

<b>Port Auth. of N.Y. &amp; N.J. v Guardian Serv. Indus., Inc</b>
2025 NY Slip Op 33533(U)
September 22, 2025
Supreme Court, New York County
Docket Number: Index No. 101710/2016
Judge: Mary V. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 101710/2016

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

MOTION DATE 11/26/2024

Plaintiff,

MOTION SEQ. NO. 004

- v -

GUARDIAN SERVICE INDUSTRIES, INC, MORETRENCH AMERICAN, NICHOLSON/E.E. CRUZ, LLC, PHOENIX CONSTRUCTORS, JOINT VENTURE, FLUOR ENTERPRISES, INC., SLATTERY SKANSKA, INC. D/B/A SKANSKA USA CIVIL NORTHEAST, INC., BOVIS LEND LEASE LMB, INC. D/B/A LEND LEASE (US) CONSTRUCTION LMB INC., GRANITE CONSTRUCTION NORTHEAST INC.

DECISION + ORDER ON MOTION

Defendant.

-----X

GUARDIAN SERVICE INDUSTRIES, INC.

Third-Party Plaintiff

- v -

MORETRENCH AMERICAN, CORPORATION

Third-Party Defendant

-----X

GUARDIAN SERVICE INDUSTRIES, INC.

Second Third-Party Plaintiff

- v -

NICHOLSON/E.E. CRUZ, LLC

Second Third-Party Defendant

-----X

MORETRENCH AMERICAN CORPORATION

Third Third-Party Plaintiff

- v -

PHOENIX CONSTRUCTORS, JOINT VENTURE, FLUOR ENTERPRISES, INC., SLATTERY SKANSKA, INC. d/b/a

SKANSKA USA CIVIL NORTHEAST, INC., BOVIS LEND LEASE  
LMB, INC. d/b/a LEND LEASE (US) CONSTRUCTION LB INC.  
and GRANITE CONSTRUCTION NORTHEAST INC.,

Third Third-Party Defendants

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 211, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, and after a final submission date of June 16, 2025, Plaintiff Port Authority of New York and New Jersey's ("Port Authority") motion for summary judgment dismissing all negligence claims and crossclaims asserted against it, and seeking summary judgment on its contractual indemnification and breach of contract for failure to procure insurance claims against Defendant/Third-Party Plaintiff Guardian Service Industries Inc. ("Guardian") is granted in part and denied in part. Guardian's cross motion for summary judgment dismissing Port Authority's Complaint is denied.

### **I. Background**

In the aftermath of the September 11, 2001, terrorist attacks, Port Authority was tasked with rebuilding the World Trade Center where the Twin Towers once stood. Port Authority retained Phoenix Constructors ("Phoenix") to serve as a general contractor for the reconstruction project. Phoenix Constructors subcontracted steel erection work to Skanska Mechanical Structural ("Skanska"), who employed a construction worker named Robert Chamberlin ("Chamberlin").

On June 22, 2007, Chamberlin was injured working at the construction site when he fell from a wet steel beam. Chamberlin's work area was wet due to water infiltration issues at the worksite – he testified water was pouring down a wall like a "waterfall." Some of that water was tracked onto the steel beams and caused him to slip and fall. Chamberlin sued Port Authority and

Phoenix for personal injuries allegedly sustained due to violations of the Labor Law (*see Chamberlin v Port Authority of New York and New Jersey, et al.*, Index No 112963/2007). In a written Decision and Order dated March 4, 2010, Hon. Carol Robinson Edmead granted Chamberlin summary judgment on his Labor Law § 240(1) claim against Port Authority and Phoenix. Justice Edmead also granted Chamberlin summary judgment against Port Authority and Phoenix for violations of Labor Law § 241(6) predicated on violations of Industrial Code §§ 23-8.1(f)(1)(iv), 23-8.1(f)(2)(i), and 23-1.16. Port Authority then commenced a third-party action against Guardian, who was contracted to perform janitorial services at the World Trade Center construction site. Guardian then started a second third-party complaint against Moretrench, who Guardian subcontracted to perform “dewatering” at the construction site.

