

Soriano v 85 Flatbush LLC

2024 NY Slip Op 32760(U)

August 1, 2024

Supreme Court, Kings County

Docket Number: Index No. 501305/2015

Judge: Devin P. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**Supreme Court of the State of New York
County of Kings**

Part LL1

Index Number 501305/2015

Seqs. 008, 010, 014-020

EBER DANIEL LEAL SORIANO,

Plaintiff,

against

85 FLATBUSH LLC AND NY DEVELOPERS &
MANAGEMENT, INC.,

Defendants.

85 FLATBUSH LLC AND NY DEVELOPERS AND
MANAGEMENT, INC.,

Third-Party Plaintiffs,

against

ON TARGET SHEET METAL CORP. AND HARLEYSVILLE
INSURANCE COMPANY OF NEW YORK,

Third- Party Defendant.

85 FLATBUSH LLC AND NY DEVELOPERS AND
MANAGEMENT, INC.,

Second Third-Party Plaintiff,

against

ECD NY, INC., CONSTRUCTION REALTY SAFETY
GROUP, INC. D/B/A CONSTRUCTION & REALTY SAFETY
GROUP, INC.,

Second Third-Party Defendant.

85 FLATBUSH LLC AND NY DEVELOPERS AND
MANAGEMENT, INC.,

Third Third-Party Plaintiffs,

against

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered

Notice of Motion and Affidavits Annexed	<u>1-10</u>
Order to Show Cause and Affidavits Annexed.	<u> </u>
Answering Affidavits	<u>11-37</u>
Replying Affidavits	<u>38-51</u>
Exhibits	<u>Var</u>
Other	<u> </u>

ZENCO GROUP INC.,

Third Third-Party Defendant.

ZENCO GROUP INC.,

Fourth Third-Party Plaintiffs,

against

CHUTES & COMPACTORS OF NY INC. d/b/a CHUTES
ENTERPRISES,

Fourth Third-Party Defendant.

AND RELATED 5th 3rd PARTY ACTION

Upon the foregoing papers, plaintiff's motion for summary judgment (Seq. 008), ECD NY, Inc. (ECD)'s motion for summary judgment (Seq. 010), 85 Flatbush LLC (85 Flatbush) and NY Developers and Management Inc. (NY Developers) motion for partial summary judgment (Seq. 011), Chutes & Compactors of NY Inc. (Chutes)'s motion for summary judgment (Seq. 014), 85 Flatbush and NY Developers' motion for summary judgment against Zenco Group Inc. (Zenco) (Seq. 015), 85 Flatbush and NY Developers' motion for summary judgment against Harleysville Insurance Company of New York (Harleysville) (Seq. 016), Zenco's motion for summary judgment (Seq. 017), Harleysville motion for summary judgment on 85 Flatbush's request for declaratory judgment regarding its insurance status (Seq. 018), On Target Sheet Metal Corp. (On Target)'s motion for summary judgment dismissing plaintiff's complaint and on all claims against it (Seq. 019), and Construction Realty Safety Group Inc. (CR Safety)'s motion for summary judgment dismissing the second third-party complaint against it (Seq. 020) are decided as follows:

Introduction and Factual Background

It is undisputed that 85 Flatbush LLC owned the premises located at 85 Flatbush Avenue, Brooklyn, NY, and that NY Developers was retained by 85 Flatbush as the general contractor at the site. On Target was plaintiff's employer and an HVAC sub-contractor on the site (Soriano first EBT at 19, 30). Chutes was the trash chute installation contractor at the site. ECD NY was a concrete sub-contractor that created the hole into which plaintiff allegedly fell (Gary Smith, assistant project manager employed by ECD NY, EBT at 12, 46, 48). Zenco was a carpentry sub-contractor at the site (Jacob Friedman, representative of Zenco, EBT at 35–36). CR Safety was the site-safety coordinator on site (Eddie Carter, CR Safety's site-safety coordinator, EBT at 29).

