

F.J. Sciame Constr. Co., Inc. v Five Star Elec. Corp.

2025 NY Slip Op 31776(U)

May 7, 2025

Supreme Court, New York County

Docket Number: Index No. 157419/2023

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

INDEX NO. 157419/2023
MOTION DATE 03/28/2025
MOTION SEQ. NO. 002 003

F.J. SCIAME CONSTRUCTION CO., INC., SCIAME CONSTRUCTION, LLC,

Plaintiffs,

- v -

FIVE STAR ELECTRIC CORP.,

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 135, 138

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 136, 141, 142, 143, 144, 145, 146, 147

were read on this motion to/for JUDGMENT - SUMMARY

This action arises from a workplace accident suffered by non-party Domenico Castaldo in August 2017 when he allegedly tripped on a hose while working for defendant Five Star Electric Corp. ("Five Star") at a construction project located at 285 Jay Street in Brooklyn (the "Project"). Five Star was subcontracted to perform electrical work at the Project by the Project's construction manager, plaintiff F.J. Sciame Construction Co., Inc. ("Sciame"), pursuant to a contract dated March 3, 2014. Castaldo commenced a related, underlying action—Domenico Castaldo and Nicole Castaldo v. F.J. Sciame Construction Co. Inc. and Sciame Construction, LLC, Index No. 158417/2018 (the "Castaldo Action")—against the plaintiffs herein, Sciame and Sciame Construction, LLC ("Sciame LLC" and, together with Sciame, "plaintiffs"), asserting claims for negligence and violation of Labor Law §§ 200, 240(1), and 241(6).

By decision and order dated October 12, 2022, the court granted partial summary judgement to both Sciame and Castaldo in the Castaldo Action. The court awarded summary judgment to Castaldo on his Labor Law § 241(6) cause of action insofar as predicated on

Industrial Code §§ 23-1.7(e)(2) and 2.1(a), dismissed the Labor Law § 240(1) claim and the remainder of the Labor Law § 241(6) cause of action, and determined that a triable issue of fact as to whether Sciame had constructive notice of a dangerous condition precluded summary judgment on the Labor Law § 200 and negligence claims. On appeal, the First Department, as relevant here, modified the court's summary judgment decision to dismiss all claims in the Castaldo Action as against Sciame LLC, and otherwise affirmed.

Plaintiffs commenced a third-party action against Five Star in the Castaldo Action, but that third-party action was severed and plaintiffs were directed to commence a new action against Five Star. Plaintiffs thereafter commenced the instant action, asserting causes of action against Five Star for (1) contribution; (2) common-law and (3) contractual indemnification; and (4) breach of contract for failure to procure insurance. Plaintiffs now move for partial summary judgment pursuant to CPLR 3212 on their third cause of action for contractual indemnification (MOT SEQ 002). Five Star opposes the motion and separately moves pursuant to CPLR 3212 for summary judgment dismissing the complaint in its entirety (MOT SEQ 003), which motion is in turn opposed by plaintiffs. For the reasons that follow, plaintiffs' motion is granted and Five Star's motion is denied.

On a motion for summary judgment, the proponent bears the initial burden of making a prima facie showing that it is entitled to summary judgment as a matter of law, providing sufficient evidence that no material issues of triable fact exist (*see Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 74 [2020]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once met, the burden shifts to the opposing party to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). However, if the proponent fails to make out its prima facie case for summary judgment, its motion must be denied regardless of the sufficiency of the opposing papers (*Alvarez*, 68 NY2d at 324; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). The court's function on these motions is limited to "issue finding," not "issue determination" (*see id.* at 505).

PLAINTIFFS' MOTION (MOT SEQ 002)

Plaintiffs submit the contract between Sciamé and Five Star (NYSCEF Doc. No. 90).

Section 4.6.1 of the contract provides that:

The Subcontractor shall be solely responsible for any and all injuries to persons . . . resulting from or arising out of any act or omission or any negligence or carelessness on the part of the Subcontractor, its employees, sub-subcontractors or agents in relation to this Subcontract or the Subcontract Work hereunder. In addition to any liability or obligation of the Subcontractor to Sciamé . . . relating to indemnification . . . , the Subcontractor shall defend . . . , indemnify and hold harmless Sciamé [and] such other persons or entities as Sciamé . . . may identify in writing . . . (each an “Indemnitee” and collectively the “Indemnites”) to the fullest extent permitted by law, from any and all liabilities, damages, expenses (including reasonable attorneys’ and consultants’ fees), disbursements and costs (including court costs) to which any or all of them may be subject by reason of any claim or suit alleging personal injury and/or property damage as described in the preceding sentence.

