Privilege Underwriters Reciprocal Exch. v SBP N.Y. LLC

2025 NY Slip Op 33226(U)

September 2, 2025

Supreme Court, New York County

Docket Number: Index No. 152866/2021

Judge: David B. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **58**

Justice

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PRIVILEGE UNDERWRITERS RECIPROCAL EXCHANGE AS SUBROGEE OF THOMAS PETERFFY AND 432 PARK AVENUE #84A LTD., THOMAS PETERFFY, 432 PARK AVENUE #84A LTD.,

Plaintiffs,

- v -

SBP NEW YORK LLC,PEMBROOKE & IVES INC.,STH PAINTING, INC.,REN INTERIORS, LLC,FRESCO DECORATIVE PAINTING, INC.,RAEL AUTOMATIC SPRINKLER CO., INC.,LEWIS A. SANDERS, ALICE SANDERS,

Defendants.

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INDEX NO. 152866/2021

MOTION DATE 05/31/2024, 12/20/2024

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 154, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 224, 225, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245

were read on this motion to/for JUDGMENT - SUMMARY.

Defendant/third-party defendant Pembrooke & Ives Inc. (Pembrooke) moves pursuant to CPLR 3211(a)(7) for an order dismissing the third-party claim of SBP New York, Inc. (SBP) against Pembrooke for common-law indemnification; and pursuant to CPLR 3211(a)(1) dismissing SBP's fourth cause of action for contractual indemnity, fifth cause of action for failure to procure insurance, and sixth cause of action for breach of contract (seq. 003). SBP opposes.

Defendant Fresco Decorative Painting, Inc. (Fresco) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint, any cross-claims or counter-claims, and the third third-party complaint against it (seq. 004). Plaintiffs, SBP, and Pembrooke oppose.

I. FACTUAL AND PROCEDURAL BACKGROUND

This action, and four others related to it, arise from property damage sustained by plaintiffs' subrogors, allegedy caused by a fire that occurred on April 1, 2018 at premises located 432 Park Aveue, Unit 88, New York, New York (premises). Defendants Sanders are the owners of the premises, Pembrooke was the interior design specialist, and SBP was the general contractor.

The Sanders hired Pembrooke pursuant to a July 13, 2016 Proposal for Interior Design Services (Proposal). As pertinent here, the Proposal, between Pembrooke and the Sanders, provides that Pembrooke would obtain and maintain commercial general liability coverage, and that it would indemnify, defend, and hold harmless the Sanders and "their respective partners, shareholders, members, officers, directors, employees, agents, contractors, lessors, mortgagees and their related companies from and against all claims, damages, losses, and expenses . . . arising out of or resulting from negligent acts or omissions by [Pembrooke] in the performance of the Services required under" the Proposal (NYSCEF 148).

On April 19, 2017, the Sanders entered into an agreement with SBP, as "construction manager," to renovate the premises (NYSCEF 168).

On July 11, 2017, Pembrooke hired Fresco to provide painting services at the premises (NYSCEF 234).

According to the Fire Department of New York (FDNY)'s fire incident report, the FDNY's examination "showed fire originated in [the Sanders's premises] in the foyer, in the

shop vac, approximately two feet off the east wall, approximately five feet off the south wall, at floor level in combustible material (sawdust). Fire extended to combustible items." It is undisputed that the shop vacuum belonged to SBP, and the report further provides that sawdust was left in the vacuum. The report and other supporting FDNY documents also indicate that multiple sprinklers were in the premises, and were operational and working when the FDNY arrived at the premises (NYSCEF 210).

In the main complaint, plaintiffs sue SBP, Pembrooke, Fresco, and others for negligence, breach of contract, contractual indemnity, and failure to provide insurance (NYSCEF 139).

As pertinent to the instant motions, Fresco's creative director, Noah Post, testified at his deposition that Fresco used a particular surface finish at the premises, but it was not flammable, and that Fresco only used water-based products as part of its practice, including at the premises. He also testified that Fresco did not work on the premises' ceilings, did not cover the sprinklers in any way, and did no plaster work that would have caused debris that could have clogged a sprinkler (NYSCEF 202).

II. PEMBROOKE MOTION TO DISMISS

On a motion to dismiss under CPLR 3211(a)(7), the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 152NY2d 83, 87--88 [1994]; *Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 [1st Dept 2013], quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]).

Pursuant to CPLR 3211(a)(1), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the grounds that . . . a defense is founded upon documentary evidence[.]" Dismissal is "warranted only if documentary evidence submitted

utterly refutes plaintiff's factual allegations, and conclusively establishes a defense to the asserted claims as a matter of law" (*Kolchins v Evolution Markets, Inc.*, 128 AD3d 47 [1st Dept 2015], *affd*, 31 NY3d 100 [2018] [internal quotations omitted]).

A. Common-law indemnity claim

Pembrooke contends that SBP's common-law indemnity claim against it must be dismissed as plaintiffs have sued SBP for its own negligence, thereby precluding its claim for indemnity. SBP observes that plaintiffs' complaint contemplates that SBP may be held vicariously liable and that, therefore, there is no basis to dismiss the common-law indemnity claim. In reply, Pembrooke denies that the complaint contains an allegation of vicarious liability against SBP.

"To establish a claim for common-law indemnification, the one seeking indemnity must prove not only that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident but also that it was not guilty of any negligence beyond the statutory liability" (*Winkler v Halmar Intl.*, LLC, 206 AD3d 458, 461 [1st Dept 2022] [citations omitted]). "The right to contribution and apportionment of liability among alleged multiple wrongdoers arises when they each owe a duty to plaintiff or to each other and by breaching their respective duties they contribute to plaintiff's ultimate injuries" (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 454 [1st Dept 1985]).

Here, the complaint does not contain an allegation that SBP may be held vicariously liable for another's negligence, only its own. Thus, as plaintiffs sue SBP for its own negligence and breach of contract, SBP is not entitled to common-law indemnity from Pembrooke (*see 63rd & 3rd NY LLC v Advanced Contr. Solutions LLC*, 223 AD3d 447 [1st Dept 2024] [as pleadings did not allege facts indicating that third-party plaintiffs may be vicariously liable, their claims for

common-law indemnity dismissed]; *Shivers v City Smiles Dental*, 215 AD3d 410 [1st Dept 2023] [dismissing common-law indemnity cross-claims as claims were actionable only where party seeking indemnity is vicariously liable, without negligence on its part]). This third-party claim is thus dismissed.

B. Contractual indemnity claim

Pembrooke asserts that SBP is not entitled to contractual indemnity as there is no written agreement between them, and as the Proposal does not include an obligation by Pembrooke to indemnify SBP. SBP maintains that the Proposal's indemnity clause requires Pembrooke to indemnify the Sanders and their "contractors," and that SBP was one of the contractors retained by the Sanders. Pembrooke, in reply, contends that the word "contractor" is too vague to constitute an obligation to indemnity SBP.

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87-88 [1st Dept 2018] quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]).

It is undisputed that the indemnity provision in the Proposal does not name SBP, nor was it signed by SBP. Moreover, while SBP contends that it was a "contractor" on the renovation project and thus covered by the provision, the agreement between the Sanders and SBP identifies SBP as the "construction manager." Thus, Pembrooke establishes that SBP is not entitled to contractual indemnity from it (*see Tonking v Port Auth. of New York and New Jersey*, 3 NY3d 486 [2004] [provision did not name defendant by name or use term "construction manager"];

Hernandez v Port Auth. of New York and New Jersey, 238 AD3d 408 [1st Dept 2025] [defendant was neither named nor described in indemnification clause at issue, and was not "agent" as described therein]; *Weidtman v Tremont Renaissance Hous. Dev. Fund Co., Inc*., 224 AD3d 488 [1st Dept 2024] [defendants were not third-party beneficiaries of indemnification provisions that did not mention them and of which they were not signatories]).

C. Failure to procure insurance claim

Pembrooke alleges that it was not obligated to purchase insurance to benefit SBP, but that, in any event, it obtained all of the insurance required by the Proposal.

SBP denies that Pembrooke sufficiently demonstrated that it obtained the required insurance coverage.

As SBP is not an intended beneficiary of the Proposal, it has no standing to assert a claim for failure to procure insurance against Pembrooke. In any event, Pembrooke's documentary evidence sufficiently establishes that it procured the required insurance coverage.

D. Breach of contract

Pembrooke denies that it entered into any agreement with SBP, pursuant to which it may be held liable to SBP for breach of contract. Nor does SBP assert that it was a beneficiary or intended beneficiary of the Proposal.

SBP argues that as it is an intended indemnitee under the Proposal, Pembrooke's failure to indemnity it constitutes a breach of contract.