Plaintiff commenced this action to recover for damages he claims to have sustained on August 1, 2024 when he fell through an unsecured floor opening at a construction site. It is undisputed that the plaintiff was working for On Target, the HVAC sub-contractor at the premises. Plaintiff was installing a ventilation shaft in what would become a trash room on the seventh floor of the newly constructed building (Soriano second EBT at 32–33). In the middle of the room there was a three-foot-by-three-foot hole where the garbage chute was going to be installed (Soriano first EBT at 98–99). That hole was covered by a piece of plywood (Soriano second EBT at 41). Although plaintiff testified that he did not inspect the plywood covering, he testified that it was unsecured (Soriano first EBT at 104). While drilling into a wall to install the ventilation shaft, the plywood plaintiff was standing on bent and then “collapsed,” causing both the plywood and plaintiff to fall to the sixth floor below (*id.* at 119; Soriano second EBT at 48).

Plaintiff testified that he did not have any role in making the hole (Soriano first EBT at 100). Plaintiff was instructed to work in this area by “Mandy” (Mendy Weisberger), his On

Target field supervisor (*id.* at 103; Weisberger EBT at 9, 21, 27, 36, 41). Mr. Carter, the site safety manager, testified that the wooden cover would have been removed and replaced by other trades “definitely more than [once]” (Carter EBT at 168).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant’s showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law § 240 (1)

Liability under Labor Law § 240 (1) is “absolute” where the failure or absence of a safety device enumerated by the statute (*e.g.* a protective floor covering) is the proximate cause of the plaintiff’s accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.*, 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]).

Plaintiff testified that he fell through an unsecured or improperly secured opening in the floor because the plywood covering that had been placed over the hole failed. Plaintiff further testified that he was performing construction work at the time of his accident, which is covered work under Labor Law § 240 (1). No party speaks to the thickness of the plywood, but its failure suggests that it was not a sufficiently substantial cover for the opening in the floor (*see Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 A.D.3d 446 [1st Dept 2013] [cited by *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 671 [2d Dept 2018] [three-quarter inch thick plywood was sufficiently substantial floor covering; however, plaintiff received summary

judgment because the cover was unsecured]). Working near an exposed floor opening is an elevation-related risk as contemplated by the Labor Law (*see Zhou v 828 Hamilton, Inc.*, 173 AD3d 943, 944–945 [2d Dept 2019]). Plaintiff’s testimony is unrebutted in the record before the court. Therefore, plaintiff has made out his prima facie entitlement to summary judgment under Labor Law § 240 (1).

85 Flatbush and NY Developers argued in opposition that plaintiff’s motion is premature due to outstanding party depositions. However, the adjournments necessitated by the transfer of this action to this part and subsequent summary judgment filings has since allowed the deposition of the majority of parties to be conducted. The court therefore now has before it a full record on which to rely, and there is no indication that further discovery might lead to relevant facts “essential to oppose the motion” (*Zhou*, 173 AD3d at 944).

The remaining arguments in opposition offered by defendants and third-party defendants, and advanced by On Target in that branch of its own motion seeking summary judgment dismissing plaintiff’s complaint (Seq. 019), are without merit. There is no evidence in the record that plaintiff was the sole proximate cause of his accident or that he was directed not to work on the floor covering and was therefore recalcitrant (*see Cioffi v Target Corp.*, 188 AD3d 788 [2d Dept 2020]). Additionally, the argument that the plywood was substantial enough to stand on but not substantial enough to work on is unavailing. Safety devices that are designed to hold workers, including scaffolds, sidewalk bridges, and protective platforms must “be so constructed so as to provide the workers with proper protection” (*Birbilis v Rapp*, 205 AD2d 569, 570 [2d Dept 1994]). If a floor covering in an active work area was either so insubstantial or unsecured that it could not support someone performing work, then the covering was evidently inadequate to provide proper protection for workers.

Plaintiff's motion for summary judgment on his Labor Law § 240 (1) (Seq. 008) is granted; that branch of On Target's motion (Seq. 019) seeking summary judgment dismissing plaintiff's claim is denied.

Labor Law § 241 (6)

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscato v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). Plaintiff's claim under Labor Law § 241 (6) is predicated on the alleged violation of 12 NYCRR 23-1.7 (b) (1) (i), which reads:

(i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

It is undisputed that there was no safety railing around the hazardous opening. Plaintiff testified that the plywood covering was unsecured, that it bent and collapsed, and that it was the failure of the covering to protect him that caused his fall. No party provides evidence that the plywood covering was secured at the time of the accident.

Therefore, plaintiff's motion (Seq. 008) is granted as to his Labor Law § 241 (6) claim.

