

Freeman v SHS Upper City NY II LLC

2025 NY Slip Op 32527(U)

July 11, 2025

Supreme Court, Kings County

Docket Number: Index No. 525329/2018

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of July, 2025.

P R E S E N T :

HON. WAVNY TOUSSAINT,
Justice.

-----X

NYJA FREEMAN,

Plaintiff,

-against-

Index No.: 525329/2018

MS #10

SHS UPPER CITY NY II LLC, TAMARKIN
DEVELOPMENT WEST END AVENUE LLC, and
WHITE CONTRACTING & RENOVATION INC.,

DECISION AND ORDER

Defendants,

-----X

SHS UPPER CITY NY II LLC and TAMARKIN
DEVELOPMENT WEST END AVENUE LLC,

Third-Party Plaintiffs,

-against-

CM AND ASSOCIATES CONSTRUCTION
MANAGEMENT LIMITED LIABILITY COMPANY,

Third-Party Defendant,

-----X

CM AND ASSOCIATES CONSTRUCTION
MANAGEMENT LIMITED LIABILITY COMPANY,

Second Third-Party Plaintiff,

-against-

WHITE CONTRACTING & RENOVATION INC.,
UNLIMITED STONE WORKS, INC., et al.,

Second Third-Party Defendants.

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The following papers numbered 1 to read herein	Papers Numbered
Notice of Motion/Order to Show Cause/ and Affidavits (Affirmations) Annexed	<u>275-288</u>
Cross Motion and Affidavits (Affirmation) Annexed	<u>294</u>
Answers/Opposing Affidavits (Affirmations)	<u>297</u>
Reply Affidavits (Affirmations)	<u> </u>
Affidavit (Affirmation)	<u> </u>
Other Papers	<u> </u>

Upon the foregoing papers, SHS Upper City NY II LLC (SHS) and Tamarkin Development West End Avenue LLC (Tamarkin) move (Seq. 10) for an order, pursuant to CPLR § 3212, granting summary judgment against third-party defendant CM and Associates Management LLC (CM&A) as to their contractual and common law indemnification claims. They additionally seek reimbursement of all past defense costs and a judicial declaration that CM&A is obligated to defend them in the litigation moving forward. CM&A opposes the motion, arguing in part that the motion is premature, as the deposition of SHS and Tamarkin’s witness has not been completed.

BACKGROUND AND PROCEDURAL HISTORY

In this personal injury action, plaintiff, a construction laborer employed by CM&A, alleges she was injured on May 7, 2018, at 1:00 p.m., while working on the third floor of the construction project located at 553-559 West End Avenue, New York, NY. According to plaintiff, she tripped and fell on a piece of rebar lying on the floor when she attempted to pick up a heavy garbage bag and bin full of construction debris. Plaintiff commenced this action on December 17, 2018 against the owner of the premises, SHS; developer Tamarkin; and subcontractor White Contracting & Renovation Inc., alleging violations of Labor Law §§ 240(1), 241(6), and 200. As relevant here, SHS and Tamarkin filed a third-

~~filed~~ a third-party action against CM&A asserting the stated contractual and common law indemnification claims.¹

On August 12, 2024, Mark Sangiorgi (Mr. Sangiorgi) testified on behalf of SHS and Tamarkin as the Construction Manager for the project. His deposition began at 12:12 p.m. but ended at 2:38 p.m., without having been completed. During the deposition, Mr. Sangiorgi informed his counsel that a personal “emergency situation” had developed and that as a result, he could not complete the deposition (NYSCEF Doc No. 286, p. 114). All counsel present at the deposition agreed to resume Mr. Sangiorgi’s deposition at a mutually agreeable future date (*id.*, at p. 115). Further, counsel for plaintiff reserved the right to depose another representative for SHS and Tamarkin which, as the Court observes from the record, may include Cary Tamarkin, identified by Mr. Sangiorgi as the “founder” of Tamarkin (*id.* p. 33) and the individual who signed the construction management agreement on behalf of SHS and Tamarkin (*id.* p. 28, 49).

