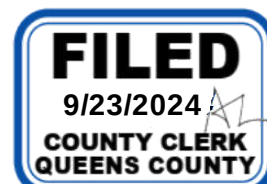


State of New York v H & L Contr., LLC
2024 NY Slip Op 35355(U)
September 20, 2024
Supreme Court, Queens County
Docket Number: Index No. 702326/2019
Judge: Maurice E. Muir
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice



THE STATE OF NEW YORK and THE NEW
YORK STATE DEPARTMENT OF
TRANSPORTATION,

IAS Part - 42

Index No.: 702326/2019

Plaintiff,

Motion Date: 10/26/23

-against-

Motion Cal. No. 35

H & L CONTRACTING, LLC,

Motion Seq. No. 1

Defendant.

The following electronically filed (“EF”) documents read on this motion by plaintiff for an order: 1) pursuant to CPLR § 3212, granting Plaintiffs summary judgment on their first cause of action for contractual indemnity; 2) pursuant to CPLR § 2201, staying this action until the underlying action in the Court of Claims, captioned *Cannon v. The State of New York et ano.*, bearing docket number 132072/18 is finally determined; and 3) granting such other and further relief as this Honorable Court may deem just and proper.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memorandum of Law.....	EF 04 - 24
Affirmation in Opposition-Exhibits-Service.....	EF 29 - 32
Memorandum of Law in Reply.....	EF 34

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to enforce a contract between the New York State Department of Transportation (“DOT” or “plaintiff”) and H & L Contracting, LLC (“H&L” or defendant”),

which involved installing a fendering system beneath the Whitestone Expressway on the Flushing River. On or before January 1, 2018, H&L employed James Cannon ("Mr. Cannon"), as a Harbor Worker, to operate an excavator located on a barge to install "fendering" along the shore of a waterway known as Flushing River. Here, Mr. Cannon alleges that he was injured on two (2) occasions: on January 3, 2018, he allegedly slipped and fell due to a "bent metal step" on the excavator, and landed on a "damaged" crane mat, causing him injury; and on January 11, 2018 while disembarking from the barge he was forced to climb a ladder, walk across a dangerous catwalk with protruding rebar and then climb over a 3 foot gap and a small wall when he fell aggravating all the injuries he sustained on January 3, 2018. As a result, on February 27, 2018, he commenced an action against H & L, the owner of the subject barge, entitled *Cannon v. H & L Contracting, LLC*, under Index Number 702991/18. Moreover, on or about October 1, 2018, Mr. Cannon commenced an action against the State of New York, as owner of the project, in the New Court State Court of Claims ("Court of Claims"), pursuant to New York Labor Law §§§ 200, 240, and 241, entitled *Cannon v. The State of New York et ano.*, bearing docket number 132072/18, which action is still pending.

As a result, on February 8, 2019, DOT commenced the instant action seeking contractual indemnification against H & L based on the terms of an "Obligation to Indemnify by the Contractor" contained in the contract between H & L and the State, which was executed on December 1, 2014. The provision §107-09 C of the contract reads as follows:

C. Obligation to Indemnify by the Contractor. To the fullest extent permitted by law, the Contractor shall indemnify and save harmless the State . . . from suits, claims, actions, damages and costs, of every name and description arising from the work under its contract during its prosecution and until the final acceptance thereof. [. . .] The Contractor's obligation under this paragraph shall not be deemed waived by the failure of the State to retain the whole or any part of such monies due the Contractor, nor where such suit, action, damages and/or costs have not been resolved or determined prior to release of any monies to the Contractor under the contract, nor shall such obligation be deemed limited or discharged by the enumeration or procurement of any insurance for liability for damages imposed by law upon the Contractor, Subcontractor or the State, any municipality in which the work is being performed, and/or any public benefit corporation, railroad or public utility whose property or facilities are affected by the work, or any consultants working for the State on or for the project. The Contractor has the obligation, at its own expense, for the defense of any action or proceeding which may be brought against the parties specified in paragraph §107-09 C. Obligation to Indemnify by the Contractor. This obligation shall include the cost of attorneys' fees, disbursements, costs and other expenses incurred in connection with such action or proceeding. Such obligation does not extend to those suits, actions, damages and costs of every name that

arise out of the sole negligence of the State . . . relative to the construction, alteration, or repair or maintenance of a building, highway or structure and appurtenances and appliances thereof including moving, demolition and excavating connected therewith.

Now, the plaintiff seeks summary judgment on its claim for indemnity, and/or to stay the action pending a resolution of the Court of Claims personal injury action, which H & L opposes.