Eventually, Port Authority settled Chamberlin’s lawsuit for \$3,450,000, and the third-party complaints were severed from Chamberlin’s personal injury action, resulting in the case at bar. Now, Port Authority seeks summary judgment dismissing all negligence claims and crossclaims asserted against it and seeking summary judgment on its contractual indemnification and breach of contract for failure to procure insurance against Guardian. In turn, Guardian cross moves for summary judgment dismissing Port Authority’s complaint. Port Authority’s motion is granted in part and denied in part, while Guardian’s cross motion is denied.

## II. Discussion

### A. Standard

“Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party’s “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-

moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial (*See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

### **B. Port Authority’s Motion**

Port Authority’s motion for summary judgment is granted in part and denied in part. Port Authority’s motion to dismiss all negligence cross claims asserted against it is denied. Port Authority argues that it cannot be held liable for negligence related to Chamberlin’s accident because it did not control the means or methods of his work, nor did it create or have notice of any specific dangerous condition.

“Where a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises” (*see Villanueva v 114 Fifth Avenue Associates LLC*, 162 AD3d 404, 406 [1st Dept 2018]). This case stems from a defect on the premises, namely a recurring condition of excessive water accumulation. The First Department has ruled in analogous situations that injuries arising from the presence of water on construction sites can give rise to Labor Law § 200 and common law negligence liability under a “dangerous condition” theory (*see Bradey v NYU Langone Hospitals*, 223 AD3d 509, 510 [1st Dept 2024]; *Lindsay v CG Maiden Member, LLC*, 213 AD3d 604, 605 [1st Dept 2023]; *Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 808-809 [1st Dept 2010]). Therefore, unless Port Authority can establish affirmatively and definitively it had no notice of the presence of water in Chamberlin’s work area, it is not entitled to summary judgment dismissing these claims.

However, Port Authority's argument that it lacked notice is insufficient given Port Authority's own witness admitting to widespread issues of excess water. Thomas Scarcella, a Port Authority engineer, testified he knew of complaints about water pooling on the project in 2007, the year Chamberlin was injured, and testified the presence of water throughout the entire construction site "was a pretty consistent problem for us" (*see* NYSCEF Doc. 245 at 67). He further recalled the pooling water being "a big nuisance" since "it would cause mosquitos. It would smell, [and cause] mold" and when asked what other issues pooling water caused, he mentioned "rats" (*id.* at 69). This is corroborated by Chamberlin's deposition testimony that the construction site was "having a lot of flooding problems. There was just water pouring down the walls...it was getting all over everything. It was all over the whole surface we were working on" (NYSCEF Doc. 194 at 91). Given this testimony, the Court cannot summarily rule Port Authority lacked notice of a dangerous water condition in Chamberlin's work area. Therefore, Port Authority's motion for summary judgment dismissing all negligence crossclaims asserted against it is denied.

Port Authority's motion for summary judgment on its contractual indemnification claim against Guardian is granted conditioned on an apportionment of negligence amongst the various parties at the time of trial. The indemnification clause, found at § 20 of the parties' "Standard Contract Terms and Conditions" (NYSCEF Doc. 247 at p. 324), provides:

"[t]o the extent permitted by law, [Guardian] shall indemnify and hold harmless the Port Authority...from and against all claims and demands, just or unjust, of third persons...arising out of or in any way connected or alleged to arise out of or alleged to be in any way connected with the Contract and all other services and activities of the Contractor under this Contract and for all expenses incurred by it and by them in the defense, settlement or satisfaction thereof, including without limitation thereof, claims and demands for death, for personal injury...whether they arise from the acts or omissions of [Guardian], of the Port Authority, of third persons, or from the acts of God or the public enemy...".

It is undisputed that Guardian was contracted to perform, amongst other things, “dewatering” at the construction site and to maintain “dewatering” systems, and that Guardian subcontracted some of that “dewatering” work to Moretrench American Corporation (“Moretrench”) (NYSCEF Doc. 201 at 26-27). A Guardian witness testified it was responsible for “dewatering” in a location of the worksite called the “west bathtub” while Phoenix was responsible for “dewatering” in the “east bathtub” (NYSCEF Doc. 201 at 40). Another Guardian witness, Michael Pecoraro, Jr., testified water pooling issues in the “west bathtub” would be relayed to Guardian and Port Authority, and Guardian would rely on Moretrench to remove the water (NYSCEF Doc. 205 at 76-78). According to Skanska, Chamberlin’s employer, he was injured while working in the “west bathtub” (NYSCEF Doc. 244 at 251-52). Thus, there is no dispute that Chamberlin was injured due to the presence of water in a location of the construction site where Guardian was contracted to perform “dewatering” services. Therefore, the indemnification clause is triggered.