As Pembrooke demonstrates that SBP was not an intended indemnitee, there is no basis upon which SBP can assert that Pembrooke breached its contract with SBP. In any event, the claim is duplicative of the indemnity claim (*see Demurjian v Demurjian*, 190 AD3d 410 [1st Dept 2021] [dismissing indemnity claim as duplicative of breach of contract claim]; *Nationstar*

Mortgage, LLC v Generation Mortgage Co., 191 AD3d 535 [1st Dept 2021] [breach of contract claim correctly dismissed as duplicative of indemnity claim]).

E. Conclusion

For all of these reasons, Pembrooke's motion to dismiss the second, third, fourth, and fifth causes of action asserted against it in the third-party complaint is granted.

III. FRESCO'S MOTION FOR SUMMARY JUDGMENT

Fresco contends that the evidence shows that it did not cause or contribute to the fire, as it finished its work more than a week before the incident, used only water-based materials not susceptible to spontaneous combustion, and did not work on the premises' ceilings. It observes that plaintiffs claim that a defendant left behind combustible-stained rags on March 29 and 30, 2018, and that plaster or plaster debris was found to have covered a sprinkler in the premises, thereby preventing it from activating and extinguishing the fire, and Fresco denies having done either. Absent any negligence on its part, Fresco maintains that no claims against it for indemnity may be maintained.

SBP, Pembrooke, and plaintiffs contend there are triable issues as whether Fresco's materials were non-combustible, and whether it covered the sprinkler with plaster dust.

"On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega*, 18 NY3d at 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v*

City of New York, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212[b]).

The movant's "failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). Only if movant's burden is met does the burden then shift to the opposing party to demonstrate the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d at 557).

Fresco's testimony establishes that it only used water-based products in its work in general, and only used such products during its work at the premises, thus establishing, prima facie, that it did not cause or contribute to the start of the fire through its use of combustible materials. Defendants do not raise any triable issues as their argument relies on pure speculation that because Fresco's witness had no personal knowledge as to which products were used at the premises, it is possible that combustible products may have been used. Absent any evidence that Fresco used combustible products in general or on this specific project, there is no remaining factual issue as to whether Fresco caused the fire through the use of combustible products (*see e.g. Walsh v W. Gramercy Assocs*., 235 AD3d 462 [1st Dept 2025] [affidavit insufficient to raise triable issue as it was not based on facts in record and was speculative]; *see generally Nellenback v Madison County*, _ NY3d_, 2025 WL 1127776 [2025] ["to avoid summary judgment, the opposing party must provide evidence based on more than hypothetical or unsubstantiated assertions"]).

Similarly, Fresco's evidence demonstrates that it did not work on the ceilings, did not cover up or in any way touch the sprinklers, and did no work that would have caused the sprinklers to be covered up with plaster debris. In any event, the FDNY documents do not indicate that any sprinkler did not work or that the failure of a sprinkler to work contributed to the fire. The engineering report relied on by SBP contains no finding that Fresco's work impacted the sprinkler system in any way.

Fresco has thus demonstrated that it is entitled to summary dismissal of the complaint, all cross-claims or counterclaims, and the third third-party complaint against it.

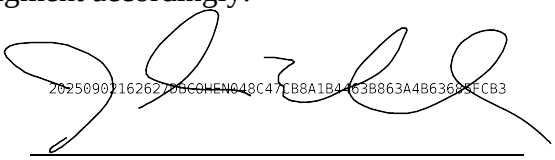
IV. CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendant/third-party defendant Pembrooke & Ives Inc. for an order dismissing the third-party claims of SBP New York, Inc. against Pembrooke for common-law indemnification. contractual indemnity, failure to procure insurance, and breach of contract is granted, and those claims are severed and dismissed (seq. 003); and it is further

ORDERED that defendant/third-party defendant Fresco Decorative Painting, Inc.'s motion is granted, and the complaint, any cross-claims or counter-claims, and the third third-party complaint against it are severed and dismissed (seq. 004); and it is further

ORDERED that the clerk is directed to enter judgment accordingly.



9/2/2025
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:		**CASE DISPOSED**		**NON-FINAL DISPOSITION**			
	X	**GRANTED**	**DENIED**	**GRANTED IN PART**		**OTHER**	
APPLICATION:		**SETTLE ORDER**		**SUBMIT ORDER**			
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**		**FIDUCIARY APPOINTMENT**		**REFERENCE**	