

**Clune Constr. Co., L.P. v Donnelly Mech. Corp.**

2026 NY Slip Op 30335(U)

January 27, 2026

Supreme Court, New York County

Docket Number: Index No. 652942/2021

Judge: Judy H. Kim

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. JUDY H. KIM PART 04**

*Justice*

-----X

CLUNE CONSTRUCTION COMPANY, L.P.,

Plaintiff,

- v -

DONNELLY MECHANICAL CORP., SPJ PIPING CORP.,  
JOHN DOES 1-10, ABC COMPANIES 1-10,

Defendants.

-----X

SPJ PIPING CORP.,

Third-Party Plaintiff,

-against-

SILVERSTEIN PROPERTIES, LLC,

Third-Party Defendant.

-----X

INDEX NO. 652942/2021

MOTION DATE 02/09/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595017/2024

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 55, 56, 57, 58, 59, 60

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

Upon the foregoing documents, Donnelly Mechanical Corp.’s motion for summary judgment: (1) on its crossclaim for contractual indemnification against codefendant SPJ Piping Corp. (“SPJ”); and (2) dismissing SPJ’s cross-claims for indemnity and contribution is granted.

**FACTUAL BACKGROUND**

In January 2019, plaintiff Clune Construction Company, L.P. (“Clune”) was hired as the construction manager for a construction project on the 41st floor of 3 World Trade Center involving the “fit-out of certain office space” (the “Project”) (NYSCEF Doc No. 2, complaint at

¶8). Clune subcontracted with defendant Donnelly Mechanical Corp. (“Donnelly”) to provide the labor, material, equipment, and supervision for the HVAC work on the Project. As pertinent here, Clune’s contract with Donnelly required that:

To the fullest extent permitted by Law, [Donnelly] shall indemnify, defend, protect and hold harmless (Clune Construction Company) [...] against any and all liabilities, injuries, claims, demands, damages, loss, costs and expenses, including but not limited to reasonable attorney's fees, provided that such liability, injury, claim, demand, loss, cost or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including loss of use) but only to the extent caused or alleged to be caused in whole or in part by the negligent acts or omissions of the Subcontractor, anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

(NYSCEF Doc No. 41 [emphasis added]). Donnelly, in turn, hired defendant SPJ “to perform ‘hot work’ such as ‘brazing’—joining metal pieces by soldering them at a high temperature” (NYSCEF Doc No. 56, Tarr affirm in opp at ¶3).

It is undisputed that on October 22, 2019, SPJ was performing brazing work at the Project site when the resulting heat activated the Building’s sprinkler system, releasing water that entered the Building’s elevator shafts and damaged the elevator bays (NYSCEF Doc. No. 2, complaint). As a result, plaintiff commenced this action on May 4, 2021, asserting negligence claims against Donnelly and SPJ as well as a contractual indemnification claim against Donnelly (*id.*).

Donnelly answered and asserted crossclaims against SPJ for common law and contractual indemnification, contribution, and breach of contract (for failing to procure liability insurance) (NYSCEF Doc No. 7, Donnelly answer). SPJ answered, asserting crossclaims for contribution and indemnification against Donnelly (NYSCEF Doc. No. 5, SPJ answer). SPJ separately impleaded the Building’s owner, Silverstein Properties, LLC, as a third-party defendant, asserting claims for

common law indemnification and contribution against it (NYSCEF Doc. No. 33, third-party complaint).

On January 19, 2023, Clune and Donnelly executed a Settlement Agreement and General Release in which Donnelly agreed to reduce its charges on three other projects with Clune, totaling \$333,224.50, in exchange for Clune's release of all claims against Donnelly arising out of the October 22, 2019 accident (NYSCEF Doc No. 50, Settlement Agreement). On March 10, 2023, Clune, Donnelly, and SPJ executed a stipulation of discontinuance in which Clune discontinued its claims against Donnelly and SPJ with prejudice (NYSCEF Doc. No. 32, stipulation of discontinuance). This stipulation noted, however, that Donnelly and SPJ's crossclaims "are not discontinued and will remain active" (*id.*).

#### *The Instant Motion*

Donnelly now moves, pursuant to CPLR 3212(b), for summary judgment on its contractual indemnification crossclaim against SPJ and to dismiss SPJ's indemnification and contribution crossclaims. In support of its motion, Donnelly cites section 8 of its subcontract with SPJ, which provides that:

To the fullest extent permitted by law, Subcontractor agrees to indemnify, hold harmless and defend Contractor and Owner [...] from and against any of the following claims, cause of action, liability, loss, or expense. In the event of joint negligence or fault on the part of the indemnities of the Subcontractor, Subcontractor shall provide indemnity for the percentage of negligence or fault attributable to actions of Subcontractor [...]

