

Clarke v 76 Eleventh Ave. Prop. Owner LLC

2026 NY Slip Op 30150(U)

January 14, 2026

Supreme Court, New York County

Docket Number: Index No. 158427/2021

Judge: David B. Cohen

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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

JAMAL CLARKE,

Plaintiff,

- v -

76 ELEVENTH AVENUE PROPERTY OWNER
LLC, OMNIBUILD CONSTRUCTION INC., NAF
CONSTRUCTION MANAGEMENT, LLC,

Defendants.

-----X

76 ELEVENTH AVENUE PROPERTY OWNER LLC,
OMNIBUILD CONSTRUCTION INC.

Plaintiffs,

-against-

EASTERN SECURITY CORPORATION

Defendant.

-----X

76 ELEVENTH AVENUE PROPERTY OWNER LLC,
OMNIBUILD CONSTRUCTION INC., NAF CONSTRUCTION
MANAGEMENT, LLC

Plaintiffs,

-against-

DHS FRACO LLC

Defendant.

-----X

NAF CONSTRUCTION MANAGEMENT, LLC

Plaintiff,

-against-

EASTERN SECURITY CORPORATION

INDEX NO. 158427/2021

MOTION DATE 03/26/2025

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595542/2022

Second Third-Party
Index No. 595290/2024

Third Third-Party
Index No. 595291/2024

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for DISMISS.

Third-party defendant Eastern Security Corporation (Eastern) moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the third third-party complaint of defendant NAF Construction Management, LLC (NAF), or, in the alternative, pursuant to CPLR 3212(b), for summary judgment. NAF opposes the motion.

I. PROCEDURAL BACKGROUND AND FACTS

This action arises from personal injuries allegedly sustained by plaintiff on September 28, 2020, at a construction site located at 76 Eleventh Avenue, New York, New York (the premises). Plaintiff commenced this action against defendant 76 Eleventh Avenue Property Owner LLC (the owner) and Omnibuild Construction Inc. (Omnibuild). NAF was later added as a defendant. At the time of the alleged accident, plaintiff was employed by Eastern, which provided site security at the premises pursuant to an agreement with Omnibuild. NAF became the construction manager for the project in or about May 2020 pursuant to a separate agreement with the owner. It is undisputed that there is no written contract between NAF and Eastern.

II. DISCUSSION

Party Contentions

Eastern argues that the third third-party complaint must be dismissed because NAF has no contractual relationship with Eastern and therefore cannot maintain claims for contractual indemnification, breach of contract, or failure to procure insurance. Eastern contends that the documentary evidence establishes that it provided site security pursuant to an agreement with Omnibuild, not NAF, and that there was no assignment, assumption, or other agreement

extending contractual obligations to NAF. It further argues that NAF's claims for common-law indemnification and contribution are barred by Workers' Compensation Law § 11 because Eastern was plaintiff's employer and plaintiff did not sustain a grave injury within the meaning of the statute. Eastern also maintains that dismissal is warranted notwithstanding any outstanding discovery, as NAF's claims are defeated as a matter of law.

In opposition, NAF argues that dismissal is premature and that discovery is necessary to determine the nature of Eastern's work at the premises and its relationship with NAF after NAF became construction manager. NAF contends that Eastern continued providing security services after NAF assumed its role and that factual issues exist as to whether Eastern's work was performed on NAF's behalf. NAF further argues that Eastern's conduct and course of dealing support its claims for indemnification and contribution and preclude dismissal at the pleading stage.

In reply, Eastern asserts that NAF's opposition relies on speculation and conclusory assertions and fails to identify any documentary evidence establishing contractual privity between the parties. Eastern reiterates that continued performance at the premises does not give rise to a contractual obligation running to NAF and that no discovery can cure the absence of a written agreement or overcome the statutory bar imposed by Workers' Compensation Law § 11.

