

Cocozza v Popkin

2026 NY Slip Op 31729(U)

April 20, 2026

Supreme Court, New York County

Docket Number: Index No. 159580/2021

Judge: Lynn R. Kotler

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

-----X

THOMAS COCOZZA,

Plaintiff,

- v -

GREGG POPKIN, JOAN POPKIN, NEWMARK CUSTOM
HOMES, INC.,

Defendants.

-----X

NEWMARK CUSTOM HOMES, INC.,

Third-Party Plaintiff,

-against-

ALL POINTS PLUMBING INC.,

Third-Party Defendant.

-----X

INDEX NO. 159580/2021

MOTION DATE 03/18/2026

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595300/2025

The following e-filed documents, listed by NYSCEF document number (Motion 004) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123

were read on this motion to/for

JUDGMENT - SUMMARY

This action arises from a workplace accident suffered by plaintiff in February 2021 when he allegedly slipped on snow/ice while descending an exposed exterior staircase at a construction project located at 25 Great Oak Way, East Hampton, New York (the "Premises"). At the time of the accident, plaintiff was working for third-party defendant All Points Plumbing Inc. ("All Points"), which was subcontracted to perform plumbing work at the Premises by the general contractor, defendant/third-party plaintiff Newmark Custom Homes, Inc. ("Newmark"). All Points now moves pursuant to CPLR 3212 for summary judgment dismissing Newmark's third-party complaint, which asserts causes of action against All Points for contribution and common-law and contractual indemnification, or in the alternative, to sever the third-party action. Plaintiff and Newmark oppose the motion. The motion is granted in part.

As a threshold matter, the court notes that, although All Points' motion was filed more than 120 days after the filing of the Note of Issue on July 29, 2024, the third-party action was not commenced until March 2025, four months after the statutory deadline to move for summary judgment had expired (*see* CPLR 3212[a]). "Absent a 'satisfactory explanation for the untimeliness,' constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits" (*Wittenberg v Long Island Power Auth.*, 225 AD3d 730, 732 [2nd Dept. 2024], citing *Brill v City of New York*, 2 NY3d 648, 652 [2004]). In this case, the fact that All Points was not even a party to the action when the 120-day deadline expired constitutes good cause to allow this late motion for summary judgment.

All Points states that it seeks a severance of the third-party action only as alternative relief should the court reject its summary judgment application as untimely. As such, the branch of the motion that seeks, in the alternative, to sever the third-party action is denied as moot.

On a motion for summary judgment, the proponent bears the initial burden of making a prima facie showing that it is entitled to summary judgment as a matter of law, providing sufficient evidence that no material issues of triable fact exist (*see Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 74 [2020]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once met, the burden shifts to the opposing party to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). However, if the proponent fails to make out its prima facie case for summary judgment, its motion must be denied regardless of the sufficiency of the opposing papers (*Alvarez*, 68 NY2d at 324; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

Initially, All Points' motion is granted to the extent it seeks dismissal of the third-party claims for contribution and common-law indemnification. All Points submits, as relevant here, plaintiff's verified bill of particulars and deposition testimony, which demonstrate that plaintiff did not sustain a "grave injury" within the meaning of Workers' Compensation Law § 11 (*see Itara v Masaryk Towers Corp.*, 211 AD3d 605, 605 [1st Dept. 2022]; *see also TCS Constr. Corp. v AmTrust N. Am., Inc.*, 235 AD3d 479, 481 [1st Dept. 2025]; *Granite State Ins. Co. v Moklam Enters., Inc.*, 193 AD3d 616, 616 [1st Dept. 2021]; *Hernandez v Seadyck Realty Co., LLC*, 161

AD3d 711, 711–12 [1st Dept. 2018]; *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. 221-223 W. 82 Owners Corp.*, 120 AD3d 1140, 1140 [1st Dept. 2014]). Neither Newmark nor plaintiff oppose this branch of the motion and thus do not raise a triable issue of fact as to whether plaintiff suffered a “grave injury” within the meaning of the statute. As such, Newmark may not maintain its claims against All Points for contribution or common-law indemnity with respect to plaintiff’s injuries (*see Majewski v Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577, 582 [1998]).

All Points’ motion is denied, however, to the extent it seeks the dismissal of the third-party claim for contractual indemnification. All Points submits a copy of the contract between itself and Newmark, which reflects that the relevant contractual provision requires All Points to indemnify Newmark for “all claims, lawsuits, demands, causes of action, liability, loss, damage and/or injury,” including attorneys’ fees and costs, “arising out of, in any way whatsoever, any acts, omissions, negligence, or willful misconduct on the part of [All Points], its officers, owners, personnel, employees, agents, contractors, invitees, or volunteers.” All Points correctly contends this contract provision does not require it to indemnify Newmark for Newmark’s own negligence. It is incorrect, however, in its further contention that dismissal of the contractual indemnity claim is therefore required by the court’s decision and order dated June 17, 2025, which denied plaintiff’s motion for partial summary judgment against Newmark as to liability on plaintiff’s causes of action under Labor Law §§ 200 and 241(6) (MOT SEQ 003).

In that decision and order, the court determined, as relevant here, that plaintiff had established *prima facie* entitlement to summary judgment on the subject Labor Law claims via the submission of evidence demonstrating that, despite having actual knowledge of the snow-covered and slippery condition of the stairs on which the accident occurred and that plaintiff was using those stairs, Mark Cardone, Newmark’s owner, neither cleared away the snow and ice on the stairs nor cordoned off the stairs to prevent their use. All Points relies on this determination to argue that Newmark’s contractual indemnity claim must be dismissed because Newmark seeks to be indemnified for its own negligence. However, the court’s determination as to the *prima facie* evidence of Newmark’s negligence does not demonstrate that All Points was not also negligent.

Indeed, the court ultimately denied plaintiff's summary judgment motion based on the further determination that there were triable issues of fact as to whether plaintiff's own recalcitrance was the sole proximate cause of the accident. As already noted above, All Points' contractual indemnity obligation is triggered by "any acts, omissions, negligence, or willful misconduct on the part of [All Points]" or its employees. Thus, a determination that plaintiff, an All Points employee, was the sole proximate cause of his own accident would trigger All Points' contractual indemnity obligation, even if only to reimburse Newmark for its defense costs.

Accordingly, it is

ORDERED that third-party defendant's motion is granted to the extent it seeks dismissal of the third-party claims for contribution and common-law indemnity, which third-party claims are hereby dismissed, and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

4/20/2026

DATE

LYNN R. KOTLER, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: