

Plaintiff,

-against-

NYC CRANE HOIST & RIGGING LLC

Defendant.

-----X

INDEX NO. 156501/2018
MOTION DATE 08/30/2021, 09/20/2021
MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

Third-Party
Index No. 595374/2019

Second Third-Party
Index No. 595664/2021

The following e-filed documents, listed by NYSCEF document number (Motion 004) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 136, 162, 163, 164, 165, 166, 172, 174, 175, 176, 177, 178, 204, 206, 207, 208, 212, 213, 216, 218, 220, 221, 224

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 167, 168, 169, 170, 171, 173, 179, 180, 181, 182, 205, 209, 210, 211, 214, 215, 217, 219, 222, 223, 225

were read on this motion to/for JUDGMENT - SUMMARY

Motions bearing sequence numbers 004 and 005 are consolidated herein for disposition.

These motions involve disputes regarding the rights and obligations among the owner of a building at which a construction worker was injured, the contractor that the owner hired to furnish equipment involved in the accident, and the subcontractor that the contractor engaged to perform all the labor required under the contractor's agreement with the building owner.

Background

Plaintiff Adrian Andrade alleges that, on January 11, 2018, he was injured while performing construction work (Project) at 118 Fulton Street in Manhattan (Premises) and that the owner of the Premises, defendant, third-party plaintiff, and second third-party plaintiff CP V TS Fulton Owner, LLC (Fulton), among other defendants, should be held liable to him for common law negligence and for violation of Sections 200, 240, and 241(6) of New York's Labor Law (see complaint, dated July 13, 2018, ¶ 75 *et seq.* [NYSCEF Doc No. 119], annexed as ex A to the affirmation of Steven H. Kaplan, Esq. [Kaplan Affirmation] [NYSCEF Doc No. 113]). At the time of his alleged injury, plaintiff was employed by NYC Crane Hoist & Rigging, LLC (NYC Crane) (complaint, ¶74), which Fulton later named as second third-party defendant herein (see second third-party complaint [NYSCEF Doc No. 124], annexed as ex F to the Kaplan Affirmation).

Fulton answered on September 22, 2018 (NYSCEF Doc No. 120 [ex B to Kaplan Affirmation]), generally denying plaintiff's allegations and asserting 22 affirmative defenses. On April 29, 2019, Fulton filed its third-party complaint against U.S. Crane & Rigging, LLC (US Crane) and RNC Industries, LLC (RNC) (NYSCEF Doc No. 121 [ex C to the Kaplan Affirmation]).

US Crane was the contractor which Fulton hired to furnish, install, and dismantle an electric internal climbing crane involved in an accident at the Premises that allegedly caused

plaintiff's injuries (see May 13, 2016 contract between Fulton and US Crane [US Crane Contract]), annexed as ex G to the Kaplan Affirmation [NYSCEF Doc No. 125]).

The US Crane Contract provided, in pertinent part, that:

“THE TRADE CONTRACTOR [*i.e.*, US Crane] AGREES TO INDEMNIFY AND HOLD HARMLESS THE CONSTRUCTION MANAGER [*i.e.*, nonparty Gilbane Residential Construction LLC], THE OWNER [Fulton]. . . , AND ALL OF THEIR AGENTS AND EMPLOYEES FROM AND AGAINST CLAIMS, DAMAGES, LOSSES AND EXPENSES, INCLUDING BUT NOT LIMITED TO ATTORNEYS' FEES ARISING OUT OF OR RESULTING FROM THE PERFORMANCE OR FAILURE IN PERFORMANCE OF THE TRADE CONTRACTOR'S WORK[,] REGARDLESS OF WHETHER CAUSED IN PART BY A PARTY INDEMNIFIED HEREUNDER”

(*id.* Article 5.1).

Article 5.3 of the US Crane Contract states that US Crane's indemnity obligation as Trade Contractor extended to the Construction Manager and Fulton, and all their agents and employees, including:

“ANY AND ALL CLAIMS, DAMAGES, LOSSES OR EXPENSES, INCLUDING BUT NOT LIMITED TO ATTORNEYS' FEES ARISING OUT OF OR RESULTING FROM. . . ANY OTHER WRONGFUL OR NEGLIGENT ACT OR OMISSION OF THE TRADE CONTRACTOR OR ANY OF ITS TRADE-SUBCONTRACTORS, OF ANY TIER OR ANY PERSON OR ENTITY FOR WHOSE ACTS OR OMISSIONS ANY OF THEM MAY BE LIABLE.”

