

Mahon v 2917 Nostrand, LLC

2024 NY Slip Op 33711(U)

October 10, 2024

Supreme Court, Kings County

Docket Number: Index No. 527351/2023

Judge: Carolyn E. Wade

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
PATRICK MAHON,

Plaintiff,

-against-

2917 NOSTRAND, LLC and COLE PARTNERS,
INC.

Defendants.

-----X
2917 NOSTRAND, LLC

Third-Party Plaintiff,

-against-

COLE PARTNERS, INC.

Third-Party Defendant.

-----X

After oral argument, Defendant/Third-Party Plaintiff 2917 Nostrand, LLC's ("Nostrand") motion to dismiss the cross-claims asserted by Defendant/Third-Party Defendant Cole Partners, Inc. ("Cole") is decided as follows:

I. Cole's Cross-Claims for Contractual Indemnification and Breach of Contract

As a preliminary matter, Cole, in its opposition papers, has withdrawn its third and fourth cross-claims in its Verified Answer against Nostrand for contractual indemnification and breach of contract for failure to procure insurance. Therefore, the branch of Nostrand's motion to dismiss the contractual indemnification and breach of contract cross-claims is granted.

The Prime Contract between Cole and Nostrand states that the prevailing party shall be entitled to attorneys' fees and costs. NYSCEF Doc. No. 18, Article 6, Section 6.2. Because Nostrand is the prevailing party with regard to Cole's cross-claims for contractual indemnification

and breach of contract, Nostrand is hereby awarded its attorney's fees and costs for defending these claims.

II. Cole's Cross-Claims for Contribution and Common Law Indemnification Are Dismissed and Cole Shall Pay Nostrand's Attorneys' Fees and Costs

On May 10, 2022, Cole and Nostrand entered into a contract ("Prime Contract") wherein Cole agreed to perform construction work for Nostrand at 2800 Nostrand Avenue (the "Project"), which property Nostrand owns. NYSCEF Doc. No. 18.

Notably, the contractual indemnification provision in the Prime Contract reads as follows:

To the fullest extent permitted by Applicable Laws, the Contractor [Cole] shall defend, indemnify and hold harmless Owner [Nostrand] and its officers, directors, managers, members, employees and agents (collectively "Indemnities") from and against any and all liabilities, and expenses, including reasonable attorney's (collectively damages, losses fees and expenses of whatsoever kind and nature "Losses") arising out of or alleged to arise from or in connection with a breach by the Contractor of this Agreement.

NYSCEF Doc. No. 18, Rider, Par. 18.

Plaintiff, Patrick Mahon, commenced this action alleging that Cole was the general contractor and construction manager at the worksite. Specifically, he alleged that Cole exerted control over the area where he was injured on August 19, 2024, when a steel beam fell from an excavator/backhoe that was being operated by a Cole employee. See NYSCEF Doc. No. 1, Par. 16-21, 28-29.

Where, as here, a contract between the parties governs their relationship and identifies the party who is required to indemnify the other, common law indemnification and contribution claims can not proceed (*Mas v. Two Bridges Assocs.*, 75 NY2d 680 [1990] [no common law contribution where there is contractual indemnification]; *Board of Education v. Sargent, Webster, Crenshaw &*

Folley, 71 NY2d 21 (1987) (same); *Kindred Hosps. E. v. Buffalo Bd. of Educ.*, 2021 U.S. Dist. LEXIS 6964 [W.D.N.Y. Jan. 12, 2021] ["Under New York law, where there is a breach of contract claim and a valid, enforceable contract is found, a court will not recognize [a] separate cause[] of action for . . . common law indemnity"]; *CSC Scientific Co. v. Manorcare Health Servs., Inc.*, 867 FSupp2d 368, 377-78 (S.D.N.Y. 2011) [common law indemnification is unavailable where the parties have a valid and unambiguous written agreement]).¹

Cole's reliance on Gen. Obligations Law § 5-322.1 is misplaced. Gen. Obligations Law § 5-322.1 states:

A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent [emphasis added].

¹ Cole argues that a second Rider containing an indemnification provision was entered into on August 24, 2022 (NYSCEF Doc. No. 19) - five (5) days after the Plaintiff was allegedly injured - and discovery is necessary to determine if the parties intended for the August 19, 2022 alleged injury to be covered by the August 24, 2022 rider. However, the Prime Contract entered into on May 10, 2022 - prior to the August 19, 2022 alleged injury - contains an indemnification provision, so there is no need for discovery related to the August 24, 2022 rider.

Cole's argument that the August 24, 2022 rider contains a provision stating that the August 24, 2022 rider shall prevail over any conflict with the May 10, 2022 Prime Contract does not assist Cole for several reasons. First, the conflict provision in the August 24, 2022 rider does not refer to the May 10, 2022 Prime Contract. It refers to a "proposal". Second, even if it did state that the August 24, 2022 rider shall prevail over any conflict with the May 10, 2022 Prime Contract, there is no conflict between the August 24, 2022 rider and the May 10, 2022 Prime Contract as it relates to indemnification. Both agreements require Cole to indemnify Nostrand for acts engaged in by Cole and its agents.

The indemnification provision in the Prime Contract states that it applies to “the fullest extent permitted by Applicable Laws.” Thus, it indemnifies Nostrand only from conduct engaged in by Cole, not by Nostrand. Consequently, Gen. Obligations Law § 5-322.1 does not apply (*see Edwards v. State Univ. Constr. Fund*, 196 AD3d 778 [3d Dept 2021] [“by its plain language, it obligated Ralo to indemnify SUCE for losses attributable to the actual or alleged negligence of Ralo or its employees, not of SUCE or Fahs. Accordingly, the provision does not run afoul of General Obligations Law § 5-322.1”]; *Miranda v Norstar Bldg. Corp.*, 79 AD3d 42 [3d Dept 2010] [same]; *Beniquez v Teresharan Land Co. of Manhattan LLC*, 55 Misc. 3d 517 [Sup Ct, N.Y. Cty. 2017] [same]).

Moreover, Gen. Obligations Law § 5-322.1 does not apply where, as here, any liability against a property owner is purely vicarious, in the absence of any evidence that it was present at the site or that it supervised any activity with regard to the construction (*see Bink v. F.C. Queens Place Assoc., LLC*, 27 AD3d 408 [2d Dept 2006]; *Rivera v. St. Regis Hotel Joint Venture*, 240 AD2d 332 [1st Dept 1997]). The Complaint is devoid of any allegations that Nostrand was present at the site and supervised the construction. In fact, the Prime Contract states that Cole shall provide all services, materials, and labor for the Project; supervise all of its employees; and have a responsible supervisor on the project at all times that work is being performed. NYSCEF Doc. No. 18, Article 2, Article 11.

Accordingly, based upon the above, Nostrand’s Motion is **granted as follows**:

ORDERED that Cole’s cross-claims for contractual indemnification and for breach of contract for failure to procure insurance are hereby dismissed; and it is further

ORDERED that Cole’s cross-claims for contribution and common law indemnification are dismissed, and it is further,

ORDERED that pursuant to the Prime Contract, Cole shall pay Nostrand’s attorney’s fees and costs associated with this motion. Within thirty (30) days of entry of this order, Nostrand shall submit an attorney’s affirmation identifying: (i) the number of hours expended on its motion; (ii) its attorneys’ hourly rate and information in support of the hourly rate; and (iii) its costs related to this motion.

This constitutes the Decision/Order of the Court.

Date: October 10, 2024
Brooklyn, New York



Hon. Carolyn E. Wade, J.S.C.
HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT

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