Villavicencio v West 97th St. Realty Corp.
2025 NY Slip Op 33256(U)
August 28, 2025
Supreme Court, New York County
Docket Number: Index No. 155147/2020
Judge: David B. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

---X

VILLAVICENCIO, ANDREA

Plaintiff,

- v -

WEST 97TH STREET REALTY CORP.

Defendant.

---X

INDEX NO. 155147/2020

MOTION DATE 08/27/2024

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

WEST 97TH STREET REALTY CORP., STELLAR MANAGEMENT

Plaintiffs,

-against-

RCD RESTORATIONS, INC

Defendant.

---X

Third-Party
Index No. 595401/2021

The following e-filed documents, listed by NYSCEF document number (Motion 003) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 105, 106, 107, 108, 109, 110

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

Defendants/third-party plaintiffs West 97th Street Realty Corp. (Owner) and MEL Management Corp. d/b/a Stellar Management (Stellar) (Owner/Stellar) move for summary judgment, pursuant to CPLR 3212, on their third-party claim against third-party defendant RCD Restorations, Inc. (RCD) for contractual defense and indemnification, together with reimbursement of defense costs. RCD opposes.

BACKGROUND FACTS

This action arises out of a construction-related injury sustained by plaintiff on February 26, 2020, after she fell through a plank of a temporary bridge scaffold while performing façade work at 50 West 97th Street in Manhattan (the premises) (NYSCEF 85).

In July 2016, Owner and its managing agent, Stellar, retained RCD as a general contractor to perform façade repairs at the premises. RCD hired Arsenal Scaffold to erect a building-wide sidewalk-bridge platform, above which its crew used a suspended two-point scaffold for all façade access (*id*).

On June 29, 2020, plaintiff sued Owner and Stellar for violations of the Labor Law and common-law negligence (*id*). After answering, the defendants commenced a third-party action against RCD on May 3, 2021, for contractual indemnification and defense costs (NYSCEF 88).

Plaintiff's Deposition Testimony (NYSCEF 92)

Plaintiff testified that she worked on the façade repair project from 2019 through February 2020 as a "mechanical helper," earning $20 per hour in cash and taking daily direction from RCD's foreman, Mario Velasquez. Velasquez led daily safety meetings and assigned all work tasks. On the day of the accident, plaintiff was demolishing balcony brick using a jackhammer when it stopped working. She then descended the suspended scaffold via an electric hoist to retrieve a replacement tool from the ground-level platform below.

The sidewalk bridge spanned the entire front of the building and consisted of OSHA planks nailed together, which workers could stand on. It was about 10 to 15 feet above the sidewalk and nearly covered its full width. Plaintiff described stepping off the scaffold onto the platform and walking across the bridge when, about halfway across, her right foot fell through a

plank, causing her to fall backwards onto the bridge deck. She testified that she struck her head, back, elbows, and knees, and may have briefly lost consciousness. Her hardhat cracked during the fall.

Plaintiff denied seeing any RCD signage on the bridge and testified that she did not know who built or maintained it.

RCD Affirmation (NYSCEF 108)

Joseph Caggiano, RCD's president, affirms that RCD acted as the general contractor solely for the building's façade work. RCD employs only office staff and "does not have any employees who act as laborers," and therefore hires subcontractors to perform all on-site labor, with those subcontractors "wholly and solely responsible" for hiring their workers and for job-site safety.

For this project, RCD retained Regalado Contracting, Inc. to supply labor, and Arsenal Scaffold, Inc. to "build and maintain the temporary bridge on which the Plaintiff claims to have fallen." RCD "had nothing to do with the hiring of the Plaintiff, did not set any work schedules for the Plaintiff, did not pay [her], did not supervise [her] work, and no representative ever had any contact with the Plaintiff"; any foremen or supervisors on the job were provided by the subcontractors, not by RCD.

The Contractor Agreement (NYSCEF 89)

The Contractor Agreement between Owner/Stellar and RCD requires RCD to maintain, at its own expense, CGL insurance, plus statutory workers' compensation coverage, for the life of the project, naming the owner and all of its affiliates as additional insureds.

Section 7.2 of the Contractor Agreement has an indemnity clause that states, "to the fullest extent permitted by law," RCD must indemnify, defend, and hold harmless the owner, its

parent, subsidiaries, affiliates, and all of their officers, employees, agents, successors, and assigns against every loss, claim, or expense— including attorneys' and experts' fees—"caused by reason of or as a result of" the performance of the work, except to the extent a claim is attributable to the indemnitee's own negligence.

Section 7.2.1 extends that duty to claims brought by "any employee of CONTRACTOR or a subcontractor, or anyone for whose acts they may be liable."

The contract defines the "Work" as "Local Law 11 Related Façade Repair" at the premises, including erection of the sidewalk bridge and suspended scaffold, brick demolition and replacement, repointing and caulking, shelf-angle and balcony concrete repairs, and associated tenant-protection tasks.

PARTY CONTENTIONS

Owner/Stellar contend that the Contractor Agreement obligates RCD to "indemnify, protect, and defend" them against any claim arising from the façade-repair project. Because plaintiff, an RCD employee, was injured while performing façade repair, and neither Owner nor Stellar exercised any on-site supervision, they maintain that the indemnity clause therefore applies. Accordingly, they seek summary judgment for full indemnification and reimbursement of all attorneys' fees.