Subsections (3)(b), (d), and (h) of Article 6 require US Crane, as Trade Contractor, to procure Commercial General Liability (CGL) and excess or umbrella liability insurance for work to be performed under the Contract, providing certain coverages and meeting certain limits of liability, and including as “Additional Insureds” under those policies the Construction Manager,

Fulton, “both [Fulton] and Construction Manager’s officers, directors, and employees,” and “any other person or entity required to be added as an additional insured by the Contract Documents.”¹

RNC is the foundation and superstructure contractor that Fulton hired for the Project and the party to which Fulton, prior to January 11, 2018, assigned all its rights and obligations with respect to the US Crane Contract, under an Assignment, Assumption & Release Agreement “dated as of May __, 2016” (Assignment Agreement) (annexed as ex I to Kaplan Affirmation [NYSCEF Doc No. 127]);² see also US Crane Statement of Material Facts [SMF], ¶9 [NYSCEF Doc No. 114]). The Assignment Agreement provides, in pertinent part that Fulton, as:

“Assignor hereby assigns, transfers and sets over to Assignee [*i.e.*, RNC] all of its right, title and interest in and to the [US Crane Contract], and Assignor warrants and represents the [US Crane Contract] to be free of any adverse liens, claims or encumbrances. [RNC] hereby assumes all of Assignor’s obligations under the [US Crane Contract] . . .”

(*id.* ¶1). The Assignment Agreement also provides that US Crane, as “Vendor[,] hereby consents to the assignment of the [US Crane Contract] by Assignor and the assumption of the [US Crane Contract] by assignee, and hereby releases Assignor from any further obligations accruing under the [US Crane Contract] from and after the date hereof” (*id.* ¶2).

¹ Article 1.1.1 of the US Crane Contract states that “The Contract Documents consist of the following, each of which are incorporated herein and made part of this Contract Agreement:

Exhibit A – Certificate of Equal Employment Opportunity Compliance

Exhibit B – Scope of Work Trash Chute dated March 24, 2016

Exhibit C – List of Drawings, Specifications and Other Documents dated March 23, 2016 as prepared by SLCE Architects LLP

Exhibit D – Project Schedule dated 3/31/16

Project Manual dated March 24, 2016.”

² Fulton’s Vice President, Steve Martinelli, executed the Assignment Agreement on its behalf as “Assignor.” Richard Tonyes, RNC’s Principal, signed as “Assignee.” US Crane’s manager, Thomas Auringer, signed the Agreement on its behalf as “Vendor.” Neither Mr. Martinelli nor Mr. Tonyes dated their respective signatures. Mr. Auringer, however, wrote “7.21.16” by hand to the right of his signature (*id.*).

On July 21, 2016, third-party defendant US Crane subcontracted with second third-party defendant NYC Crane to perform all labor at the Project that the US Crane Contract required (see NYC Crane Subcontract [NYSCEF Doc No. 128], annexed as ex J to Kaplan affirmation; see also US Crane SMF, ¶12 [NYSCEF Doc No. 114]). As noted, plaintiff was an employee of NYC Crane at the time of his injury (see US Crane SMF, ¶¶14-16). US Crane maintains that it was not present at the Project and did not supervise or control NYC Crane's work at the Premises, and so cannot be deemed liable for plaintiff's injuries exercised on the grounds of negligence, common law indemnification or contribution (*id.* ¶¶13-18).

Fulton's Third-Party Complaint

On April 29, 2019, Fulton filed its third-party complaint ([NYSCEF Doc 121], annexed as ex C to the Kaplan affirmation), in which it asserts four causes of action against US Crane and RNC. In its first cause of action, Fulton alleges that plaintiff's injuries were caused by negligence of US Crane and RNC (and their respective agents, servants, and/or employees), not by Fulton, and so Fulton is entitled to common law indemnification or contribution from US Crane and RNC for any judgment or settlement plaintiff may recover from Fulton (*id.* ¶1 *et seq.*).