Applicable Law

Under CPLR 3211(a)(1), dismissal is warranted where documentary evidence utterly refutes the pleading's factual allegations and conclusively establishes a defense as a matter of law (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). To qualify as "documentary," the evidence must be unambiguous, authentic, and essentially undeniable, such as contracts or other writings that, assuming their validity, themselves resolve the dispute (*Amsterdam Hosp. Group, LLC v*

Marshall-Alan Assoc., Inc., 120 AD3d 431, 432 [1st Dept 2014]). Where a pleading's factual allegations or legal conclusions are flatly contradicted by documentary evidence, they are not entitled to a presumption of truth (*Morgenthau & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 78 [1st Dept 2003]).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept the facts alleged as true, accord the pleader the benefit of every favorable inference, and determine only whether the facts alleged fit within any cognizable legal theory (*Leon*, 84 N.Y.2d at 87–88; *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151–152 [2002]). Dismissal is warranted where the pleading fails to allege facts supporting an essential element of the claim or where the alleged facts do not permit recovery as a matter of law (*Holder v Jacob*, 231 AD3d 78, 86 [1st Dept. 2024]; *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

A claim for contractual indemnification must be founded on a clear and unmistakable promise by one party to indemnify another (*Shah v 20 E. 64th St. LLC*, 230 AD3d 405, 410–411 [1st Dept 2024]; *Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274–275 [2007]). Such provisions are strictly construed, and a duty to indemnify will not be implied from silence or ambiguity (*Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491–492 [1989]). In the absence of contractual privity, assignment, or a written agreement containing an indemnification provision running to the claimant, no cause of action for contractual indemnification exists (*Drzewinski v Atl. Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]).

Workers' Compensation Law § 11 limits an employer's liability for injuries sustained by an employee in the course of employment to workers' compensation benefits and bars third-party

claims for contribution or common-law indemnification unless the employee sustained a “grave injury” within the meaning of the statute.

Analysis

A. Contractual Indemnification, Breach of Contract, and Failure to Procure Insurance

NAF’s claims for contractual indemnification, breach of contract, and failure to procure insurance are predicated on the existence of a contractual relationship between NAF and Eastern, or on Eastern’s alleged agreement to assume contractual obligations running to NAF. The documentary evidence, however, establishes that Eastern provided site security pursuant to an agreement with Omnibuild, not NAF, and that there is no written contract between NAF and Eastern. NAF does not submit any documentary evidence demonstrating contractual privity, assignment, or a clear and unmistakable promise by Eastern to indemnify NAF or procure insurance on its behalf.

NAF’s allegation that Eastern continued providing services at the premises after NAF became construction manager is insufficient to establish contractual privity or an implied agreement to indemnify. In the absence of a written agreement or other documentary evidence demonstrating an intent to extend indemnification or insurance obligations to NAF, these claims fail as a matter of law. Accordingly, the causes of action for contractual indemnification, breach of contract, and failure to procure insurance must be dismissed.

B. Common-Law Indemnification and Contribution

NAF’s claims for common-law indemnification and contribution are likewise barred. It is undisputed that plaintiff was employed by Eastern at the time of the alleged accident. Workers’ Compensation Law § 11 therefore limits Eastern’s liability to workers’ compensation benefits and precludes third-party claims for contribution or common-law indemnification absent

a “grave injury” as defined by the statute. Here, no grave injury is alleged. As a result, NAF’s claims for common-law indemnification and contribution must be dismissed as a matter of law.

C. Discovery Argument

NAF’s contention that dismissal is premature due to outstanding discovery is unavailing. NAF fails to identify any specific facts likely to be uncovered through discovery that would establish contractual privity with Eastern or overcome the statutory bar imposed by Workers’ Compensation Law § 11. Where, as here, the claims are defeated by documentary evidence and statutory limitations, speculative assertions regarding discovery are insufficient to preclude dismissal.

III. CONCLUSION

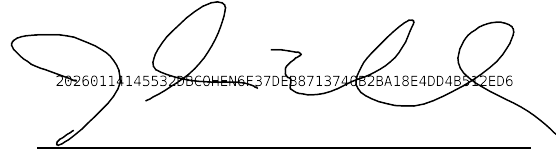
For the foregoing reasons, Eastern Security Corporation’s motion to dismiss the third third-party complaint is granted.

Accordingly, it is hereby

ORDERED that third-party defendant Eastern Security Corporation’s motion, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the third third-party complaint of defendant NAF Construction Management, LLC is granted; and it is further

ORDERED that the third third-party complaint is severed dismissed in its entirety as against third-party defendant Eastern Security Corporation; and it is further

ORDERED that the parties shall appear for the previously scheduled compliance conference on February 3, 2026, at 71 Thomas Street, Room 305, New York, New York, at 9:30 a.m.



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1/14/2026

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE