

Cox v Forest Hills MHA Hous. Dev. Fund Corp.

2025 NY Slip Op 35288(U)

June 25, 2025

Supreme Court, Queens County

Docket Number: Index No. 723471/20

Judge: Timothy J. Dufficy

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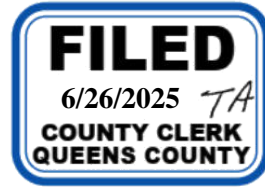
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35



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EARL COX,

Plaintiff,

Index No.: 723471/20

-against-

Mot. Date: 11/26/24

Mot. Seq. 7

**FOREST HILLS MHA HOUSING
DEVELOPMENT FUND CORPORATION,**

Defendants.

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**FOREST HILLS MHA HOUSING
DEVELOPMENT FUND CORPORATION,**

Third-Party Plaintiff,

-against-

ATLAS WELDING & BOILER REPAIR, INC.,

Third-Party Defendant.

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The following papers were read on this motion by defendant/third-party plaintiff Atlas Welding & Boiler Repair, Inc. (Atlas), for an order, pursuant to CPLR 3212, granting third-party defendant Atlas summary judgment dismissing the third-party Complaint asserted against it by Forest Hills MHA Housing Development Fund Corporation.

**PAPERS
NUMBERED**

Notice of Motion-Affidavits-Exhibits	EF 130-158
Answering Affidavits-Exhibits.....	EF 159-161
Replying Affidavits.....	EF 170

Upon the foregoing papers, it is ordered that the motion defendant/third-party plaintiff Atlas is decided, as follows.

This is an action for personal injuries, arising from a workplace accident, that occurred on August 18, 2020. Plaintiff, an employee of third-party defendant Atlas, alleges that he was injured, on that date, when he fell while descending a ladder affixed to a boiler at premises owned by defendant/third-party plaintiff Forest Hills MHA Housing Development Fund Corporation (Forest Hills).

It is undisputed that Atlas had a maintenance agreement with Forest Hills, pursuant to which Atlas was to perform boiler and hot water maintenance, including monthly maintenance and service calls. Plaintiff was making a service call at the time of the accident.

The court record reflects that the action was commenced against Forest Hills, on December 4, 2020, by the filing of a Summons and Complaint. Therein, the plaintiff alleges that he was injured when he fell from an oil tank ladder, at the premises, and that Forest Hills was negligent in maintaining the premises. Issue was joined by Forest Hills by service of an Answer, on January 5, 2021. Over two (2) years later, on May 11, 2023, Forest Hills commenced a third-party action against Atlas by the filing and of a Third-Party Summons and Complaint. The Third-Party Complaint asserts two (2) causes of action: for contractual indemnification and failure to procure insurance. Atlas filed an Answer to the Third-Party Complaint, on August 22, 2023.

Atlas now brings the instant motion for summary judgment dismissing the third-party action. The motion is opposed by Forest Hills.

As an initial matter, any arguments that the motion is untimely are without merit. The Court, in its discretion, finds that, under the circumstances of this case, Atlas has demonstrated “good cause” for making the motion beyond the one hundred and twenty (120) day deadline, after the filing of the Note of Issue. Additionally, at the time that this motion was made, Atlas had already made a motion to extend its time to move for summary judgment (Motion Sequence No. 5). In an Order, dated November 25, 2024, (NYSCEF Doc. No. 173), this Court granted the motion and extended the deadline for Atlas to move for summary judgment to March 29, 2025.

As reflected in the prior Order of this Court, dated June 23, 2025 (NYSCEF Doc. No. 181), which denied the motion for summary judgement by Forest Hills, the record reflects that Forest Hills owned the premises, located at 108-53 62nd Drive, in Queens County. There were two boilers in the basement of the premises, known as Boiler

Number 1 and Boiler Number 2, both of which had ladders affixed to them. On the date of the accident, the plaintiff was descending from the ladder affixed to Boiler Number 2. Plaintiff testified that, on the date of the accident, he was at the premises for the purpose of performing a monthly inspection and a service call, because Boiler Number 2 was not working. Before the accident, he performed work on the boiler, which required him to ascend and descend the ladder three times. As he was descending the ladder for the fourth time, he fell, sustaining injuries. He had taken approximately six or seven steps down the ladder affixed to the boiler when he fell, sustaining injuries.