It is well settled law that “[t]he 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 demonstrate the absence of any material issues of fact” (*Ayotte v. Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; see *Schmitt v. Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Only if a *prima facie* demonstration has been made, does the burden shift to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact, which requires a trial of the action. (see *Alvarez v. Prospect Hospital*, 68 NY2d 320; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Roos v. King Constr.*, 179 AD3d 857 [2d Dept 2020]). On a motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving party. (see *Monroy v. Lexington Operating Partners, LLC*, 179 AD3d 1053 [2d Dept 2020]; *Rivera v. Town of Wappinger*, 164 AD3d 932 [2d Dept 2018]; *Boulos v. Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]). Furthermore, the Court’s function on a motion for summary judgment is “to determine whether material factual issues exist, not to resolve such issues” (*Lopez v. Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v. Joyce*, 127 AD3d 954 [2d Dept 2015]).

As summary judgment is to be considered the procedural equivalent of a trial, “it must clearly appear that no material and triable issue of fact is presented This drastic remedy should not be granted where there is any doubt as to the existence of such issues . . . or where the issue is ‘arguable’” [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact (see *Ayotte v. Gervasio*, 81 NY2d 1062; *Khadka v. American Home Mortg. Servicing, Inc.*, 139 AD3d 808 [2016]). Summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Collado v. Jiacono*, 126 AD3d 927, 928 [2d Dept 2014]), citing *Scott v. Long Is. Power Auth.*,

294 AD2d 348, 348 [2d Dept 2002]; *see Charlery v. Allied Transit Corp.*, 163 AD3 914 [2d Dept 2018]; *Chimbo v. Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

Furthermore, it is well established that an employer may be subject to indemnity if a written agreement to indemnify exists, *i.e.*, where there is a “written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant” (*see Velasquez-Guadalupe v. Ideal Bldrs. & Constr. Servs., Inc.*, 216 AD3d 63 [2d Dept 2023]; *McIntosh v. Ronit Realty, LLC*, 181 AD3d 580 [2d Dept 2020]; *Chong Fu Huang v. 57-63 Greene Realty, LLC*, 174 AD3d 777 [2d Dept 2019]; *Cocanoski v. 35 Cedar Place Assoc., LLC*, 147 AD3d 810 [2d Dept 2017]). Normally, the party seeking contractual indemnification must first “prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Mohan v. Atlantic Court, LLC*, 134 AD3d 1075, 1078 [2d Dept 2015], quoting *Cava Constr. Co, Inc. v. Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]; *see Chapa v. Bayles Props., Inc.*, 221 AD3d 855 [2d Dept 2015]). Here, plaintiff claims that indemnification under the instant contract is triggered without a finding of negligence, based upon the obligation that H&L shall indemnify plaintiff as against any “claims . . . of every name and description arising from the work under its contract during its prosecution.”

“The right to contractual indemnification depends upon the specific language of the contract” (*Dos Santos v. Power Auth. of State of N.Y.*, 85 AD3d 718, 722 [2d Dept 2011], quoting *George v. Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]; *see Chapa v. Bayles Props., Inc.*, 221 AD3d 855; *Skerrett v. LIC Site B2 Owner, LLC*, 199 AD3d 956 [2d Dept 2021]; *DeSouza v. Empire Transit Mix, Inc.*, 155 AD3d 605 [2d Dept 2017]; *Valente v. Dave & Buster’s of New York, Inc.*, 132 AD3d 973 [2d Dept 2015]). “The 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 circumstances” (*Alayev v. Juster Assoc., LLC*, 122 AD3d 886, 887 [2d Dept 2014]; *see Hooper Assoc. v. AGS Computers, Inc.*, 74 NY2d 487 [1989]; *Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 NY2d 774 [1987]; *McNamara v. Gusmar Enters., LLC*, 204 AD3d 779 [2d Dept 2022]; *Cuellar v. City of New York*, 139 AD3d 996 [2d Dept 2016]; *Lawson v. R & L Carriers, Inc.*, 126 AD3d 944 [2d Dept 2015]). The contract between plaintiff and defendant satisfies the requirements that a “written contract,” must have been entered into prior to the accident and must have been sufficiently particular to have encompassed “an agreement to

indemnify the person asserting the indemnification claim for the type of loss suffered” (*Rodriguez v. N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005]; *see Village of Dobbs Ferry v. Landing on the Water at Dobbs Ferry Homeowners Assn., Inc.*, 198 AD3d 838 [2d Dept 2021]; *Tullino v. Pyramid Companies*, 78 AD3d 1041 [2d Dept 2010]).

