

J&D II Realty LLC v 3417 KH Partners, LLC
2025 NY Slip Op 33512(U)
September 12, 2025
Supreme Court, Kings County
Docket Number: Index No. 512600/2017
Judge: Carolyn E. Wade
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At an IAS Term, Part 84 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 12th day of September, 2025

PRESENT: HON. CAROLYN E. WADE, JSC

-----X
J & D II REALTY LLC,

Plaintiff,

Index: 512600/2017

-against-

DECISION and ORDER

3417 KH PARTNERS, LLC,
VOLMAR CONSTRUCTION INC.,
BOHEMIA CONCRETE CORP.,
GEI CONSULTANTS, INC., P.C.,
METRIC CONSULTING & INSPECTION, INC.,
SAMI HAJJAR, P.E.,
AVITZ ENGINEERING, PLLC,
STRUCTURAL CONSULTING SERVICES, P.C.,
THE MCGUIRE GROUP ARCHITECTS, P.C.,

Motion Seq. 9

Defendants,

-----X
BOHEMIA CONCRETE CORP.,

Third-Party Plaintiff,

-against-

RGB GROUP, INC.,
METRIC CONSULTING AND INSPECTION,
and VIBRANALYSIS, INC.

Third-Party Defendants,
-----X

Defendant, VOLMAR CONSTRUCTION INC. (“Volmar”), moves (Mot. Seq. 9) for an Order, pursuant to CPLR § 3212, granting Summary Judgment on their First, Second, and Third cross-claims against Defendant/Third-Party Plaintiff, BOHEMIA CONCRETE CORP.

("Bohemia"), and directing that Volmar is entitled to contractual indemnity, common law indemnity, and, in the alternative, contribution from Bohemia.

Upon a reading of the foregoing papers, and all other papers and proceedings in this action, and after oral argument, Mot. Seq. 9 is decided as follows:

STATEMENT OF FACTS

The underlying action was commenced by Plaintiff, J & D II REALTY LLC, against Defendants 3417 KH Partners, LLC ("3417 KH") and Volmar Construction Inc. ("Volmar"), as well as Defendant/Third-Party Plaintiff Bohemia Concrete Corp. ("Bohemia") for property damage to Plaintiff's building, located at 3405 Kings Highway, Brooklyn, New York. Such property damage was allegedly caused by Defendants' construction project on the adjoining premises, located at 3417 Kings Highway, Brooklyn, New York.

Plaintiff is the title owner of 3405 Kings Highway, Brooklyn, New York. Defendant, 3417 KH, owned the adjoining building located at 3417 Kings Highway, Brooklyn, New York. Volmar was hired as a general contractor to construct a medical office building, located at 3417 Kings Highway, Brooklyn, New York (hereinafter referred to as "construction site.") As part of their duties as a general contractor, Volmar retained Bohemia, as subcontractor, to perform, *inter alia*, excavation work at the construction site.

Defendant Volmar alleges that the subcontract with Bohemia, which was fully executed, clearly and unambiguously provided that Bohemia agreed to indemnify, defend, and hold harmless Volmar from claims, suits, damages, etc., in connection with, or as a result or consequence of, the performance of the work of Bohemia.

ANALYSIS

The proponent of a Summary Judgment motion must make 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. NYU Medical Center*, 64 NY2d 851 (1985). The burden then shifts to the motion's opponent to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact. *Id.* When there are no issues of material fact, the motion for Summary Judgment must be granted. *Id.*

Article 4.6 of the Subcontract "Indemnification" mandates that:

"To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6"

Article 13.1 of the Subcontract "Insurance and Bonds" mandates that:

"Contractor, Owner and all other parties who Contractor is required to name as additional insureds by any contract, shall be included as insureds on the CGL, using ISO Additional Insured Endorsement CG20 10 (11 85) or a combination of CG20 10 (10 01) & CG20 37 (10 01), or an endorsement providing equivalent or broader coverage to the additional insureds. The coverage provided to the additional insureds under the policy issued to the Subcontractor shall be at least as broad as the coverage provided to the

Subcontractor under the policy. Coverage for the additional insureds shall apply as primary and non-contributing insurance before any other insurance or self-insurance, including any deductible, maintained by, or provided to, the additional insureds.”

“The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability: (1) Commercial General Liability (CGL) coverage with limits of Insurance of not less than \$2,000,000 each occurrence and \$4,000,000 Annual Aggregate ... (2) Automobile Liability (a) Business Auto Liability with limits of at least \$1,000,000 each accident ... (3) Commercial Umbrella (a) Umbrella limits must be at least \$5,000,000.”

