

Moore v DMD Contr. NY LLC

2024 NY Slip Op 32052(U)

June 17, 2024

Supreme Court, New York County

Docket Number: Index No. 158337/2020

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

-----X

HOWARD MOORE,

Plaintiff,

- v -

DMD CONTRACTING NY LLC A/K/A DMD CONTRACTING
LLC, STV CONSTRUCTION, INC., NEW YORK CITY
HOUSING AUTHORITY,

Defendant.

-----X

DMD CONTRACTING NY LLC A/K/A DMD CONTRACTING
LLC, STV CONSTRUCTION, INC., NEW YORK CITY
HOUSING AUTHORITY

Plaintiff,

-against-

SAFETY DYNAMICS, LLC

Defendant.

-----X

DMD CONTRACTING NY LLC A/K/A DMD CONTRACTING
LLC, STV CONSTRUCTION, INC., NEW YORK CITY
HOUSING AUTHORITY

Plaintiff,

-against-

MEDCO ELECTRIC INC.

Defendant.

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INDEX NO. 158337/2020
MOTION DATE 12/23/2023
MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595125/2022

Second Third-Party
Index No. 595252/2023

The following e-filed documents, listed by NYSCEF document number (Motion 004) 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 134, 135, 165, 166, 167, 170, 171 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, and after oral argument, which took place on October 24, 2023 with Jesse M. Minc, Esq. appearing for Plaintiff Howard Moore ("Plaintiff"), Kelly A.

McGee, Esq. appearing for Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs DMD Contracting NY LLC a/k/a DMD Contracting LLC (“DMD”), STV Construction, Inc. (“STV”) and New York City Housing Authority (“NYCHA”) (collectively “Defendants”), and Eduardo Maffia, Esq. appearing for Third-Party Defendant Safety Dynamics, LLC (“Safety Dynamics”), Safety Dynamics’ motion for summary judgment seeking dismissal of Defendants’ third-party claims and all related crossclaims is granted in part and denied in part.

A. Background

For a thorough summary of the pertinent facts, the reader is referred to this Court’s Decision and Order on Plaintiff’s motion for summary judgment in motion sequence 002.

B. The Instant Motion

Safety Dynamics argues it is entitled to summary judgment dismissing DMD, NYCHA, and STV’s third-party claims alleging contribution, common law indemnification, contractual indemnification, and failure to procure insurance coverage (NYSCEF Doc. 117). Safety Dynamics argues that First Department case law in analogous cases have ruled that safety consultants do not exercise the requisite degree of supervision or control over a labor law plaintiff to sustain a common law negligence and Labor Law § 200 claim. Therefore, Safety Dynamics argues that the common law indemnification and contribution claims must fail.

Safety Dynamics argues that the purchase order executed between Safety Dynamics and DMD does not require Safety Dynamics to provide contractual indemnification because the language of the indemnification clause runs in favor of Safety Dynamics, and in any event, the accident was not caused by Safety Dynamics and therefore DMD is not entitled to contractual indemnification.

Defendants/Third-Party Plaintiffs DMD, NYCHA, and STV oppose Safety Dynamics motion (NYSCEF Doc. 166). These parties argue that Safety Dynamics was responsible for safety and had the authority to immediately order any unsafe work which posed a risk to the health and life of an individual to cease. These parties argue that an issue of fact exists as to whether Safety Dynamics should have noticed an extension ladder, which may have been in the trench where Plaintiff fell for days and exercised its authority to remove that ladder. They also argue that Safety Dynamics arguments related to contractual indemnification are without merit because the purchase order contains an indemnification clause which runs in favor of DMD and supersedes the consulting agreement.¹

C. Legal Analysis

1. Standard

“Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party’s “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

¹ Plaintiff takes no position on Safety Dynamics motion (NYSCEF Doc. 135).

2. Common Law Indemnification and Contribution

Viewing the facts in the light most favorable to the non-movant, Safety Dynamics' motion seeking dismissal of the common law indemnification and contribution claims asserted against it is denied. To establish a claim for common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident (*Pena v Intergate Manhattan LLC*, 194 AD3d 576, 578 [1st Dept 2021]). Where a party exercises only general supervisory duties over the worksite, it is entitled to summary judgment on contribution and common-law crossclaims (*Royland v McGovern & Co., LLC*, 203 AD3d 677, 679 [2022]; *Mendriski v New York City Housing Authority*, 189 AD3d 410 [1st Dept 2020]).

At this juncture the Court is unable to grant Safety Dynamics motion dismissing the common law indemnification claims (*see Burgos v 213 West 23rd Street Group LLC*, 48 AD3d 283, 284 [1st Dept 2008]). There remains an issue of fact as to whether Safety Dynamics exercised "only general supervisory duties" especially given deposition testimony from Safety Dynamics' representative. Mr. McGregor testified that he walked through the worksite five to six times a day to identify unsafe practices and also testified that it would be an unsafe practice for a worker to enter the trench where Plaintiff fell using an extension ladder (NYSCEF Doc. 126 at 43:2-17; 55:4-16).

He also testified that he knew that Medco employees were taking apart extension ladders to use for trench access which was considered a safety hazard and that he had exercised sufficient authority and control, as DMD's agent, and instructed the Medco superintendent about ladders being used improperly (*id.* at 129:7-23). Mr. McGregor likewise testified that even the job-built

ladders which were being used in the trench, and which Mr. McGregor observed at the site of the accident, was not secure because “there was nothing to secure it against” (*id.* at 120:9-12). Finally, Safety Dynamics has failed to proffer any evidence on its motion for summary judgment about steps it took as the site safety inspector to safeguard against debris and garbage from piling up in the trenches to ensure that ladders would not slip. Because there is testimony that Safety Dynamics could control what ladders were being used and in what manner they were being used, and has failed to show steps it took to safeguard the trenches, Safety Dynamics has failed to make a prima facie showing that it was free from negligence in this accident. (*Silva v FC Beekman Associates, LLC*, 92 AD3d 754, 756 [2d Dept 2012]).² Moreover, there has yet to be any factual finding of negligence against DMD and NYCHA aside from a statutory violation of Labor Law §240(1), and consequently the Court cannot dismiss the claim for common-law indemnification based on the purported negligence of DMD and NYCHA (*Burgos v 213 West 23rd Street Group LLC*, 48 AD3d 283 [1st Dept 2008]).

Likewise, the contribution claims are valid because a negligent party who is subject to liability under Labor Law §240(1) may seek contribution from another party whose culpable fault was also a cause of the injury (*id.*). It is a triable issue of fact whether Safety Dynamics is at all culpable for Plaintiff’s fall from the ladder and therefore Safety Dynamics is not entitled to summary judgment dismissing the contribution claim.

3. Contractual Indemnification and Failure to Procure Insurance

The portion of the motion seeking dismissal of contractual indemnification and failure to procure insurance claims is granted in part and denied in part. There is a purchase order executed between DMD and Safety Dynamics for 2080 hours of service from Mr. McGregor (NYSCEF

² The Court finds Safety Dynamics’ cited case law unavailing as those cases involved different facts and a different provision of the Labor Law, namely § 200.

Doc. 156). The purchase order expressly states in paragraph one that “DMD Contracting LLC, rejects any additional, conflicting or different terms proposed by Supplier in any communications between the parties or otherwise” and “[i]n the event of any conflict between these Terms and Conditions and Supplier’s [Safety Dynamics] forms or website, these terms shall prevail” (*id.*). There is an insurance clause wherein Safety Dynamics agreed to procure insurance naming DMD and NYCHA as additional insureds (*id.* at ¶ 10). Finally, there is an indemnification clause stating that Safety Dynamics agreed to indemnify DMD and NYCHA “against all damages, judgments, liabilities, liens, suits, and expenses (including attorney’s fees) directly or indirectly related to any cause of action, claim or lien filed by any person with respect to any work performed or materials delivered pursuant to the Purchase Order.”

The plain language of the purchase order clearly lays out Safety Dynamics’ obligation to procure insurance for NYCHA and DMD’s benefit as well as its obligation to indemnify DMD and NYCHA for any claims directly or indirectly related to the work performed by Mr. McGregor.

Although Safety Dynamics argues there is a conflicting indemnification/hold harmless clause in a consulting agreement, this, at a minimum, creates an issue of fact as to which clause takes precedence. The Court is unable to grant summary judgment given the clear indemnification language in the purchase order agreement, which is coupled with language stating that in the event of a conflict, the terms of the purchase order agreement prevail. Accordingly, the motion for summary judgment is denied as to NYCHA and to DMD.

As to STV, Safety Dynamics is entitled to summary judgment on the contractual indemnification and failure to procure insurance claims as there is no contract between STV and Safety Dynamics nor is STV named in the purchase order (*see Higgins v TST 375 Hudson, LLC*, 179 AD3d 508, 511 [1st Dept 2020] [“EMCOR is not entitled to contractual indemnification from

ADCO. There is no contract between them, and EMCOR was not named in ADCO’s subcontract as a party that ADCO was required to indemnify.”]).

Accordingly, it is hereby,

ORDERED that Third-Party Defendant Safety Dynamics’ motion for summary judgment seeking dismissal of Defendants/Third-Party Plaintiffs’ DMD Contracting NY LLC a/k/a DMD Contracting LLC, STV Construction, Inc., and New York City Housing Authority claims for common law indemnification, contribution, contractual indemnification, and failure to procure insurance is denied; and it is further

ORDERED that Third-Party Defendant Safety Dynamics’ motion for summary judgment seeking dismissal of STV Construction Inc.’s claims for contractual indemnification and failure to procure insurance is granted; and it is further

ORDERED that within ten days of entry, counsel for Defendants/Third-Party Plaintiffs’ DMD Contracting NY LLC a/k/a DMD Contracting LLC, STV Construction, Inc., and New York City Housing Authority shall serve a copy of this decision, with notice of entry, on all parties via NYSCEF; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

6/17/2024
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE