

**350 E. Houston St., LLC v Travelers Indem. Co. of  
Am.**

2024 NY Slip Op 33730(U)

October 10, 2024

Supreme Court, New York County

Docket Number: Index No. 650450/2018

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC PART 36**

*Justice*

-----X  
350 EAST HOUSTON STREET, LLC and BERKELEY  
INSURANCE COMPANY,

Plaintiffs,

- v -

TRAVELERS INDEMNITY COMPANY OF AMERICA,  
TEMPLE INSURANCE COMPANY, COPPS FOUNDATIONS,  
INC, and PETERSON GEOTECHNICAL CONSTRUCTION  
LLC,

Defendants.

INDEX NO. 650450/2018

MOTION SEQ. NO. 010

**DECISION + ORDER ON  
MOTION**

-----X  
COPPS FOUNDATIONS, INC,  
Third-Party Plaintiff,

-against-

NOBLE CONSTRUCTION GROUP, LLC,  
Third-Party Defendant.

Third-Party  
Index No. 595847/2019

The following e-filed documents, listed by NYSCEF document number (Motion 010) 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 345, 346, 347, 348, 349, 420, 421, 422, 423, 424, 425, 442

were read on this motion to/for

**SUMMARY JUDGMENT<sup>1</sup>**

The underlying facts of this case are set forth in detail in the decision and order of this court dated October 9, 2018, deciding Mot. Seq. 001, which, among other things, dismissed the complaint as against defendant Axis Insurance Company (NYSCEF Doc. No. 77, *decision and order on Mot. Seq. 001*). Therefore, familiarity with all the underlying facts is presumed and same shall not be repeated here.

Noble Construction Group, LLC (“Noble”) moves the court, for an order: (1) granting it leave to file a motion for summary judgment beyond the 120-day timeframe set forth by the CPLR, upon good cause shown; (2) pursuant to CPLR 3212, granting Noble summary judgment dismissing the third-party complaint in its entirety, with prejudice, along with any and all cross-claims and counterclaims; and (3) pursuant to CPLR 3212, granting summary judgment on its counter-claims for contractual indemnity and additional insured coverage against Copps Foundation Inc. (“Copps”) (NYSCEF Doc. No. 298, *notice of motion*).

<sup>1</sup> This motion is decided together with Mot. Seqs. 007; 008; 009; and 011.

On or about October 13, 2019, Copps commenced a third-party action against Noble asserting claims based on theories of common law indemnification and contribution (NYSCEF Doc. No. 303, *third-party complaint*).

Noble argues that good cause exists to extend its deadline to file a motion for summary judgment, citing, among other things, office failure, as well as, personal health and family issues of the handling attorney.

Noble argues that common-law indemnification is not available to Copps because it seeks damages arising out of breach of contract. It maintains that Copps' conclusory claim that any potential damages plaintiff may recover against it arises out of the active, negligence of Noble, fails as a matter of law. The allegations in plaintiffs' complaint stem from breached duties that were within Copps' responsibility. Noble delegated the exact duties to Copps via the trade contract and Copps has failed to establish that it delegated any of the breached duties to Noble. Therefore, Noble maintains that Copps' cause of action for common-law indemnification fails as a matter of law.

Additionally, Noble contends that contribution is unavailable where, as here, plaintiff seeks recovery of economic loss damages. The underlying action, claims Noble, seeks to recover costs for damages to both the adjacent property and the project itself, arising from the work Copps was contracted to perform. Since contribution stems from claims sounding in breach of contract, they are purely economical and, thus, the contribution claim against Noble fails as a matter of law, warranting dismissal of the third-party action.

Noble further represents that it is entitled to contractual indemnification from Copps as matter of law pursuant to the trade contract between Noble and Copps, which further includes full reimbursement for all expenses, including but not limited to attorney's fees, costs and disbursements. Insofar as the damages arise out of the installation of the micropiles, which was specifically assumed by Copps in the trade contract, and, given that Noble, as construction manager, was not involved in the means and methods employed in the installation of same, Noble asserts that it is entitled to contractual indemnification.

Copps opposes the motion, arguing that this Court should deny Noble's motion as untimely. Additionally, it contends that Noble has failed to establish its *prima facie* entitlement to dismissal of the third-party complaint. Copps again argues that its trade contract with Noble contains six separate competing provision for alleged indemnity associated with claims for damages and for construction delays as claimed by plaintiff in this action, creating ambiguity that warrant denial of the motion. Alternatively, Copps maintains that there are factual questions regarding Noble's negligence that require the denial of movant's motion. It references the contract between plaintiff and Noble, wherein Noble, as construction manager, agreed to represent the owner in the performance of the work and to supervise the worksite contractors over all phases of the construction (NYSCEF Doc. No. 334, *350 Houston-Noble contract*). Referencing the deposition testimony of Charles Becker, a principal of Noble, Copps maintains that it was Noble's responsibility to direct, supervise and check the work performed at the site. Matthew Izzo, Noble's project manager, confirmed that Noble's superintendents were on-site

during the installation of the micropiles, which was managed and supervised by Noble. (NYSCEF Doc. No. 339 at 55, *Izzo deposition*).

Copps represents that Noble was notified that Peterson was experiencing issues during the installation of the micropiles, including by letter dated February 9, 2017. Despite numerous discussions on site and a meeting, Noble rejected the remedial measures recommended to deal with the changed conditions, directing Peterson to complete the micropiling while ignoring the known risks. Joseph G. Engels, P.E. of GEI Consultants, opined that Noble is culpable because, as construction manager, it was responsible for the work performed by all the subcontractors on the project (NYSCEF Doc. No. 337, *Copps' expert disclosure*; 341 at 274, *Weinberger EBT*).

Peterson also opposes the motion. Peterson maintains that issues of fact exist as to the parties that were advised of the change in soil condition and what actions they took or failed to take in response to the information provided. It references the testimony of Andrew Peterson, who testified that there was a meeting on site with all parties, including Noble, where Peterson advised that the rock was unstable and presented additional recommendations using telescoping pile casing, along with other remedial measures commonly used to address the issues presented. When Peterson indicated that the rock was unstable, JZN and ultimately, Noble and the owner disagreed. Noble directed that Peterson continue the work (NYSCEF Doc. No. 268 at 201, 220, 248-251).

In reply, Noble argues that it has shown good cause for consideration of its late motion. Furthermore, Noble claims that Copps has failed to make any substantive argument to refute Noble's assertion that its claims for common law indemnification and contributions are flawed, unproven, and fail as a matter of law. According to Noble, the record reveals that the duties the plaintiffs assert were breached by Copps were explicitly assumed by Copps through the trade contract. Noble also denies that the trade contract between Noble and Copps is ambiguous and insists that Copps' contractual indemnification obligations have been triggered.

Noble also responds to the opposition filed by Peterson. Noble argues, *inter alia*, that the damages plaintiff complained of was as a direct result of the work performed by Peterson, under the supervision of Copps, as was required by the Noble-Copps trade contract. It further contends that the duties plaintiff asserts were breached by Copps, were assumed by Copps via the trade contract, and passed onto Peterson. It further asserts that the February 2017 letter referenced in opposition to the motion was a change order and not, as defendants represent, a letter giving notice of a dangerous condition. Noble also contends that there is no evidence that, after discovering the change in soil/rock conditions, the work would create a dangerous condition. Noble also argues that the affidavit of Keith van Sise reveals that it was owner who made the decision to proceed with the planned scope of work, not Noble.

As an initial matter, this court shall consider the untimely motion, finding that the stated reasons for the delay establish good cause (CPLR 2001). Upon considering the arguments advanced, this court finds that dismissal of the contribution claim is warranted.

Common-law contribution, as codified in CPLR 4101 provides as follows:

“Except as provided in sections 15-108 and 18-201 of the general obligations law, sections eleven and twenty-nine of the workers’ compensation law, or the workers’ compensation law of any other state or the federal government, two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.”

For common-law contribution, “the touchstone for purposes of whether one can seek contribution is not the nature of the claim in the underlying complaint but the measure of damages sought therein.” (*Children’s Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 324 [1st Dept 2009].) “Where a plaintiff’s direct claims against a codefendant seek only a contractual benefit of the bargain recovery, their tort language notwithstanding, contribution is unavailable” (*Trump Vill. Section 3, Inc. v N.Y. State Hous. Fin. Agency*, 307 AD2d 891, 897 [1st Dept 2003]; see *Rockefeller Univ. v Tishman Constr. Corp.*, 240 AD2d 341, 343-344 [1997], *lv denied* 91 NY2d 803 [1997]). Courts have clarified that “purely economic loss resulting from a breach of contract does not constitute ‘injury to property’” (*Children’s Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 323 [1st Dept 2009], quoting *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987]).

Here, the damages sought from plaintiff as against Copps is economic only, arising out of allegations that Copps breached its obligations under Section 12.2(b) of the Copps-Noble contract and seeking contractual indemnification. This Court has dismissed contribution action arising out of contractual breaches where, as here, no predicate tort liability exists (see *17 Vista Fee Assocs. v Teachers Ins. & Annuity Ass’n of Am.*, 259 AD2d 75, 81 [1st Dept 1999]; *Rockefeller Univ. v Tishman Constr. Corp.*, 240 AD2d 341, *lv denied* 91 NY2d 803; *SSDW Co. v Feldman-Misthopoulos Assocs.*, 151 AD2d 293, 294-295 [1989]). Therefore, the claim seeking contribution as against Noble is dismissed, as a matter of law.

Moreover, this court finds that the claim for common-law indemnification must also be dismissed as a matter of law. “It is well-established that ‘in New York, a party cannot obtain common-law indemnification to recover damages resulting from its own breach of contract.’” (*CJUF III 20 Henry Props. LLC v Edison Coatings, Inc.*, 2020 WL 4451924, 2020 US Dist. LEXIS 137692, \*7, [EDNY 2020], quoting *Milnot Holding Corp. v Thruway Produce, Inc.*, No. 08-cv-6140, 2014 US Dist. LEXIS 33048, 2014 WL 993743, at \*4 [WDNY 2014].) Here, “there is no common-law indemnification claim because [plaintiff] sought recovery from [Copps] because of the latter’s alleged wrongdoing—breach of contract—and not vicariously because of any negligence on the part of [Noble]” (*Chatham Towers, Inc. v Castle Restoration & Const., Inc.*, 151 A.D.3d 419, 420 [1st Dept 2017]; see *Knight v H.E. Yerkes and Assocs., Inc.*, 675 F.Supp. 139, 143 [SDNY 1987].) Given the foregoing, that branch of the motion seeking dismissal of the third-party complaint is granted and claims asserted against Noble are hereby dismissed.

That branch of the motion seeking summary judgment on the counterclaim against Copsps is granted and shall be referred to a special referee to hear and determine. All other arguments need not be addressed given the findings above. Accordingly, it is hereby

**ORDERED** that branch of the motion seeking dismissal of the third-party complaint against NOBLE CONSTRUCTION GROUP, LLC is granted and the third-party complaint is hereby dismissed; and it is further

**ORDERED** that that branch of the motion seeking summary judgment on NOBLE CONSTRUCTION GROUP, LLC's counterclaim is granted and shall be referred to a special referee to hear and determine; and it is further

**ORDERED** that counsel for movant shall, within twenty (20) days after this decision and order is uploaded to NYSCEF, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for Noble shall serve a copy of this decision and order, with notice of entry, upon all parties, as well as the clerk of the court; and it is further

**ORDERED** that the Clerk of the Court shall amend the caption of this action as follows:

-----X  
350 EAST HOUSTON STREET, LLC  
and BERKELEY INSURANCE COMPANY,  
Plaintiffs,

Index No. 650450/2018

v

TRAVELERS INDEMNITY COMPANY  
OF AMERICA, and PETERSON GEOTECHNICAL  
CONSTRUCTION LLC,  
Defendants.

-----X

This constitutes the decision and order of this court.

October 10, 2024



HON. VERNA L. SAUNDERS, JSC

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