In its second cause of action, Fulton asserts that, if plaintiff was injured through any negligence other than his own, it was due to the "sole, primary and active negligence" of US Crane and RNC (and their respective agents, servants, and/or employees), not by any negligence of Fulton, and so Fulton will be entitled to "judgment over and against" US Crane and/or RNC for all of any settlement or judgment Andrade recovers from Fulton (*id.* ¶24 *et seq.*).

In its third cause of action, Fulton alleges that, under the agreements Fulton entered with US Crane and RNC, US Crane and RNC agreed to indemnify Fulton and hold it harmless from claims such as those being asserted by plaintiff against Fulton in this matter (*id.* ¶33 *et seq.*).

In its fourth cause of action, Fulton contends that US Crane and RNC breached their respective agreements to procure insurance for Fulton's benefit, and so Fulton is entitled to recover in damages the amounts for which Fulton is held liable to plaintiff, and the amounts Fulton is required to spend defending plaintiff's suit, which would have been covered by such insurance (*id.* ¶41 *et seq.*).

On July 16, 2019, US Crane answered Fulton's third-party complaint, generally denying Fulton's allegations and asserting 27 affirmative defenses and three cross-claims against Fulton (NYSCEF Doc No. 122). On August 22, 2019, RNC answered Fulton's third-party complaint, denying Fulton's allegations, and asserting fifteen defenses, fourteen affirmative defenses, and four counterclaims against Fulton, and four cross-claims against US Crane (NYSCEF Doc No. 60).

On July 7, 2020, counsel for Fulton, US Crane and RNC executed and e-filed a stipulation of discontinuance without prejudice as to RNC only in the first third-party action (NYSCEF Doc No. 123).

Fulton's Second Third-Party Complaint

On July 22, 2021, Fulton e-filed its second third-party complaint against NYC Crane (NYSCEF Doc No 109), which mirrors its allegations against defendants in the first third-party action. In its first cause of action, Fulton alleges that plaintiff's injuries were caused by negligence of NYC Crane and its agents, servants, and/or employees, not by Fulton, and so Fulton is entitled to common law indemnification or contribution from NYC Crane for any judgment or settlement plaintiff may recover from Fulton (*id.* ¶1 *et seq.*).

In its second cause of action, Fulton alleges that if plaintiff was injured through any negligence other than his own, it was due to the "sole, primary and active negligence" of NYC

Crane and its agents, servants, and/or employees, not by Fulton, and so Fulton will be entitled to “judgment over and against” NYC Crane for any settlement or judgment Andrade recovers from Fulton (*id.* ¶14 *et seq.*).

In its third cause of action, Fulton asserts that, under an agreement that NYC Crane allegedly entered with US Crane, NYC Crane agreed to indemnify Fulton and to hold it harmless from claims such as those being asserted by plaintiff against Fulton, and so Fulton “will be entitled to indemnity and judgment over against NYC Crane” resulting from such breach (*id.* ¶19 *et seq.*).

In its fourth cause of action, Fulton alleges that, pursuant to an agreement NYC Crane allegedly entered with US Crane, NYC Crane was obligated to procure liability insurance for Fulton’s benefit but failed to do so, and so Fulton is entitled to recover in damages for this breach of contract in the amounts for which Fulton may be held liable to plaintiff, and the amounts Fulton is required to spend defending plaintiff’s suit, which otherwise would have been covered by such insurance (*id.* ¶23 *et seq.*).

NYC Crane e-filed its answer to Fulton’s second third-party complaint on September 10, 2021, generally denying Fulton’s allegations and asserting 30 affirmative defenses and three counterclaims (NYSCEF Doc No. 135).

Discussion

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]).

To prevail, the movant must produce evidentiary proof in admissible form sufficient to warrant granting summary judgment in its favor (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once the movant has made its showing, the burden shifts to the opposing party, to submit proof in admissible form sufficient to show a question of fact exists, requiring trial (*Kosson v Algaze*, 84 NY2d 1019, 1020 [1995]).