Here, in support of its own motion, Atlas submits, among other things: the pleadings; the deposition transcript of the plaintiff; the deposition transcript of Gary Thomas (Thomas) of Forest Hills; the plaintiff's bill of particulars and supplemental bill of particulars; an affidavit of Donald Berger (Berger) of Atlas; a copy of the maintenance agreement; an insurance policy declaration page; and, a copy of a certificate of insurance.

At his deposition, the plaintiff testified that, on the date of the accident, he was employed by Atlas as a heating services mechanic. His duties included repairing boilers and burners. When he would arrive at work, he would be handed a paper which indicated the address and indicate that it was a service call. He testified that he would perform work at the subject premises if there was a service call and he also visited the subject premises to perform monthly servicing. Monthly inspections of the boilers consisted of checking the burners to inspect combustion and making sure the three low-water cutoffs safety devices were not cut off or disabled.

Plaintiff testified that he first went to 108-53 62nd Drive, in 2014. He visited the premises about eight times per year for monthly inspections and for service calls. There were two boilers in the basement of the premises. Plaintiff approximated that the boilers were installed, in 1978, based on the date code written on the tag. Both boilers had ladders affixed to them. Plaintiff testified that neither the ladders nor the boilers were modified at all from 2014 through the time of his accident.

On the date of the accident, the plaintiff went to the premises to perform a monthly inspection of the boiler and to perform service on boiler number 2, since it was not operating. His accident occurred when he was descending the ladder that was affixed to the boiler. The court record contains his affidavit where he affirms that two of the rungs on the ladder were "very close to the boiler, much closer than the others." He further

affirms that due to this condition, as he was descending the ladder, his foot “didn’t catch” the next step,” which caused him to fall from the ladder

Thomas testified that he is the property manager for the premises. The boilers were installed by the prior owner of the building.

Berger affirms that he has been the vice president of Atlas for approximately thirty (30) years. He was involved in the review and approval of the maintenance agreement between Forest Hills and Atlas, dated January 1, 2018. Pursuant to the agreement, Atlas agreed to perform boiler and hot water heater maintenance services, as well as perform monthly maintenance inspections and perform an annual summer “boiler overhaul” or boiler service for each boiler covered under the agreement. He affirms that Atlas did not install the subject boiler or the ladder that was affixed to it. He further affirms that Atlas was not required to perform inspections, maintenance, or repairs of the affixed ladder.

Additionally, pursuant to the maintenance agreement, Atlas was not required to perform any work with respect to the affixed ladder, and Atlas did not modify or change the affixed ladder.

Atlas also submits the report of a licensed professional engineer, Robert Fuchs, who affirms that he inspected the subject boiler and ladder, on August 24, 2021, at which time he took photographs and measurements. Fuchs states that his inspection revealed that there was inadequate horizontal clearance between the sixth and seventh rungs of the affixed ladder to the attached boiler. Specifically, the clearance of 4 ½ inches between the sixth rung and the boiler and the clearance of 4 3/8 inches between the seventh rung and the boiler was inadequate, as generally accepted industry standards require a minimum clearance of seven (7) inches. He opines that this inadequate clearance is a defective condition and creates a safety risk for workers descending the ladder, due to their natural downward momentum. Fuchs states that the inadequate clearance of the sixth and seventh rungs was hazardous condition and a proximate cause of the accident.

The maintenance agreement states, in pertinent part:

Management hereby retains Contractor to perform all boiler and hot water heater maintenance services, including but not limited to monthly maintenance and summer overhauls, described on the attached Exhibit "A" (the "Scope of Work").

Contractor agrees to inspect the boiler and hot water heater, where applicable, at least once each month and provide preventive maintenance services as set forth in the scope of work as needed at the time of monthly inspection and at such additional times as Management or Contractor may deem necessary.

Contractor agrees to complete a monthly inspection report on the forms ...

The agreement contains an indemnity clause which states:

The Contractor/Vendor agrees to indemnify and hold harmless the owner of the premises, ... its officers and employees, from and against all liability, claims, demands, damage, costs, and expenses (including attorney's fees) on account of injury to persons including death resulting therefrom and damage to property **arising out of the performance of this contract by the Contractor/Vendor**, employees and agents of the Contractor/Vendor or in conjunction with the Contractor's property, **except where such claims and demands arise out of the sole negligence of the above named parties**. The Contractor/Vendor shall, at his or its own expense, defend any and all action at law brought against the above named parties and shall pay all attorney fees and all other expenses. These conditions shall also apply to any sub-contracted operations. [emphasis added].

Finally, the maintenance agreement, contains an insurance procurement clause which requires Atlas to carry commercial general liability insurance, with a per occurrence limit for bodily injury and property damage of at least \$1 million, and that Atlas was to furnish a certificate of insurance naming Forest Hills as an additional insured.

A movant for summary judgment must make *prima facie* showing of entitlement to summary judgment as a matter of law through the submission of sufficient evidence to demonstrate the absence of any material issues of fact, and he or she must do so by tender of evidentiary proof in admissible form (*see Alvarez v Prospect Hosp.*, 68 NY2d 320

[1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once the movant has made the *prima facie* showing, the burden shifts to the opposing party to come forward with sufficient proof in admissible form to establish the existence of triable issue of fact (*Alvarez v Prospect Hosp.*, *supra*, 68 NY2d 320, 324).

"A party's right to contractual indemnification depends upon the specific language of the relevant contract" (*Gurewitz v City of New York*, 175 AD3d 658, 664 [2d Dept 2019]). A contractual indemnity provision "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hanna v Millazo*, 179 AD3d 907, 909 [2d Dept 2020] [internal quotations and citations omitted].)

To establish *prima facie* entitlement to summary judgment dismissing a claim for contractual indemnification, a moving party must show that it was not contractually obligated to indemnify the party asserting the indemnification claim (*see Assevero v Hamilton & Church Props., LLC*, 131 AD3d 553, 558 [2d Dept 2015]). This may be accomplished by showing that the indemnification clause at issue was not triggered or is otherwise inapplicable under the circumstances (*see Tolpa v One Astoria Sq., LLC*, 125 AD3d 755, 756 [2d Dept 2015]; *cf. Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 995-996 [2d Dept 2009].)

Here, strictly construing the indemnity clause, which states that indemnification is triggered by claims "arising out of the performance of the performance of this contract [by Atlas,]" Atlas established its *prima facie* entitlement to judgment as a matter of law dismissing the claim for contractual indemnification asserted against it (*see Hanna v Milazzo, supra*, 179 AD3d at 909). The evidence shows that this claim arises out of an allegedly defectively designed ladder that was owned, controlled and maintained by Forest Hills. It did not arise out of any actions by Atlas, which was solely responsible for maintaining and servicing the boiler and did not have any responsibilities regarding the ladder affixed to the boiler.

In opposition, Forest Hills fails to raise an issue of fact. The Labor Law construction site accident cases it relies upon are distinguishable, as in those cases, the plaintiff's employers were responsible for supplying the tools and equipment that caused the injuries to the plaintiff and/or those contracts contained much broader indemnification

clauses. Accordingly, the branch of the motion by Atlas to dismiss the third-party cause of action by Forest Hills for contractual indemnification is granted.

Finally, in regards to the cause of action for failure to procure insurance, Atlas has established, *prima facie*, that it obtained the insurance required by the maintenance agreement. Forest Hills fails to raise an issue of fact as that branch of the motion is unopposed.

Accordingly, it is

ORDERED that the branch of the motion for summary judgment by third-party defendant Atlas Welding & Boiler Repair, Inc (Atlas) dismissing the cause of action for contractual indemnification by defendant/third-party plaintiff Forest Hills MHA Housing Development Fund Corporation (Forest Hills) is granted; and it is further

ORDERED that the branch of the motion for summary judgment by third-party defendant Atlas for summary judgment dismissing the third-party cause of action by Forest Hills is granted; and it is further

ORDERED that the third-party action is dismissed, in its entirety; and it is further

ORDERED that any arguments or requests for relief not addressed herein have been considered by the Court and are denied.

Dated: June 25, 2025



TIMOTHY J. DUFFICY, J.S.C.