Guardian’s argument that the indemnification clause is unenforceable pursuant to General Obligations Law § 5-322.1 is without merit as the clause contains the requisite savings language “to the extent permitted by law” (*see Williams v City of New York*, 74 AD3d 479 [1st Dept 2010]; *Bennett v Bank of Montreal*, 161 AD2d 158, 160 [1st Dept 1990]). Guardian also agreed to indemnify Port Authority for the acts and omissions of third parties, i.e., its subcontractor, Moretrench. Therefore, Guardian’s argument that it does not owe indemnity for Moretrench’s negligence is incorrect. However, as there remain open questions of fact as to the apportionment of negligence between the various parties, including Port Authority, and Port Authority may not be indemnified for its own negligence (*see* General Obligations Law § 5-322.1), Port Authority is granted contractual indemnification conditioned on an apportionment of negligence amongst the

parties at the time of trial (*Gervasi v FSP 787 Seventh LLC*, 228 AD3d 459, 461 [1st Dept 2024]; *Winkler v Halmar International, LLC*, 206 AD3d 458, 463 [1st Dept 2022]).

Port Authority's motion for summary judgment on its breach of contract for failure to procure insurance claim is denied. A party moving for summary judgment for failure to procure insurance must show correspondence from the insurer of the party against whom summary judgment is sought indicating that the moving party was not named as an insured on any policies issued (*Dorset v 285 Madison Owner LLC*, 214 AD3d 402 [1st Dept 2023]). Port Authority has not met its burden. It failed to annex any of the applicable insurance policies on its motion in chief, nor has it submitted communications from insurers declining coverage.<sup>1</sup>

### C. Guardian's Cross motion

Guardian's cross motion for summary judgment dismissing Port Authority's Complaint asserted against it is denied. The Court has already determined Guardian owes Port Authority contractual indemnification conditioned on an apportionment of negligence amongst the parties at the time of trial, therefore Guardian's motion to the extent it seeks dismissal of the contractual indemnification claim asserted against it is denied.

Guardian's motion for summary judgment dismissing Port Authority's claim for breach of contract for failure to procure insurance is likewise denied. Although Guardian produced an insurance policy from Liberty Insurance Underwriters Inc. which included Port Authority, as an "owner" as an additional insured, the policy produced contains an "other insurance" clause which makes the policy excess over other valid and collectible insurance rather than primary as required

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<sup>1</sup> In opposition, Mooretrench asked the Court to search the record and grant it summary judgment on its cross claim against Port Authority. However, Mooretrench never moved for summary judgment, or filed any cross motion, therefore the Court declines to entertain this request (*see Fifth Partners LLC v Foley*, 227 AD3d 543 [1st Dept 2024]; *Onofre v 243 Riverside Drive Corp.*, 232 AD3d 443, 443-444 [1st Dept 2024]). If the Court were to entertain this request, it would be denied, as there are issues of fact as to Mooretrench's own negligence in failing to adequately remove water from the construction site.

by Guardian’s contract with Port Authority (see NYSCEF Doc. 249). The second policy produced by Guardian, issued by National Casualty Company, is an umbrella policy that only applies as excess to underlying insurance. Guardian also has not included any correspondence from the insurer(s) indicating why defense and indemnification has not been provided to Port Authority in accordance with the contract between Guardian and Port Authority. Thus, the Court cannot summarily rule that Guardian has met its contractual obligations to procure insurance for the benefit of Port Authority. Therefore, Guardian’s motion for summary judgment is denied. The Court has considered the parties remaining contentions and finds them to be unavailing.

Accordingly, it is hereby,

ORDERED that Port Authority’s motion for summary judgment is granted solely to the extent that it is granted summary judgment on its contractual indemnification crossclaim against Guardian, conditioned on an apportionment of negligence amongst the parties at the time of trial, and the remainder of Port Authority’s motion is denied; and it is further

ORDERED that Guardian’s cross motion for summary judgment is denied; and it is further

ORDERED that within ten days of entry, counsel for Port Authority shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

9/22/2025  
DATE

Mary V Rosado JSC  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<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