8.3 Any claim, demand, cause of action, loss, expense or liability on account of [...] damage to or loss of property (including the property of Contractor or Owner) arising directly or indirectly out of the acts or omissions of Subcontractor or its Subcontractors, suppliers or agents, or the employees of any thereof, in the performance of the work, including, without limitation, such claims, loss or liability arising under non-delegable duties of Contractor or Owner (such as claims by OSHA) or arising from the use or operation by Subcontractor of construction equipment, tools, scaffolding or facilities furnished to Subcontractor by Contractor or Owner to perform the work.

[...]

8.5 Any such indemnification obligation by Subcontractor shall include any expenses and attorneys' fees incurred by Contractor for legal action to enforce Subcontractor's indemnification obligations under this Article. Where partial indemnity is provided under this agreement, costs, professional fees, attorneys' fees, expenses, disbursements, etc. shall be indemnified on a pro rata basis. Indemnification under this paragraph shall operate whether or not Subcontractor has obtained the insurance specified herein

(NYSCEF Doc No. 49, Lambe aff. at Ex. B, subcontractor agreement).

Donnelly also submits the affidavits of SPJ's Foreman, Vito Scimeca, (NYSCEF Doc No. 44), SPJ mechanic/welder Mahmuwd Hinds (NYSCEF Doc No. 46), and SPJ Steamfitters Vincente Venne (NYSCEF Doc No. 45), Queci Henry (NYSCEF Doc No. 47) and Larmon Shane Hamblin (NYSCEF Doc No. 48), who state, in sum and substance, that SPJ's workers never began brazing work until the Building's Fire Watch told them that the Building's sprinklers were drained and its alarms turned off, including on October 22, 2019.

Finally, Donnelly submits the affidavit of its Project Manager, Niall Lambe, who managed the Project, stating that:

On October 22, 2019, SPJ was at the Project performing brazing operations. There were not any Donnelly employees present at the Project on October 22, 2019, when SPJ performed its brazing operations. Donnelly was not performing any work Project on October 22, 2019, when SPJ performed its brazing operations.

Donnelly was not involved in the brazing operations at issue in this case other than to hire SPJ to perform the work. Donnelly did not supervise, control, or dictate the means and methods of the brazing work performed by SPJ on October 22, 2019. Donnelly was not asked about whether the fire suppression system in the leased space was energized on October 22, 2019, either prior to or during SPJ's brazing operations at the Project on that date. Donnelly was not permitted to de-energize the fire suppression system at the Project on October 22, 2019, either during or prior to SPJ performing its brazing operations. Donnelly was not required to warn SPJ about the status of the fire suppression system at the Project on October 22, 2019, either during or prior to SPJ performing its brazing operations

(NYSCEF Doc No. 49, Lambe aff. at ¶¶3-4 [emphasis added]).

Donnelly argues that the foregoing establishes that the damage at issue in this action arises from SPJ's work on the Project—inasmuch as it is undisputed that the heat from SPJ's "hot work" caused the Building's sprinklers to activate—such that indemnification provision of its subcontract with SPJ is implicated, and that no negligence on its part caused this damage.

In opposition, SPJ argues that under the doctrine of ejusdem generis, SPJ's obligation, under section 8.3, to indemnify Donnelly for damages arising out of its work on the Project "including, without limitation, such claims [...] arising under non-delegable duties of Contractor or Owner (such as claims by OSHA) or arising from the use or operation by Subcontractor of construction equipment, tools, scaffolding or facilities furnished to Subcontractor by Contractor or Owner to perform the work," limits SPJ's indemnification obligations to damage caused by its own negligence, and that discovery is necessary to determine whether SPJ was negligent. SPJ also argues, in the alternative, that summary judgment is premature because discovery is needed to determine whether Donnelly's settlement with plaintiff was a "voluntary payment" beyond the subcontract's indemnity provision but also that Donnelly's settlement payment was illusory because it came in the form of deductions of Donnelly's charges on other Clune projects.

In reply, Donnelly asserts that section 8.3 of the subcontract with SPJ is a common and readily understood provision in the construction industry to which the doctrine of ejusdem generis does not apply. Donnelly also maintains that, as a matter of law, its settlement of Clune's "potentially viable cause of action for contractual indemnity" was not a "voluntary payment" (NYSCEF Doc No. 58, Cohn reply affirm at ¶6).

## DISCUSSION

"The proponent of a summary judgment motion must make a 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 New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In reviewing a motion for summary judgment, the Court “must view the evidence in the light most favorable to the nonmoving party, including drawing all reasonable inferences in favor of the nonmoving party” (*Vega v Metro. Transportation Auth.*, 212 AD3d 587, 588 [1st Dept 2023]).

Donnelly has established its entitlement to summary judgment on its contractual indemnification crossclaim. A party is entitled to full contractual indemnification where 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, 777 [1987]) and it has “establish[ed] that it was free from any negligence and was held liable solely by virtue of the statutory liability” (*Correia v Professional Data Mgt.*, 259 A.D.2d 60, 65 [1st Dept 1999]). “Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*id.*). Where, as here, Donnelly seeks to be indemnified for its settlement of a claim that the proposed indemnitor was aware of, it must also establish “the reasonable possibility that those claims were encompassed by the indemnification clause, that the settlement was reasonable and made in good faith, and that the [indemnitee] could have been found liable to the plaintiff[]” (*Nesterczuk v Goldin Mgt., Inc.*, 77 AD3d 800, 804 [2d Dept 2010] citing *Slepian v Motelson*, 66 AD3d 871, 872 [2009]; see also *Zurich Am. Ins. Co. v Tower Natl. Ins. Co.*, 159 AD3d 418, 419 [1st Dept 2018]).

Donnelly has satisfied these requirements. The parties' intent to indemnify is clearly indicated in section 8.3 of the Subcontractor Agreement, which requires SPJ to indemnify Donnelly for any damage "arising directly or indirectly out of the acts [...] of Subcontractor [...] in the performance of the work." In this context, the phrase "arising out of" means "originating from, incident to, or having connection with, and requires only that there be some causal relationship between the injury and the risk for which coverage is provided" (*Worth Const. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415 [2008] [internal citations and quotations omitted]). The requisite causal relationship between SPJ's work and the damage to the Building's elevator bays is present here, as it is undisputed that the heat from SPJ's work set off the Building's sprinkler system, which flooded the Building's elevator bays. SPJ's argument, in opposition, that Silverstein Properties LLC's negligence was an intervening cause of this damage is irrelevant—as the focus of the inquiry "is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained," the fact that another party's negligence may also have been a cause is irrelevant to this inquiry (*Regal Const. Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010] [injury plaintiff's project manager sustained while walking across job site arose out of plaintiff prime contractor's work such that it fell within the scope of the additional insured clause of plaintiff's insurance policy, notwithstanding the negligence of construction manager's employees in painting the plywood floor joist on which project manager slipped] quoting *Worth*, 10 NY3d at 416).

Contrary to SPJ's claim, the doctrine of *eiusdem generis*—that "general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 319 [2024] [internal citations and quotations omitted])—is inapplicable here. The phrase "in the performance of the work" is

“not ambiguous and is not a general term appearing in a list or series of entities which explain the meaning of the phrase, nor is it necessary to look to the subsequent examples of companies to ascertain the meaning of the phrase” (*Certain Underwriters at Lloyd’s, London v Forty Seventh Fifth Co. LLC*, 213 AD3d 481, 482-83 [1st Dept 2023] [internal citations omitted]). “To the extent the listed examples [that follow “in the performance of the work”] shed any light on the breadth of the phrase, they do not establish that it was meant to be limited” to negligent acts by SPJ (*id.* at 483). *Olivieri*, the sole decision cited by SPJ in support of this argument, is unavailing. The contractual provision at issue there contained “specific words used in the series [...] describ[ing] negligent acts or omissions” followed by “the general term ‘otherwise,’” which the Fourth Department concluded was properly “understood to refer to negligent acts or omissions” (*Olivieri v Barnes & Noble, Inc.*, 211 AD3d 1525, 1528 [4th Dept 2022]). No such general term is found in section 8.3 of SPJ’s contract with Donnelly.

Donnelly has also established through the undisputed affidavit of its project manager, Niall Lambe, that no negligence on its part caused the harm at issue (*see Gorham v Reliable Fence & Supply Co., Inc.*, 92 AD3d 834, 837 [2d Dept 2012] [“Racanelli made a prima facie showing of entitlement to judgment as a matter of law by submitting, inter alia, the affidavit of its project manager, who stated, in effect, that Racanelli did not have control over the work site”]). Finally, Donnelly has established that SPJ, as a party to this action, had notice of the claim against Donnelly (*see Zurich Am. Ins. Co. v Tower Natl. Ins. Co.*, 159 AD3d 418, 419 [1st Dept 2018] [“As to notice, ‘[i]t is sufficient that the party against whom ultimate liability is claimed is fully and fairly informed of the claim and that the action is pending with full opportunity to defend or to participate in the defense’”]), that Donnelly’s settlement with Clune was reasonable and in good faith, as it was for a sum “far less than [...] the amount of the alleged damage” (NYSCEF Doc No. 56, Tarr

affirm in opp at ¶5) (*see Deutsche Bank Tr. Co. of Americas v Tri-Links Inv. Tr.*, 74 AD3d 32, 43-44 [1st Dept 2010] [settlement for less than two percent of damages alleged was reasonable]; *see also Shihab v Bank of New York*, 211 AD2d 430, 432 [1st Dept 1995] [settlement for approximately \$15,000 less than claim made in reasonable good faith]), and that Donnelly “could have been held liable at trial” given SPJ’s undisputed role in causing the damage at issue (*Slepian v Motelson*, 66 AD3d 871, 872 [2d Dept 2009] [internal citations omitted]). Contrary to SPJ’s argument, Donnelly need not, on this motion, conclusively establish that Clune would have prevailed on its claim against Donnelly (*see Deutsche Bank Tr. Co. of Americas v Tri-Links Inv. Tr.*, 74 AD3d 32, 43-44 [1st Dept 2010]).

SPJ’s arguments in opposition are unavailing. The voluntary payment doctrine—which bars recovery by a party for payments made “voluntarily, as a matter of convenience, without having made any effort to learn what its legal obligations were” (*Gimbel Bros., Inc. v Brook Shopping Centers, Inc.*, 118 AD2d 532, 535 [2d Dept 1986])—is not applicable to Donnelly’s settlement payment to Clune and is “not a bar to [Donnelly’s] contractual indemnification cross claim” (*Nesterczuk v Goldin Mgt., Inc.*, 77 AD3d 800, 804 [2d Dept 2010]; *see also Zurich Am. Ins. Co. v Tower Natl. Ins. Co.*, 159 AD3d 418, 419 [1st Dept 2018] [internal citations omitted] [holding that subcontractor was obligated to indemnify general contractor for general contractor’s settlement of claim by plaintiff, subcontractor’s employee, regardless of the fact that settlement came after judgment against general contractor was set aside after verdict]). Finally, SPJ does not provide any authority for the proposition that a settlement payment that takes the form of credits or discounts is not recoverable here.

In light of the foregoing, Donnelly’s motion for summary judgment on its indemnification cross claim against SPJ is granted. The branch of Donnelly’s motion for summary judgment

dismissing SPJ's indemnification and contribution crossclaims is also granted since, as discussed above, Donnelly has established the absence of any negligence on its part.

Accordingly, it is

**ORDERED** that defendant Donnelly Mechanical Corp.'s motion for summary judgment on its contractual indemnification crossclaim is granted; and it is further

**ORDERED** that third-party plaintiff SPJ's crossclaims against defendant Donnelly for indemnification and contribution are dismissed; and it is further

**ORDERED** that the Clerk is directed to enter judgment in favor of Donnelly Mechanical Corp. as against SPJ Piping Corp. in the amount of \$333,224.50; and it is further

**ORDERED** that the issue of the amount of Donnelly's expenses and attorneys' fees incurred in connection with its efforts to enforce SPJ's indemnification obligations in this action is referred to a Special Referee to hear and report or, on consent of the parties, to hear and determine in accordance with CPLR 4317(b); and it is further

**ORDERED** that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

**ORDERED** that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part, shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

**ORDERED** that within thirty days of entry of this order, Donnelly shall serve a copy of this order with notice of entry upon all other parties and upon the Special Referee Clerk (Room 119M) to arrange a calendar date for the reference to a Special Referee; and it is further

**ORDERED** that the parties shall immediately consult one another and counsel for Donnelly shall, within fifteen days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the “References” link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

**ORDERED** that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

**ORDERED** that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) and the trial of the issues specified above shall proceed from day to day until completion, except as otherwise directed by the assigned JHO/Special Referee for good cause shown; and it is further

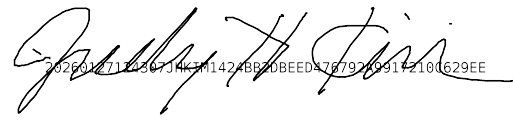
**ORDERED** that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

**ORDERED** that Donnelly shall serve a copy of this decision and order, with notice of entry, on all parties and the Clerk of the Court within ten days of the date of this decision and order; and it is further

**ORDERED** that SPJ and Silverstein Properties LLC are to appear for a status conference on March 24, 2026, at 9:30 am; and it is further

**ORDERED** that service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website).

This constitutes the decision and order of the Court.



30260427122367144511424BB20BEED476797499172101629EE

1/27/2026

DATE

HON. JUDY H. KIM, 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