In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmovant (*Prine v Santee*, 21 NY3d 923, 925 [2013]). Party affidavits and other proof must be examined carefully “because summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [citation and internal quotation marks omitted]). Still, “only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment” (*id.*).

Motion Sequence No. 004

Third-party defendant US Crane moves for summary judgment, seeking dismissal of the causes of action Fulton has asserted against it (notice of motion [NYSCEF Doc No. 112]). US Crane argues that it is entitled to summary judgment with respect to Fulton’s causes of action for contractual indemnification and for breach of contract to procure liability insurance because Fulton assigned all its rights under the US Crane Contract to RNC. As a result, any contractual obligation US Crane may have had to indemnify Fulton or to procure liability insurance coverage for it was assigned to RNC, and so Fulton lacks standing to maintain these causes of action.

US Crane further argues that it cannot be held liable to Fulton for common law indemnification or contribution because it cannot be found negligent in plaintiff’s accident, as it subcontracted with plaintiff’s employer, second third-party defendant NYC Crane, to perform all

labor at the Premises required under the US Crane contract, had no personnel at the jobsite, and did not exercise any supervision or control over the work NYC Crane performed there. Based on these alleged facts, US Crane asserts it cannot be found negligent in plaintiff's accident, citing, *inter alia*, *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, which states:

“Where, as here, a construction accident arises out of the means and methods of the work, as opposed to a dangerous condition on the site, liability . . . for common law negligence may be imposed [only] where the defendant ‘exercised control or supervision over the work and had actual or constructive notice of the purportedly unsafe condition’”

(104 AD3d 446, 449 [1st Dept 2013], quoting *Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005]).

US Crane also notes that plaintiff's accident and injuries occurred in January 2018, more than a year after Fulton and RNC entered into the Assignment Agreement, and more than a year after US Crane and NYC Crane entered into the NYC Crane Subcontract.

In opposition, Fulton argues that US Crane's motion for summary judgment, dismissing Fulton's third-party complaint against it, must be denied. First, it argues that the motion is premature because Fulton has not been afforded an adequate opportunity to conduct discovery, “[a]s no representatives from [US Crane] have been deposed, and the record suggests that crucial facts may be within [movant's] knowledge” (quoting *Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666, 667 [1st Dept 2018]).

Fulton, however, does not say what “crucial facts” have been suggested by the record which require the motion to be dismissed and does not “identify what information is in the exclusive control of [US Crane] that would raise a material issue of fact such that CPLR 3212(f) would warrant denial of the motion” (*Erkan v McDonald's Corp.*, 146 AD3d 466, 467 [1st Dept 2017]). “The mere hope that evidence sufficient to defeat a motion for summary judgment may

be uncovered during the discovery process is insufficient to deny such a motion” (*id.* 146 AD3d at 468, quoting *Guerrero v Milla*, 135 AD3d 635, 636 [1st Dept 2016] [internal quotation marks and citation omitted]).

Fulton relies on the affidavit of George Rosario to support its contention that further discovery will lead to relevant evidence. Mr. Rosario, a Concrete Safety Manager for RNC, avers that, despite the Assignment Agreement, Fulton actually retained “[s]ome of the duties and benefits under” the US Crane Contract that purportedly were “wholly assigned to RNC” (NYSCEF Doc No. 165, ¶¶1,8). The one example he gives is that Fulton provided “engineering services related to the” US Crane Contract (*id.*).

Mr. Rosario, however, does not explain how Fulton’s provision of “engineering services related to the” US Crane Contract would constitute performance of a duty Fulton owed under the US Crane Contract. Considering that Fulton is a property owner, not an engineering firm licensed to provide engineering services in this state,³ and that Mr. Rosario does not allege that any Fulton employee is qualified to provide such engineering services, this contention suggests that, rather than providing the engineering services itself, Fulton may have hired an engineering contractor to provide engineering services that RNC and US Crane needed to fulfill the US Crane Contract.