Labor Law § 200

85 Flatbush and NY Developers seek summary judgment on plaintiff's Labor Law § 200 claim. Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d

Dept 2008]). Where a plaintiff's injuries arise not from the manner in which the work was performed, but from a dangerous condition on the premises, a defendant may be liable under Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition" (*Estrella v ZRHLE Holdings, LLC*, 218 AD3d 640 [2d Dept 2023]). "A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected" (*Valentin v Stathakos*, 2024 NY Slip Op 03512 [2d Dept June 26, 2024]). "A party [with] actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific [recurrence] of that condition" (*Taliana v Hines REIT Three Huntington Quadrangle, LLC*, 197 AD3d 1349, 1352 [2d Dept 2021] [internal citations omitted]).

Leopold Spitzer, representative of NY Developers, testified that there had been other instances of unsecured floor coverings at the worksite (Spitzer EBT at 26). Therefore, the owner and general contractor's contention that they did not have constructive notice of this unsecured floor covering requires a credibility determination, which is beyond the scope of the instant motion (*Spilman v Matyas*, 212 AD3d 859, 860 [2d Dept 2023]). Plaintiff also argues that the defendants selected the means of covering the floor which may, minimally, impute constructive notice or responsibility for causing or creating the dangerous condition to the owner and general contractor.

Therefore, 85 Flatbush and NY Developer's motion for summary judgment to dismiss plaintiff's Labor Law § 200 claim (Seq. 011) is denied.

**Contractual Indemnification, Common-law Indemnification, Contribution and
Breach of Contract**

In evaluating contractual indemnification clauses, courts look to the specific language of the contract (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930, 878 NYS2d 143 [2009]). A promise to indemnify should not be found unless it can be “clearly implied from the language and purpose of the entire agreement and the surrounding circumstance” (*Santos v Power Auth. of State of NY*, 85 AD3d 718, 722 [2d Dept 2011]).

“A party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Hirsch v. Blake Hous., LLC*, 65 AD3d 570, 571 [2nd Dept. 2009]). In addition, a party seeking contractual indemnification must not have had the authority to supervise, direct, or control the manner of the work that caused the injury (*Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329, 331 [2d Dept 2005]). Likewise, claims for common-law indemnification are predicated on the negligence of the party against whom indemnification is being sought (*Poalacin v Mall Properties, Inc.*, 155 AD3d 900, 909 [2d Dept 2017]). Therefore, as a threshold matter, a party seeking summary judgment on an indemnification claim must prove itself free from negligence.

Second Third-Party Defendant ECD (Seq. 010)

It is undisputed that the seventh floor slab on which plaintiff was working had been poured and finished by ECD. Gary Smith, assistant project manager for ECD, testified that once ECD had completed pouring of a floor slab, NY Developers would take over the floor and relieve ECD of responsibilities (Smith EBT at 49); this assertion was undisputed by NY Developers. Mr. Smith admitted that it was ECD’s responsibility to nail down the plywood

covering in the first instance (*id.* at 47). Ordinarily, ECD foremen would instruct laborers to cover the opening; often a carpenter would place the floor coverings (*id.* at 63; 136). ECD argues that in light of Mr. Carter's testimony that the covering was nailed down on the morning of plaintiff's accident (Carter first EBT at 188, 194–195). ECD had finished its work and relinquished the seventh floor by February 2014 (Smith EBT at 100–103).

In light of the lack of any clarity as to whether a certain party moved, disturbed, or otherwise caused the floor covering to be unsecured, there is an open question of fact as to whether ECD's own work to cover the floor opening, including potentially using an inadequate piece of plywood, caused or contributed to the plaintiff's accident. There is no set duration under the law as to how long a protective covering must hold in order for it to be adequate and, without evidence, the court cannot conclude as a matter of law that ECD was not negligent in selecting, placing, or securing the plywood covering. Therefore, ECD's motion for summary judgment on the indemnification claims against it (Seq. 010) is denied.

85 Flatbush and NY Developer's motion for claims against On Target (Seq. 011); On Target's Motion for Summary Judgment (Seq. 019)

Initially, On Target argues that plaintiff has not suffered a grave injury and that On Target is therefore, as plaintiff's employer, shielded from third-party liability in this personal injury action under Workers' Compensation Law (WCL) § 11. On Target is correct that WCL § 11 shields it from direct claims from the plaintiff and common-law indemnification claims from other parties. The law provides an exception in circumstances where a party enters an agreement to indemnify a third-party prior to the happening of the accident. Here, On Target entered into a contract with NY Developers which contains an indemnification provision in favor of NY Developers. That provision both includes the property owner as a party to which On Target

owes indemnification and predicates the duty to indemnify on damages “arising out of or resulting from the Work.”

However, NY Developers and 85 Flatbush are still not entitled to summary judgment on their contractual indemnification claims. Counsel is correct that the indemnification provision here is nearly identical to the provision in *Popovych v 2815 Atlantic Holdings LLC*, 2023 N.Y. Slip Op. 31379 (U) [Kings County, April 4, 2023]) where this court awarded summary judgment to the owner and general contractor on their contractual indemnification claims. That said, this action differs materially from *Popovych* in that Mr. Popovych conceded his Labor Law § 200 claim against the owner and general contractor, freeing them from the possibility of a negligence finding. Here, the court has determined that a question of fact exists concerning 85 Flatbush and NY Developers’ liability under Labor Law § 200, precluding summary judgment on their contractual indemnification claims.

On Target’s motion for summary judgment seeking to dismiss the contractual indemnification claims against it is also denied. There is no affirmative evidence as to which entity caused the floor covering to be unsecured and, given that plaintiff was On Target’s employee, it is clear that On Target was performing work on the seventh floor. There remains a question of fact as to On Target’s possible negligence in causing plaintiff’s accident, precluding summary judgment on the indemnification claims.

Both parties also seek summary judgment on 85 Flatbush and NY Developers’ breach of contract claim. “A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with” (*Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2d Dept 2014]).

Here, Exhibits C and D to On Target's trade contract enumerate its obligation to procure insurance. The contract establishes the amounts of both general liability and excess insurance, and obligates On Target to purchase insurance that covers, *inter alia*, 85 Flatbush and NY Developers. On Target did in fact purchase an insurance policy from Harleysville Insurance that covers 85 Flatbush and NY Developers. 85 Flatbush and NY Developers contend that On Target may still be in breach of contract pending the determination of Harleysville's motion for declaratory judgment disclaiming coverage. However, that disclaimer is based on an argument that the accident did not "arise out of" On Target's work which, if true, would also mean that the owner and general contractor are not entitled to indemnification. There is no other allegation that the insurance procured by On Target fails to meet its contractual obligations.

Therefore, 85 Flatbush and NY Developers' motion for summary judgment on its claims against On Target (Seq. 011) is denied. On Target's motion (Seq. 019) is granted as to dismissal of the common-law indemnification, contribution, and breach of contract claims against it; the motion is denied as to 85 Flatbush and NY Developers' contractual indemnification claim.

Third-Third Party/Fourth Third-Party Defendant Chutes (Seq. 014)

Chutes argues that it is free from negligence, and therefore entitled to summary judgment dismissing the indemnification claims against it, because counsel contends Chutes was not yet on the site. The hole that the plaintiff fell into was, allegedly, the hole into which Chutes was sub-contracted to place a trash chute. Alternatively, Chutes requests severance of 4th and 5th third-party actions, arguing that it was impleaded after discovery had occurred and is prejudiced by its inability to conduct its own discovery, including depositions. No Chutes representative had been deposed at the time that these motions were reserved for decision. Further, no party has testified that Chutes was and had always been absent from the area where plaintiff's accident occurred.

Chutes cannot, therefore, demonstrate as a matter of law that it was not present at the site and did not interact with the floor covering prior to plaintiff's accident. Chutes' request for severance is also not yet ripe; this case is scheduled in the Note of Issue Final Conference Part on November 15, 2024, and the note of issue has not been filed (*see Shanley v Callanan Industries, Inc.*, 54 NY2d 52 [1981]). Therefore, Chute's motion is denied as premature.

85 Flatbush and NY Developers' motion for summary judgment against Zenco (Seq. 015); Zenco's motion for summary judgment (Seq. 017)

85 Flatbush and NY Developers contend that this accident arose at least in part out of Zenco's work, triggering Zenco's contractual indemnification obligations under Zenco's sub-contract. Mr. Carter testified that the stud wall for the room where plaintiff was working at the time of his accident was too small to accommodate the original plywood covering. Therefore, the original covering needed to be removed for the carpentry sub-contractor to install the stud wall, and a new covering would have needed to be placed. Zenco was the sub-contractor responsible for installing the stud wall (Carter first EBT at 174–176). Additionally, Zenco's contractual scope of work required it to maintain fall protection at open floor areas (Zenco sub-contract at 28 ¶ 1). Zenco's sub-contract contains an indemnification provision in favor of the prime contractor for damages "arising out of or resulting from the work."