RCD contends that the motion is premature because Owner/Stellar did not submit an affidavit from any witness with personal knowledge affirmatively stating that they were free of negligence. RCD further argues it procured the required insurance and that any coverage gap is the result of the carrier's disclaimer, not its own wrongdoing. It also asserts that the indemnity clause covers only claims "caused by" work RCD itself performed, not those traceable to independent subcontractors. RCD denies employing or supervising plaintiff, insisting factual

disputes persist over who controlled her work and whether the temporary bridge erected by Arsenal Scaffold fell within RCD's contractual scope. Finally, RCD claims no direct demand for a defense was served on it, and its liability has yet to be adjudicated, so any duty to defend or indemnify is unripe.

Owner/Stellar maintain that the motion is ripe because RCD has not pointed to any unproduced evidence uniquely within Owner/Stellar's control. They further argue that the indemnity clause expressly covers claims by employees of subcontractors, triggering RCD's duty whether plaintiff worked directly for RCD or for one of its subcontractors.

LEGAL CONCLUSIONS AND ANALYSIS

"On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party' " (*Vega v Restani Constr. Corp*., 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The "movant bears the heavy burden of establishing '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' " (*Deleon v New York City Sanitation Dept*., 25 NY3d 1102, 1106 [2015], quoting *Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" *(Alvarez*, 68 NY2d, at 324). 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* 68 NY2d, at 320, 324; *Zuckerman v City of New York,* 49 NY2d 557 [1980]).

"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'" (*Drzewinski v Atl. Scaffold & Ladder Co., Inc.,* 70 NY2d 774 [1987]).

Here, Owner/Stellar must show that, pursuant to the Contractor Agreement, the claim was "caused by reason of or as a result of the performance of the Work" and that no triable issue exists as to their negligence. It is undisputed that plaintiff's injury arose from the performance of the work, as she fell through a sidewalk-bridge plank while retrieving a jackhammer needed for performing the façade repairs. Therefore, the inquiry is whether Owner/Stellar has demonstrated, as a matter of law, that it is free from negligence.

As plaintiff's claims against Owner/Stellar for violations of Labor Law 240(1) and 241(6) would render them only vicariously liable, the only question is whether they can be held liable for a violation of Labor Law 200 or for common-law negligence (*Travalja v 135 W. 52nd St. Owner LLC*, 232 AD3d 503 [1st Dept 2024]; *Rogers v Peter Scalamandre & Sons, Inc*., 231 AD3d 1174 [2d Dept 2024]).

<u>*Common-Law Negligence and Labor Law § 200 Claims*</u>

Labor Law section 200 "codifie[s] the common-law duty imposed upon an owner or general contractor to provide construction site work[ers] with a safe place to work." (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981] [citation omitted]). There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

> Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means [means and methods] of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work.

(*Cappabianca v Skanska USA Bldg., Inc*., 99 AD3d 139, 144 [1st Dept 2012] [internal citations omitted]; *see also Toussaint* at 94 [to recover under Labor Law § 200 "a plaintiff must show that an owner or general contractor exercised some supervisory control over the operation"]).

Here, the loose plank that caused the accident was "not a defect inherent in the property," but, rather, was part of the scaffolding which was erected as a result of the means and methods of work (*Dalanna v City of New York,* 308 AD2d 400, 400 [1st Dept 2003] ["the protruding bolt [that the plaintiff tripped over] was not a defect inherent in the property, but rather was created by the manner in which plaintiffs employer performed its work"]; *Maddox v Tishman Constr. Corp.,* 138 AD3d 646, 646 [1st Dept 2016] ["the double-stacking of the sand and cement bags at the work site was not an inherently dangerous condition of the work site but a result of the means and methods of the injury-producing work"]).

Plaintiff testified at her deposition that RCD's foreman gave her instructions regarding the means and methods of her work, and that she never encountered anyone who represented themselves to be the owner of the building. Furthermore, RCD's president stated that he subcontracted out all roles related to the façade repair job, further demonstrating Owner/Stellar did not provide any supervision on the site.

Accordingly, Owner/Stellar have met its burden of showing that it cannot be held liable for plaintiff's Labor Law 200 and common-law negligence claims, and RCD has failed to raise a triable issue of fact as to whether Owner/Stellar exercised supervisory control over plaintiff's

work or the façade repair project (see *Torres-Quito v 1711 LLC*, 227 AD3d 113, 118 [1st Dept 2024]).

Owner/Stellar have thus demonstrated that they are entitled to contractual indemnity from RCD (*Travalja*, 232 AD3d at 505).

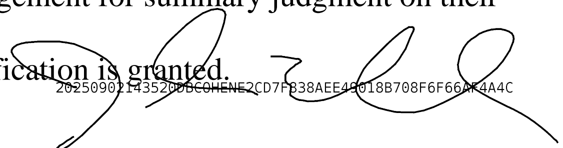
<u>*Duty to defend*</u>

RCD argues that no direct tender of the defense was made on it, and that its duty to defend or indemnify is unripe because its liability has not yet been adjudicated. A duty to defend is triggered by the allegations contained in the underlying complaint" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]). Therefore, RCD was placed on notice that it may have a duty to defend when Owner/Stellar asserted a third-party-claim for contractual indemnification.

Moreover, a contractor's duty to defend does not arise until its obligation to indemnify is established (*ACC Constr. Corp. v Merchants Mut. Ins. Co.*, 200 AD3d 551 [1st Dept 2021]). As Owner/Stellar established that RCD has a duty to indemnify them, RCD also has a duty to defend them.

Accordingly, it is hereby

ORDERED that the motion of defendants/third-party plaintiffs West 97th Street Realty Corp. and MEL Management Corp. d/b/a Stellar Management for summary judgment on their third-party claims for contractual defense and indemnification is granted.



8/28/2025			
DATE			DAVID B. COHEN, J.S.C.

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