“Subcontractor shall maintain CGL coverage for itself and all additional insureds for the duration of the project and maintain Completed Operations coverage for itself and each additional insured for at least 3 years after completion of the Work.”

“Prior to commencing the work, the Subcontractor shall submit to the Contractor a certificate of insurance, a copy of the Additional Insured Endorsement and a copy of the applicable Other Insurance clause that is part of the Subcontractor’s Commercial General Liability Policy.”

The separately executed Rider 1 “Indemnification for NY” mandates that:

“To the fullest extent permitted by law, the Subcontractor agrees to indemnify, defend and hold harmless the Contractor as well as all parties listed below as additional insureds, their officers, directors, agents, employees and partners (hereafter collectively “Indemnitees”) from any and all claims, suits, damages, liabilities, professional fees, including attorneys’ fees, costs, court costs, expenses and disbursements related to death, personal injuries or property damage(including loss of use thereof) brought against any of the Indemnitees by any person or entity, arising out of or in connection with or as a result or consequence of the performance of the Work of the Subcontractor, as well as any additional work, extra work or add-on work, whether or not caused in whole or in part by the Subcontractor or any person or entity employed, either directly or indirectly by the Subcontractor including any subcontractors thereof and their employees.”

“The Subcontractor shall cause all subcontract agreements it enters into to include this indemnification clause so as to ensure that Contractor and all Indemnitees hereunder shall have the same

protection from sub-subcontractors as is afforded by the Subcontractor.”

It is well-settled that, “[a] party is entitled to full contractual indemnification provided that the intention to indemnify can clearly be implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.” See *Drzewinski v. Atlantic Scaffold & Ladder Co., Inc.*, 70 N.Y.2d 774, quoting *Margolin v. New York Life Insurance*, 32 N.Y.2d 149 (1973). A contract that provides for indemnification will be enforced so long as the intent to assume such role is sufficiently clear and unambiguous. See *Suazo v. Maple Ridge Associates, L.L.C.*, 85 A.D.3d 459 (1st Dept. 2011).

Acceptance of an indemnity provision in a contract may be manifested by conduct or acquiescence. See *Joseph v. Atlantic Basin Iron Works*, 132 N.Y.S.2d 671 (1954), judgment aff’d, 285 A.D. 1147 (1st Dept. 1955) (the performance of work and furnishing of materials, and a demand for payment in accordance with the terms of purchase orders for work, constituted an acceptance of the indemnity provisions contained in the purchase orders). Indeed, New York courts have held that a contract of indemnity is binding on the indemnitor where there is no fraudulent concealment or where the indemnitor has knowledge of the facts. See *D’Alessandra v. Manufacturers Cas. Ins. Co.*, 106 N.Y.S.2d 561 (1951); *Vasiliades v. Lehrer McGovern*, 3 A.D.3d 400 (1st Dept 2004).

Here, the Court finds that Volmar made a prima facie showing of their entitlement to Summary Judgment on its claims for defense and indemnity against Bohemia¹. The clear,

¹ It should be noted that Volmar is not seeking indemnification for its own alleged negligence. Volmar is simply entitled to contractual indemnity based on Plaintiff’s claims that trigger the contractual indemnity provisions of the subcontract. See *In Dutton v. Builders*, 296 A.D.2d 321 (1st Dept. 2002) (indemnification clause provided partial indemnification of general contractor for personal injuries partially caused by its negligence was not contrary to N.Y. Gen. Oblig. Law § 5-322.1 and was therefore enforceable; the general contractor was to be indemnified regardless of whether it was partially negligent).

unambiguous, and enforceable indemnification provisions contained in the subcontract between Volmar and Bohemia expressly provide that Bohemia is required to defend, indemnify, and hold harmless Volmar, as against claims made by Plaintiff (*i.e.*, the purported damage to Plaintiff's property, as a result of any excavation, underpinning, and dewatering performed by Bohemia and/or its subcontractors and consultants at the construction site).

Accordingly, based upon the foregoing, it is hereby

ORDERED that Volmar's motion for Summary Judgment on their first, second, and third cross-claims against Bohemia is **GRANTED TO THE EXTENT** that Volmar is entitled to contractual indemnity (third cross-claim) and contribution (first cross-claim) from Bohemia. The portion of Volmar's motion seeking common law indemnification (second cross-claim) from Bohemia is **DENIED**.

This constitutes the Decision and Order of the Court.

ENTER:



Honorable Carolyn E. Wade, J.S.C.

**Hon. Carolyn E. Wade
Supreme Court Justice**

KINGS COUNTY CLERK
FILED
2025 SEP 18 A 9:32