In the case at bar, the contractual inclusion of “an express indemnification clause” fails to contain the liberal language which would obligate defendant “to the fullest extent permitted by law, to indemnify [plaintiff] from and against any and all claims . . . regardless of the cause or causes and the identity of the persons and/or entities responsible for same, arising out of or in any way resulting from or related to the performance or nonperformance of [defendant’s] work or its presence at the project site for any reason” (*Mogrovejo v. HG Hous. Dev. Fund Co., Inc.*, 207 AD3d 461, 463 [2d Dept 2022]), because it “does not extend to those suits . . . that arise out of the sole negligence of the State.” However, plaintiff has demonstrated, and defendant’s opposition has failed to rebut, that the subject accident was not caused solely by any “negligence of the State.” Here, it is not necessary for the State to establish its freedom from any negligence, or the fact that it may be held liable solely by virtue of any statutory or vicarious liability. (*see generally, Brooks v. Judlau Contr., Inc.*, 11 NY3d 204 [2008]; *Yang v. City of New York*, 207 AD3d 791 [2d Dept 2022]; *Winter v. ESRT Empire State Bldg., LLC*, 201 AD3d 844 [2d Dept 2022]; *Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253 [2d Dept 2019]). As such, plaintiff’s submissions demonstrate, *prima facie*, that there are no triable issues of fact with regard to whether indemnification applies hereto. Defendant’s opposition, based as it is on the assertion that defendant has already complied with the requirement that it procure insurance for its work on the project, naming plaintiff as an “additional insured, is without merit. An “agreement to procure insurance is not an agreement to indemnify or hold harmless” (*Kinney v. Lisk Co.*, 76 NY2d 215, 218 [1990]; *see Velasquez-Guadalupe v. Ideal Bldrs. & Constr. Servs., Inc.* 216 AD3d 63; *Chong Fu Huang v. 57-63 Greene Realty, LLC*, 174 AD3d 777). Such is not an issue of fact sufficient to negate the State’s *prima facie* entitlement to judgment on that basis (*see Solomon v. HSBC Bank USA, N.A.*, 185 AD3d 860 [2d Dept 2020]; *Nigro v. Village of Mamaroneck*, 184 AD3d 842 [2d Dept 2020]; *Mobley v. J. Foster Phillips Funeral Home, Inc.*, 178 AD3d 916 [2d Dept 2019]; *DeSerio v. City of New York*, 171 AD3d 867 [2d Dept 2019]; *Vicuna v. Vista Woods, LLC*, 168 AD3d 1124 [2d Dept 2019]; *Cabrera v. Arrow Steel Window Corp.*, 163 AD3d 758 [2d Dept 2018]). As such, that branch of plaintiff’s motion seeking summary judgment on contractual indemnification is granted.

Lastly, that branch of plaintiff's motion seeking a stay of this action, pending a resolution of the Court of Claims personal injury action brought by Mr. Cannon, is granted without opposition. Pursuant to CPLR § 2201, it states, in relevant part, that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." Furthermore, "[a] trial court has 'broad discretion with respect to stays as prescribed by CPLR 2201'" (*Rockman v. Nassau County Sheriff's Dept.*, 224 AD3d 757, 757 [2d Dept 2024], quoting *Matter of Hersh*, 198 AD3d 773, 776 [2d Dept 2021]). "Under the circumstances of this case, and in light of the goals of avoiding inconsistent adjudications and preserving judicial resources" (*Wilcox Dev. Corp. v. Thyssenkrupp El. Corp.*, 210 AD3d 826, 827 [2d Dept 2022]), and in light of the lack of opposition hereto, the requested stay of proceedings is proper herein.

Defendant's remaining contentions and arguments are either without merit, or need not be addressed, in light of the aforementioned determinations.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment on its first cause of action for contractual indemnity is granted; and it is further,

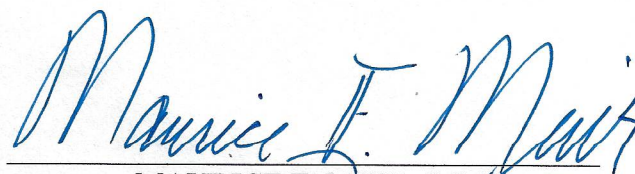
ORDERED, that plaintiff's motion for a stay of this action until the underlying action in the Court of Claims, captioned *Cannon v. The State of New York et ano.*, under Index No. 132072/18 is finally determined is granted; and it is further,

ORDERED, that plaintiff shall serve a copy of this Order with Notice of Entry on the defendant, via First Class Mail and NYSCEF, on or before October 30, 2024.

The foregoing constitutes the decision and order of the court.

Dated: September 20, 2024

Long Island City, New York


MAURICE E. MUIR, J.S.C.