In opposition, Zenco relies on the testimony of its principal Jacob Friedman. Mr. Friedman testified that Zenco would not have been required to remove the floor covering in order to perform its work (Friedman EBT at 45). Zenco also produced its site superintendent, Cheskal Zupnick, for a deposition. Mr. Zupnick testified that it was NY Developers' responsibility to secure floor coverings (Zupnick EBT at 28–29). Zenco also contends that Mr.

Carter's testimony is speculative and not based on actual knowledge that Zenco removed or replaced the protective covering.

In light of the foregoing questions of fact as to 85 Flatbush and NY Developer's liability under Labor Law § 200, and therefore for their negligence, they are not entitled to summary judgment on their contractual indemnification claims (*see* analysis of motions concerning On Target, *supra*). Zenco is also not entitled to summary judgment on the contractual indemnification claims as there is a material question of fact as to Zenco's negligence in causing or contributing to the unsecured floor covering that caused plaintiff's accident.

As to the breach of contract claim against Zenco, 85 Flatbush and NY Developers are correct that there is no evidence in the record that Zenco procured insurance. However, the question of summary judgment is not ripe until Zenco's indemnification responsibility to 85 Flatbush and NY Developers is determined (*see Ceron v Rector*, 224 AD2d 475, 476 [2d Dept 1996]).

Therefore, both motions (Seq. 015; Seq. 017) are denied in their entirety.

Second-Third Party Defendant CR Safety (Seq. 020)

CR Safety admits that it was the site-safety manager hired by NY Developers and that it was tasked with inspecting the site and reporting to NY Developers. Mr. Carter admitted that it was his responsibility to ensure that floor openings in the construction site were covered (Carter first EBT at 26). Mr. Carter claims that he checked the covering on the morning of the accident, as was his custom, and that it was secured (*id.* at 188, 194–195). CR Safety argues that it performed its duty, and was not negligent, and therefore does not owe indemnification to any party.

In opposition, 85 Flatbush and NY Developers argue that Mr. Carter testified that it was

his responsibility to direct laborers or carpenters to take care of floor openings that were unsecured and that he would not report that floor protection had been removed if he had access to carpenters who could fix it right away (EBT at 51, 75). Therefore, 85 Flatbush and NY Developers argue that there were instances in which Mr. Carter deviated from his duties to merely observe, report, and document by directing the remediation of unsecured floor coverings. This fact gives rise to a question of material fact as to whether Mr. Carter gave those directions negligently, and therefore whether CR Safety's negligence caused or contributed to the unsecured covering that caused plaintiff's accident.

85 Flatbush and NY Developers also provide a document titled "General Conditions" with CR Safety's corporate name on it which includes a promise to indemnify. However, that document is not itself dated or otherwise associated with the dated Trade Agreement executed by the parties. However, in its notice to admit, CR Safety admitted that its representative, Ron Lattanzio executed the Trade agreement and had the authority to do so. CR Safety's response did not deny that the submitted document constituted a contract, nor did it offer an explanation why a simple denial could not be made—this fact is therefore admitted (CPLR 3123 [a]; *32nd Ave. LLC v Angelo Holding Corp.*, 134 AD3d 696, 698 [2d Dept 2015]).

Ultimately, as with the foregoing motions, there are questions of fact about the circumstances that led to the unsecured floor covering which preclude summary judgment. Without evidence about the predicate events, the court is unable to determine as a matter of law which of the parties that potentially interacted with the floor covering did so, and more importantly, whether they did so negligently. CR Safety is unable to prove itself free from negligence as a matter of law on the record before the court. Therefore, CR Safety's motion (Seq. 020) is denied due to material questions of fact.