(*id.* at 19-21).¹ Section 13.1.2 of Rider B to the contract also provides for indemnification, stating that “Subcontractor shall, to the fullest extent permitted by Applicable Law, (a) indemnify and hold harmless each of the Indemnites, from and against any and all Losses that may be incurred by any of the Indemnites as a result of, in connection with, or allegedly arising from or as a consequence of (i) the performance . . . of this Agreement by the Subcontractor” (*id.* at 135). “Losses” is defined as “losses, injuries, liability, damages, judgments, fines, penalties, fees, claims, demands, liens, settlements, costs and expenses, including reasonable attorneys’ fees and disbursements” (*id.* at 93), and “Indemnites” is defined to include both Sciamé and Sciamé LLC (*id.* at 92 & 397). Plaintiffs also submit, *inter alia*, the pleadings in the Castaldo Action and deposition transcripts for Castaldo and the parties herein, which demonstrate that Castaldo was a Five Star employee and seeks damages in the Castaldo Action for injuries he sustained while performing Five Star’s work at the Project.

Plaintiffs’ submissions suffice to demonstrate their *prima facie* entitlement to summary judgment on their contractual indemnity cause of action. The indemnity provisions of the subcontract between Sciamé and Five Star requires the latter to indemnify plaintiffs for, among

¹ The subject contract is cited according to the pagination of the pdf uploaded to NYSCEF.

other things, any liability, damages, claims, losses, costs, or expenses, including reasonable attorneys' fees, "resulting from or arising out of any act" of Five Star or its employees "in relation to . . . the Subcontract Work," or "as a result of, in connection with, or allegedly arising from or as a consequence of [] the performance . . . of this Agreement" by Five Star. These broad indemnity provisions were triggered by the commencement of the Castaldo Action, in which Castaldo, a Five Star employee, seeks damages for injuries he sustained while performing Five Star's work at the Project (*see Madkins v 22 Little W. 12th St., LLC*, 191 AD3d 434, 436 [1st Dept. 2021]; *Aramburu v Midtown W. B, LLC*, 126 AD3d 498, 500 [1st Dept. 2015]; *Fuger v Amsterdam House for Continuing Care Ret. Cmty., Inc.*, 117 AD3d 649, 650 [1st Dept. 2014]).

In opposition, Five Star fails to raise a triable issue of fact. Its contention that indemnification is only required for injuries resulting from Five Star's negligence is contrary to the plain and unambiguous terms of the contract. Similarly unavailing is its contention that plaintiffs' motion is moot insofar as it seeks indemnification on behalf of Sciame LLC. Five Star correctly notes that all claims against Sciame LLC in the Castaldo Action were dismissed (*see Castaldo v F.J. Sciame Constr. Co. Inc.*, 222 AD3d 579, 580-81 [1st Dept. 2023]). Nevertheless, pursuant to the terms of the contract, Sciame LLC is entitled to indemnification for defense costs and expenses incurred in both the Castaldo Action and the present action.

Five Star argues that the indemnification provisions in the contract purport to indemnify Sciame for its own negligence, in contravention of General Obligations Law ("GOL") 5-322.1, and are therefore void and unenforceable. Not so. Section 4.6.1 of the contract provides for indemnification "to the fullest extent permitted by law" and expressly states that the indemnification obligation encompasses "(1) full indemnity in the event of liability imposed against the Indemnitees without negligence and solely by reason of statute, operation of law or otherwise; and (2) partial indemnity in the event of any actual negligence on the part of the Indemnitees either causing or contributing to the underlying claim, in which case indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault whether by statute, by operation of law, or otherwise" (NYSCEF Doc. No. 90 at 21). Section 13.1.2 of Rider B to the contract likewise provides for indemnification "to the fullest extent permitted by Applicable Law" and expressly states that "[i]nsofar as the facts and Law relating to any claim would preclude any of the Indemnitees from being completely

indemnified by Subcontractor, such of the Indemnitees shall be partially indemnified by Subcontractor to the fullest extent provided by Applicable Laws” (*id.* at 135). The contract is thus not in violation of GOL 5-322.1, as it expressly provides for only partial indemnification if Sciame is found to have been negligent, and then only for liability not attributable to its own fault (*see Dutton v Charles Pankow Builders, Ltd.*, 296 AD2d 321, 322 [1st Dept. 2002]; *see also Sanchez v 404 Park Partners, LP*, 168 AD3d 491, 493 [1st Dept. 2019]).