Mr. Rosario goes on to assert that he “is aware that almost all the obligations relating to owner responsibilities at the premises continued to be performed by [Fulton] after the assignment and [Fulton] retained its owner-related responsibilities” and from this concluded that “many of the obligations under the [US Crane Contract] continued to be performed by and were retained

³ A search for Fulton’s name in the engineering licensure database on the New York State Education Department’s Office of the Professions verification search page at <https://www.op.nysed.gov/verification-search> returns no result.

by [Fulton]" (*id.* ¶¶9-10). Of course, Fulton owns the Premises and its assignment of the US Crane Contract to RNC did not change that fact. More to the point, Mr. Rosario does not identify any "owner-related responsibilities" that were part of Fulton's performance under the US Crane Contract and so his conclusion that "many of the obligations" under the US Crane Contract "continued to be performed by and were retained by [Fulton]" (*id.* ¶10) is a non sequitur.

Mr. Rosario ends his affidavit by asserting that he is "aware that it was always the intention of RNC, [Fulton], and US Crane that, despite the assignment, [Fulton] would be indemnified by various entities, including those it entered into contracts with . . . , includ[ing], but not limited to, US Crane and NYC CRANE HOIST & RIGGING LLC" (*id.* ¶11). Mr. Rosario, however, does not explain the basis for his awareness and presents no evidence to support this contention. In any event, Fulton's reliance on the Rosario affidavit to introduce "extrinsic evidence of the parties' intent" in entering the Assignment Agreement is misplaced, as such evidence "may be considered only if the agreement is ambiguous, which is an issue for the court to decide" (*Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 31 NY3d 131, 137 [2018] [internal quotation marks and citation omitted]). Despite Fulton's conclusory contentions, the Assignment Agreement is not ambiguous so the plain meaning of its wording must be accepted, and extrinsic evidence offered by Mr. Rosario cannot be used to alter its terms.

Next, Fulton asserts that US Crane's motion for summary judgment must be denied because it relies on witnesses whose identities it did not disclose in response to Fulton's discovery demands, dated and e-filed on August 9, 2019 (NYSCEF Doc. Nos. 57 and 58). Fulton asserts its demands "ask[ed] specifically for witnesses who will be called to give sworn testimony" and complains that none of the three witnesses whose affidavits US Crane submitted were identified as fact witnesses before the motion was filed.

Fulton, however, relies on inapposite “notice witness” cases to support this argument (see *Dunson v Riverbay Corp.*, 103 AD3d 578 [1st Dept 2013]; *Williams v ATA Hous. Corp.*, 19 AD3d 406, 407 [2d Dept 2005]; *Concetto v Pedalino*, 308 AD2d 470, 470-71 [2d Dept 2003]). The affiants US Crane relies on in support of its motion are not “notice” witnesses as they do not offer evidence that Fulton “had [] actual [or] constructive notice of [an] alleged defect” at the Premises that led to plaintiff’s injuries (*Ravagnan v One Ninety Realty Co.*, 64 AD3d 481, 482 [1st Dept 2009]). Moreover, Fulton fails to identify how it is unduly prejudiced or surprised by these affidavits. Indeed, one of the affiants, Thomas Auringer, is “the sole and managing member of third-party defendant US Crane” (Auringer aff, ¶1 [NYSCEF Doc No. 118]), whose name, signature, and business address appear on the US Crane Contract, which Fulton entered with US Crane on May 13, 2016 (NYSCEF Doc No. 125). In his affidavit, Mr. Auringer describes, among other things, how his company contracted with Fulton to furnish and install an internal climbing crane at the Premises, a fact of which Fulton is fully cognizant (see Fulton’s third-party complaint, ¶34 [NYSCEF Doc No. 121]), and describes how Fulton later assigned the US Crane Contract to RNC under the Assignment Agreement (*id.* ¶36). Mr. Auringer also describes how US Crane entered into a subcontract, dated July 21, 2016, to have NYC Crane provide the labor required under the US Crane Contract. Fulton made comparable assertions regarding NYC Crane’s subcontract in its second third-party complaint against NYC Crane (see NYSCEF Doc No. 124, ¶¶20-21, 24-25).