85 Flatbush and NY Developer's motion (Seq. 016) and Harleysville's motion (Seq. 018) for a declaratory judgment

As previously noted, Harleysville is the insurance carrier for On Target. Harleysville initially accepted a tender of the defense of a lawsuit that Plaintiff filed against 85 Flatbush and New York Developers, but subsequently disclaimed coverage upon an assertion that those parties do not qualify as “additional insureds” on the On Target policies due to exclusions in the policy issued to On Target. On May 7, 2023, Defendants/Third-Party Plaintiffs served a Notice to Admit on Harleysville, attaching (A) the primary policy of insurance issued to On Target [policy SPPO0000012388P]; (B) the umbrella policy [policy CMB00000021434P]; and (C) the claims notes in its possession from the first notice of loss through October 7, 2015.

“[T]he duty to defend is broader than the duty to indemnify . . . A duty to defend is triggered by the allegations contained in the underlying complaint” (*Gem-Quality Corp. v Colony Ins. Co.*, 209 AD3d 986, 990 [2d Dept 2022]). On Target agreed in its sub-contract to purchase insurance that was primary and non-contributory. 85 Flatbush and NY Developers argue that the duty to defend attaches because there is a “reasonable possibility of recovery under the policy” (*id.*). “To be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint [in the underlying action] cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision” (*id.* at 990).

Harleysville argues that, based on the CG 7254 (additional insured rider), additional insured coverage is limited in two relevant respects. First, coverage is limited to be “only with

1

respect to liability caused, in whole or in part, by the acts or omissions of the ‘Named Insured,’ or those acting on behalf of the ‘Named Insured.’” Second, additional coverage is limited to “only . . . such damages . . . to which the additional insured is entitled to be indemnified by the ‘Named Insured’ pursuant to the ‘written contract.’” The remainder of Harleysville argument defines and explains these two limitations.

In its sub-contract/trade agreement, On Target agreed to provide commercial general liability insurance “on a primary non contributory [sic] basis” (agreement at 21). The sub-contract also contains an obligation to “defend and . . . indemnify” (*id.* at 25). Plaintiff’s complaint contains an allegation that he suffered a fall from a height at a construction site while employed by On Target. There are, therefore, sufficient allegations in the complaint to implicate On Target’s duty to defend. Harleysville argues that the two limitations on additional insured coverage preclude extending coverage to 85 Flatbush and NY Developers. Although it may be true that these limitations will preclude indemnification once the questions of negligence are resolved by a fact finder, with respect to its duty to defend, Harleysville has failed to meet the “heavy burden” of showing “that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision” (*Gem-Quality Corp.*, 209 AD3d at 990). If On Target is ultimately determined to be negligent, and 85 Flatbush and NY Developers are found not to be, the additional insured coverage would apply.

Therefore, 85 Flatbush and NY Developers motion (Seq. 016) is granted to the extent that Harleysville has a duty to defend the movants; the remainder of the motion regarding indemnification is denied. Harleysville motion (Seq. 018) is denied.

Conclusion

Plaintiff’s motion for summary judgment (Seq. 008) is granted.

ECD’s motion for summary judgment (Seq. 010) is denied.

85 Flatbush and NY Developers’ motion for partial summary judgment (Seq. 011) is denied.

Chutes’ motion for summary judgment and for severance (Seq. 014) is denied.

85 Flatbush and NY Developers’ motion for summary judgment against Zenco (Seq. 015) is denied.

85 Flatbush and NY Developers’ motion for summary judgment against Harleysville (Seq. 016) is granted to the extent of finding that Harleysville owes a duty to defend to 85 Flatbush and NY Developers.

Zenco’s motion for summary judgment (Seq. 017) is denied.

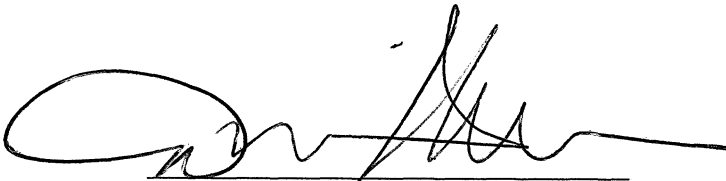
Harleysville motion for summary judgment (Seq. 018) is denied.

On Target’s motion for summary judgment (Seq. 019) is granted to the extent of dismissing the claims for common-law indemnification and contribution against it; the motion is denied as to 85 Flatbush and NY Developers’ contractual indemnification claim and as to plaintiff’s complaint.

CR Safety’s motion for summary judgment (Seq. 020) is denied.

This constitutes the decision and order of the court.

August 1, 2024
DATE


DEVIN P. COHEN