THE PARTIES’ CONTENTIONS

SHS and Tamarkin now move for summary judgment against CM&A on their third-party claims for contractual and common law indemnification, based on the express indemnification provision set forth in the Construction Management Agreement between SHS and CM&A, wherein Tamarkin is listed as an additional insured. SHS and Tamarkin allege the agreement obligates CM&A to indemnify and hold them harmless for injuries sustained by plaintiff in the course of plaintiff’s work at the construction project. CM&A opposes, contending the motion should be denied as premature, since the deposition of

¹ CM&A also filed a second third-party action against the twelve sub-contractors associated with the construction project.

SHS and Tamarkin's witness which though started, has not been completed. CM&A contends this deposition, and others, might yield evidence necessary to oppose the motion as it relates to whether SHS and Tamarkin were free from negligence, a necessary showing before contractual liability may be imposed.

In reply, SHS and Tamarkin argue CM&A concedes that the Construction Management Agreement was in full force and effect as of the date of plaintiff's accident. As such, SHS and Tamarkin assert liability attached to CM&A since it agreed to the indemnification provision without limitation. Additionally, SHS and Tamarkin argue CM&A's assertion that the motion is premature, due to the incomplete deposition, is without merit. They argue CM&A, *inter alia*, has not demonstrated that additional discovery might lead to relevant evidence necessary to oppose the motion. To this point, they assert there is no possible deposition testimony which could alter the fact that CM&A agreed to the terms of the subject indemnification provision and that same entitles them to indemnification and defense in this action, regardless of any alleged negligence.

DISCUSSION

As a preliminary matter, the Court considers whether the motion may be resolved on procedural grounds, insofar as the deposition of SHS and Tamarkin's fact witness, Mr. Sangiorgi, remains incomplete. Mr. Sangiorgi's deposition transcript indicates he was questioned by several of the attorneys representing the parties herein, including counsel for CM&A, who now opposes the motion. CM&A's counsel was the second to question Mr. Sangiorgi, followed by four other counsels. Plaintiff's counsel also reserved the right to depose another witness for SHS and Tamarkin (NYSCEF Doc No. 286, p. 86). It appears

from a fair reading of the transcript that counsel's request was based on Mr. Sangiorgi's inability to recall certain facts, particularly those regarding whether SHS and Tamarkin were aware of any alleged dangerous conditions at the construction project or whether SHS and Tamarkin had the right to suspend the project if they learned of such conditions (*id* at ps. 60-62; 86).

"A motion for summary judgment may be denied as premature where it appears that the facts essential to oppose the motion exist but cannot then be stated . . . A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Knowles v 21-43 27th St., LLC*, 224 AD3d 737, 738 [2d Dept 2024] [internal citations omitted]; *see also Litchmore v Mann*, 232 AD3d 871, 872 [2d Dept 2024], *Rosenblum v City of New York*, 230 AD3d 1175, 1175 [2d Dept 2024], *Salameh v Yarkovski*, 156 AD3d 659, 660 [2d Dept 2017],

Under the circumstances, CM&A has sufficiently demonstrated that completion of at least the deposition of Mr. Sangiorgi might lead to relevant evidence necessary to oppose the instant (or subsequent) motion. Certainly, counsels would be entitled to probe further, through Mr. Sangiorgi's testimony, the extent of SHS and Tamarkin's knowledge of the conditions at the construction project site, critical to determining whether they were free from negligence in this matter. Additionally, plaintiff's counsel has reserved the right to depose another witness for SHS and Tamarkin, potentially including Cary Tamarkin

himself. For the reasons stated, the motion is denied as premature, without prejudice to renew. Accordingly, the Court does not reach the merits of the motion.


CONCLUSION

Accordingly, it is hereby

ORDERED, that SHS and Tamarkin’s motion (Seq. 10) for an order, pursuant to CPLR § 3212, granting summary judgment against CM&A as to their contractual and common law indemnification claims, among other things, is denied with leave to renew upon the completion of discovery.

This constitutes the decision and order of the Court.

E N T E R



J.S.C.

**HON. WAVNY TOUSSAINT
J. S. C.**

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