As noted, the court in the Castaldo Action determined that a triable issue of fact exists as to whether Sciame had constructive notice of a dangerous condition, which precluded summary judgment for either Castaldo or Sciame on the Labor Law § 200 and negligence claims. It does not follow, however, that Sciame’s present motion in this action is premature. Rather, as to Sciame, summary judgment on the contractual indemnification claim must be granted conditionally, subject to a determination in the Castaldo Action as to whether Castaldo’s injuries were caused in part by Sciame’s negligence (*see Sanchez*, 168 AD3d at 493; *Aramburu*, 126 AD3d at 500-01; *Fuger*, 117 AD3d at 650-51). Finally, it does not avail Five Star to argue that Castaldo’s accident was caused solely by Sciame’s negligence because, as already determined by the court in the Castaldo Action and affirmed by the First Department, “it was caused at least in part by [Sciame’s] violation of Labor Law § [241(6)], which imposes absolute liability” (*Aramburu*, 126 AD3d at 500-01, quoting *Fuger*, 117 AD3d at 650-51).

Therefore, plaintiffs’ motion for summary judgment on their third cause of action for contractual indemnification (MOT SEQ 002) is granted unconditionally as to Sciame LLC and granted conditionally as to Sciame, subject to a determination in the Castaldo Action of the pending issues of fact as to Sciame’s negligence.

FIVE STAR’S MOTION (MOT SEQ 003)

Five Star’s summary judgment motion is untimely. The note of issue in this case was filed on September 3, 2024. Five Star did not file its summary judgment motion until January 3, 2025, more than 120 days after the filing of the note of issue (*see CPLR 3212[a]*). “Absent a ‘satisfactory explanation for the untimeliness,’ constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits” (*Wittenberg v Long Island Power Auth.*, 225 AD3d 730, 732 [2nd Dept. 2024], citing *Brill v City of New York*,

2 NY3d 648, 652 [2004]). This is so even if the untimely motion is meritorious and there is no prejudice to the non-movant (*Brill*, 2 NY3d at 652). However, an untimely motion for summary judgment may be considered by the court, even in the absence of good cause, where a timely motion was made on nearly identical grounds (*see Guallpa v Leon D. DeMatteis Const. Corp.*, 121 AD3d 416, 419–20 [1st Dept. 2014]; *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept. 2006]).

Because plaintiff’s timely motion for summary judgment did not address the first, second, and fourth causes of action for contribution, common-law indemnification, and breach of contract for failure to procure insurance, respectively, the court declines to consider the parts of Five Star’s untimely motion that seek summary judgment dismissing those claims. Five Star’s counsel asserts, in conclusory fashion, that “technical difficulties” encountered in the very last-minute uploading of Five Star’s motion accounts for the motion’s untimeliness. However, even were the court to look past counsel’s unexplained failure to timely file Five Star’s motion during the four months it had to do so and accept these “technical difficulties” as good cause for the delay, the court would still deny the motion as to these three causes of action. The grant of summary judgment to plaintiffs on their third cause of action for contractual indemnification renders moot the first and second causes of action for contribution and common-law indemnification. So too the fourth cause of action for breach of contract for failure to procure insurance, as plaintiffs concede in their opposition to Five Star’s motion that Five Star procured the necessary insurance but contend that the breach of contract claim remains unresolved to the extent that “Five Star, through its insurers, have refused to indemnify Plaintiffs for Castaldo’s claims” (NYSCEF Doc. No. 142 ¶ 11). As such, even if considered, the parts of Five Star’s motion that seek the dismissal of plaintiffs’ first, second, and fourth causes of action would be denied as moot.

The remaining portion of Five Star’s motion that seeks summary judgment dismissing plaintiffs’ third cause of action for contractual indemnification is denied in light of the grant of plaintiffs’ motion seeking summary judgment in their favor on the same claim.

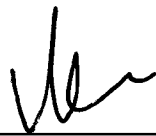
Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment pursuant to CPLR 3212 on their third cause of action for contractual indemnification (MOT SEQ 002) is granted unconditionally to the extent that defendant shall fully indemnify plaintiff Sciame Construction, LLC, and is conditionally granted to the extent that defendant shall fully indemnify plaintiff F.J. Sciame Construction Co., Inc., subject to a determination of the remaining issues of fact as to F.J. Sciame Construction Co., Inc.'s alleged negligence in the related pending action titled *Domenico Castaldo and Nicole Castaldo v. F.J. Sciame Construction Co. Inc. and Sciame Construction, LLC*, Index No. 158417/2018; and it is further

ORDERED that defendant's summary judgment motion (MOT SEQ 003) is denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

<u>5/7/2025</u> DATE			 LYNN R. KOTLER, J.S.C.	
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"/>	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