Next, relying on *Samaroo v Patmos Fifth Real Estate, Inc.* (32 Misc 3d 1209[A], 2011 NY Slip Op 51217[U] [Sup Ct, Kings County 2011], *affd* 102 AD3d 944 [2d Dept 2013]), Fulton argues that a real property owner’s right to contractual indemnification cannot be transferred to a subcontractor which would not also be exposed to potential liability under New York’s Labor

Law. *Samaroo* involved an accident in which a construction worker was injured renovating an elevator shaft. During those renovations but prior to plaintiff's injuries, the building was sold by owner Mazl Building, LLC to defendant and third-party plaintiff Patmos. As part of the sale, Mazl assigned its contracts with plaintiff's employer, Rotavele Elevator, Inc., to Patmos, including an indemnity agreement under which Rotavele agreed to indemnify the building owner, to the extent permitted by law, for injuries caused by Rotavele's work. After his injury, Samaroo brought an action, asserting violations of New York's Labor Law. Patmos commenced a third-party action against Rotavele, seeking, *inter alia*, contractual indemnification. The trial court granted summary judgment to Patmos, and the Second Department affirmed.

In doing so, the Appellate Division wrote that “[t]here is no merit to Rotavele's contention that Patmos was not entitled to seek contractual indemnification against it because the assignment of its indemnity contract with Mazl to Patmos was invalid. Contracts are freely assignable absent a contractual, statutory, or public policy prohibition” (102 AD3d at 945 [citations omitted]).

“Moreover, Patmos met its prima facie burden of demonstrating its entitlement to judgment as a matter of law on its third-party cause of action against Rotavele for contractual indemnification by establishing that the subject indemnity contract contains no express prohibition as to its assignability, that the assignment was not statutorily barred, and that there was no public policy issue inasmuch as the assignment did not change the scope of Rotavele's indemnity obligation. In opposition, Rotavele failed to raise a triable issue of fact as to its claim that the indemnity contract was not assignable. Accordingly, the Supreme Court correctly granted that branch of Patmos's motion”

(*id.* at 945-46 [citation omitted]).

Applying this three-point test, Fulton does not assert that the Assignment Agreement is invalid because of an express prohibition of assignments in the US Crane Contract or that a statutory bar exists. Instead, it relies on obiter dictum from the *Samaroo* trial court decision to argue that a property owner's right to indemnification cannot be transferred to a subcontractor

which would not be exposed to Labor Law liability like the owner. This is a misconception. Rather, the trial court merely stated that the congruity of the parties' positions in *Samaroo* made the assignment particularly apposite: both Mazl and Patmos were, at different times, owners of the subject property and so assignment of Mazl's indemnity rights to Patmos did not offend public policy because it "did not increase the risk that Rotavele's obligation to indemnify would be triggered" (32 Misc 3d 1209[A], 2011 NY Slip Op 51217 [U], *30). Fulton does not show that its assignment of its rights to RNC increased the risk that US Crane's obligation to indemnify would be triggered and so fails to show that permitting assignment in these circumstances would offend public policy under *Samaroo*.

Fulton's remaining arguments opposing US Crane's motion are premised on its assertion that, despite the existence of the Assignment Agreement, questions of fact remain about whether US Crane still has a contractual duty to indemnify it. Fulton focuses on the use of the term "Owner" in the text of the US Crane Contract (which was printed on a form agreement apparently provided by the Project's Construction Manager, nonparty Gilbane Residential Construction LLC [see NYSCEF Doc No. 125]) to argue that strict construction of its indemnification provision raises a question of fact about the permissible scope of the assignment. The fact that the word "Owner" remains in the US Crane Contract after Fulton assigned its rights thereunder to RNC, however, does not require US Crane to continue to indemnify Fulton, in derogation of the Assignment Agreement. Fulton's argument is undermined by its own authority, which indicates that strict construction of an agreement to indemnify would narrow rather than expand the scope of indemnity (see *Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491-92 [1989] ["[t]he promise [to indemnify] should not be found unless it can be clearly implied from the language and purpose of the agreement and the surrounding facts and circumstances"]

[citations omitted]). Fulton fails to point to any language in the US Crane Contract which clearly implies, or even suggests, that Fulton's right to contractual indemnification from US Crane was intended to survive, despite any assignment, and so these arguments also fail.

Finally, with respect to its causes of action for common law indemnification and contribution, Fulton offers no opposition to US Crane's assertion that it cannot be held liable in negligence because it did not exercise supervisory control of the means and methods of NYC Crane's work and it did not have actual or constructive notice of a purportedly unsafe condition at the Premises (see *Alonzo v Safe Harbors of the Hudson House Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]), and so has abandoned these causes of action as asserted against US Crane.

Motion Sequence No. 005

Second third-party defendant NYC Crane also moves for summary judgment, seeking dismissal of Fulton's second third-party complaint (notice of motion [NYSCEF Doc No. 137]). First, citing, *inter alia*, *James McKinney & Son v Lake Placid 1980 Olympic Games* (61 NY2d 836, 838 [1984]), NYC Crane argues that it is entitled to summary judgment against Fulton because Fulton assigned all of its contract rights versus US Crane to RNC and, by extension, assigned all of its contract rights against NYC Crane to RNC, and so lost standing to assert claims for contractual indemnification and breach of contract to procure insurance against NYC Crane.

NYC Crane Subcontractor's Agreement (see ex L [NYSCEF Doc No. 152] to the affirmation of Steven H. Kaplan, Esq. regarding NYC Crane [NYSCEF Doc No 139] [NYC Crane Subcontract]) has an incorporation by reference clause, which provides that NYC Crane, as Subcontractor, agreed to be bound by the terms of:

“this Agreement, which shall exclusively govern all facets of the relationship between Contractor and Subcontractor (the ‘Contract Documents’). . . and other provisions of Contractor Documents setting forth the obligations of Contractor to an upper tier contractor or owner thereunder [which] are incorporated herein by reference as a separate paragraph of this Agreement and, for the purposes of determining further obligations of Subcontractor hereunder, said provisions detailing Contractor’s obligations thereunder shall apply between Contractor and Subcontractor”

The NYC Crane Subcontract also has an indemnification clause which states, in pertinent part, that:

“[t]o the fullest extent permitted by law, Subcontractor agrees to defend, indemnify, and hold harmless Contractor from any and all liability arising out of Subcontractor[’]s operations except for personal injury and property damage caused by Contractor’s sole negligence”

From this, NYC Crane concludes that, as Fulton admittedly assigned its rights under the US Crane Contract to RNC long before plaintiff’s accident, any derivative rights Fulton may have held against NYC Crane, including any rights to contractual indemnification or procurement of insurance coverage, were also extinguished by the Assignment Agreement.

In any event, Fulton cannot claim NYC Crane breached its contract by failing to procure insurance for it or that NYC Crane was obligated to provide Fulton contractual indemnification. “Under New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor” (*Naupari v Murray*, 163 AD3d 401, 402 [1st Dept 2018] [internal quotation marks and citation omitted]).

As plaintiff was a NYC Crane employee [NYC Crane’s Statement of Material Facts, ¶¶14-16 [NYSCEF Doc No. 140]], NYC Crane cannot be held liable to Fulton for common law contribution or indemnity with respect to his injuries, because there is no evidence plaintiff

sustained “grave injuries,” as that term is defined in Workers Compensation Law Section 11, which states that:

“An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a ‘grave injury’ which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability”

(emphasis added).

Accordingly, Fulton’s claim for “common-law indemnification and contribution against [NYC Crane], plaintiff’s employer, is statutorily barred, since plaintiff did not suffer a ‘grave injury’ within the meaning of Workers’ Compensation Law § 11” (*Keita v City of New York*, 129 AD3d 409, 410 [1st Dept 2015] [citation omitted]).

The remainder of Fulton’s arguments in opposition to NYC Crane’s motion are reiterations of arguments it made against US Crane’s motion. They remain unavailing, for the reasons previously discussed.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that the motion for summary judgment by third-party defendant US Crane in motion sequence number 004 is granted and the third-party complaint is dismissed with costs and disbursements to third-party defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion for summary judgment by second third-party defendant NYC Crane in motion sequence 005 is granted and the second third-party complaint is dismissed with

costs and disbursements to second third-party defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

2/20/2024

DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE