

Alvarez v 513 W. 26th Realty, LLC

2024 NY Slip Op 31263(U)

April 10, 2024

Supreme Court, New York County

Docket Number: Index No. 150516/2019

Judge: Verna L. Saunders

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. VERNA L. SAUNDERS, JSC

PART 36

Justice

-----X

INDEX NO. 150516/2019

JONATHAN CRUZ ALVAREZ, BIANCA MARIE CRUZ
RAMIREZ,

MOTION SEQ. NO. 001

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

513 WEST 26TH REALTY, LLC and INTEGRITY
CONTRACTING, INC.,

Defendants.

-----X

513 WEST 26TH REALTY, LLC and INTEGRITY
CONTRACTING, INC.,

Third-Party Plaintiffs,

Third-Party
Index No. 595683/2019

-against-

SC CONTRACTING MANAGEMENT CORP.,
ENVIORONMENTALLY CONSCIOUS BUILDING INC., and
ENVIRONMENTALLY CONSTRUCTION CORP.

Third-Party Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 142, 143, 144, 189, 190, 191, 194, 195, 196, 197, 198, 199, 200

were read on this motion to/for

SUMMARY JUDGMENT¹

This action stems from an accident on November 16, 2018, where plaintiff allegedly slipped on water and snow while delivering plywood to the fifth floor of a construction project at the premises located at 525 West 26th Street, New York, NY. At the time of the accident, plaintiff was employed by third-party defendant ENVIRONMENTALLY CONSTRUCTION CORP. ("ECC").

ECC, a subcontractor of defendant SC CONTRACTING MANAGEMENT CORP. ("SC"), entered into a subcontract agreement which included an indemnification provision (NYSCEF Doc. No. 195, *SC/ECC's subcontract*).

513 WEST 26TH REALTY, LLC ("513") and INTEGRITY CONTRACTING, INC. ("Integrity") commenced a third-party action against SC and ECC, seeking indemnification (first cause of action), contribution (second cause of action), and contractual and/or common law

¹ This motion is decided together with Mot. Seq. Nos. 002; 003; and 004.

indemnity (third cause of action). In its answer to the third-party complaint, SC asserts cross-claims against ECC for common law indemnification (first cause of action), negligence, contribution, contractual indemnification, and failure to procure insurance coverage.

ECC now moves this court, pursuant to CPLR 3212, for an order dismissing the third-party complaint against it for contribution, as well as, common law and contractual indemnification. Additionally, it seeks dismissal of SC's cross-claims for negligence, contribution, contractual indemnification, and failure to procure insurance coverage (NYSCEF Doc. No. 101).

ECC argues that the claims for negligence, common law indemnification, and contribution must be dismissed because it was incumbent upon third-party plaintiffs 513 and Integrity, as well as, SC alleging common law indemnification claims to prove a grave injury, which they fail to do. Specifically, ECC argues that plaintiff does not allege that he sustained an acquired injury to the brain and, furthermore, has not been completely, permanently, and totally disabled from employment to satisfy the standard for "grave injury." In support of this argument, ECC submits, *inter alia*, the deposition transcripts of plaintiffs, screen captures from plaintiff's Facebook and Instagram accounts, and 513/Integrity's amended response to ECC's demand for bill of particulars and inspection (NYSCEF Doc. Nos. 106-114). ECC also argues that, in accordance with the contract with SC, it did maintain a commercial general liability insurance policy with Hudson Excess Insurance Company, policy number HXMP101572, with an effective date of April 23, 2018 (NYSCEF Doc. No. 117-118); therefore, it asserts that the cross-claim for failure to procure insurance must also be dismissed. Addressing the claims for contractual indemnification, ECC argues that the contract agreement between SC and ECC does not refer to the project at issue. ECC also argues that it cannot be determined from the face of the contract whether ECC intended to indemnify SC, Integrity, or any other party for this project. Additionally, ECC maintains that it was not negligent and that only Integrity's negligence, if any, was the cause of any alleged injuries, for its failure to maintain the safety of the worksite. It further claims that cleanup and snow removal was under the exclusive supervision and control of the general contractor Integrity. According to ECC, no other party not named in the Integrity/ECC contract is entitled to contractual indemnification coverage from ECC. Therefore, it contends SC's cross-claims should also be dismissed (NYSCEF Doc. No. 104).

Defendants/Third-Party plaintiffs 513/Integrity oppose the motion. They argue that not only must ECC's motion be denied, but they are also entitled to an award of contractual indemnification against ECC as a matter of law. To this point, 513/Integrity argues that they have sufficiently shown that (1) ECC- plaintiff's employer- was a subcontractor of SC, for the project at issue; (2) ECC supervised and controlled plaintiff's work; (3) the subcontract between SC and ECC contemplates 513 and Integrity as parties to be indemnified; and (4) if plaintiff's complaint is not dismissed, then, at the very least, indemnification is triggered in favor of 513 and Integrity, as the claimed accident arose out of, was in connection with, or was a consequence of the work subject to the subcontract (NYSCEF Doc. No. 189).

513/Integrity contends that the argument that the subcontract makes no reference to the project and is therefore inapplicable is without basis given SC's acknowledgment of the applicability of said subcontract to the project site in response to 513/Integrity's notice to admit.

Addressing ECC's argument that 513/Integrity cannot be indemnified to the extent of their own negligence, they argue that any claimed negligence is not a bar to indemnification under the terms of the subcontract agreement. They also maintain that, as advanced in their motion seeking dismissal of the complaint (Mot. Seq. 004), they were not negligent. 513/Integrity also take the position that, although they do not concede plaintiff's injuries, there is, at the very least, issues of fact as to whether plaintiff sustained a traumatic brain injury. They submit MRI results from September 17, 2019, which they claim reveals "abnormal increased T2/FLAIR signal present within the white matter, most likely post-traumatic and reduced FA reduction in the deep temporal lobe 'most compatible with traumatic white matter tract injury.'" (NYSCEF Doc. No. 191). Therefore, they maintain that their claims for common-law indemnification against ECC must also survive.

SC Contracting also submits opposition papers to this motion. SC posits that, pursuant to the subcontract agreement, ECC agreed to defend, indemnify, and hold harmless SC from all claims arising out of ECC's work. SC contends that ECC erroneously argues that, since it was not responsible for clearing the snow and ice from the fifth floor, the subject accident did not arise out of ECC's work. It is sufficient that ECC employed the plaintiff to conclude that his accident arose out of said work. According to SC, the absence of negligence on the part of ECC is irrelevant. Although SC must demonstrate that it was free of negligence under General Obligations Law § 5-322.1, SC maintains it has sustained this burden. SC argues that ECC advances no arguments with respect to the claim for failure to procure insurance in its memorandum of law and, at the very least, there is an issue of fact as to whether ECC breached its obligation under the subcontract to name SC as an additional insured. Lastly, SC argues that, to the extent the court finds that there is an issue of fact as to whether plaintiff sustained a grave injury, its cross-claims for contribution and common law indemnity remain.

In reply, ECC argues that no material issue of fact was raised with respect to plaintiff's ability to be employed and, thus, that claims for common law indemnification must be dismissed. ECC argues that 513 and Integrity, as well as, SC fail to establish that plaintiff sustained a "grave injury" within the meaning of Workers' Compensation Law § 11 to sustain their claims based on common law indemnification. According to ECC, although plaintiff alleges a multiplicity of orthopedic injuries, including head trauma, he does not assert that his head trauma has in any way rendered him completely unemployable in any capacity. According to ECC, plaintiff's own testimony establishes that he returned to work after the accident, a fact 513/Integrity and SC are unable to dispute. Thus, ECC argues that the claim for common law indemnification must be dismissed. ECC also argues that it procured all required insurance and that any specific argument that ECC's contractual liability carrier decided to deny or accept a tender is outside of ECC's control. ECC also reiterates that it has no legal duty to indemnify SC or Integrity, insofar as it made no such promise of indemnity that can be clearly implied from the language and purpose of the entire agreement.

It is well-settled that, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer may also be liable to third parties for indemnification or contribution." Under Workers' Compensation Law § 11, the definition of 'grave injury' includes "an acquired injury to the brain caused by an external physical force resulting in permanent total disability,"

meaning, the injured worker is no longer employable ‘in any capacity’ (*Rubeis* at 416-417).” (*Alulema v ZEV Elec. Corp.*, 168 AD3d 469, 470 [1st Dept 2019].) The Court of Appeals has held that “‘brain injury results in ‘permanent total disability’ under [Workers’ Compensation Law] section 11 when the evidence establishes that the injured worker is no longer employable in any capacity.

Here, plaintiff testified at his deposition that he was employed after his accident (NYSCEF Doc. No. 106 at 21-22), belying his claim that he sustained a grave injury within the meaning of Workers’ Compensation Law § 11. In opposition, 513/Integrity and SC fail to show that plaintiff was rendered unemployable in any capacity. Given the foregoing, that branch of the motion seeking dismissal of the negligence, common law contribution and common-law indemnification claims is granted and these claims are hereby dismissed.

That branch of the motion seeking dismissal of the contractual indemnification, however, is denied. The subject indemnification provision in the SC/ECC agreement (NYSCEF Doc. No. 94), which includes identical language to that found in Integrity/SC agreement (NYSCEF Doc. No. 76), provides, in relevant part:

“To the fullest extent permitted by law, [ECC] agrees to indemnify, defend and hold harmless the Owner, Contractor and all additional Indemnitees, if any, their officers, directors, agents, employees and partners (hereafter collectively ‘Indemnitees’) from any and all claims, suits, damages, liabilities, professional fees, including attorneys’ fees, costs, court costs, expenses and disbursements related to death, personal injuries or property damage (including loss of use thereof) brought or assumed against any of the Indemnitees by any person or firm, arising out of or in connection with or as a result of or consequence of the performance of the Work of [ECC] under this agreement, or any additional work, extra work or add-on work, whether or not caused in whole or in part by [ECC] or any person or entity employed, either directly or indirectly, by the [ECC] including any subcontractors thereof and their employees.”

ECC’s duty to indemnify is triggered by the broad language of the indemnification provision (*Estevez v SLG 100 Park LLC*, 215 AD3d 566, 570 [1st Dept 2023] [(i)ndemnification agreements . . . with a scope- or performance-of-the-work clause are indeed broad and will be triggered solely by virtue of an accident occurring in the course of the indemnitor’s work]). The SC/ECC indemnification provision states that indemnification is required for all claims “arising out of or in connection with or as a result of or consequence of the performance of the [w]ork of [ECC].” It is undisputed that plaintiff was injured while in the performance of his duties as an employee of ECC. This court rejects ECC’s contention that the claims for contractual indemnification must be dismissed on the ground that ECC was not negligent: “[a] contractual indemnification clause may shift liability from an owner or contractor to an employer even where the employer was not negligent.” (*Cackett v Gladden Props., LLC*, 183 AD3d 419, 422 [1st Dept 2020]; see *Ging v F.J. Sciame Const. Co., Inc.*, 193 AD3d 415, 418 [1st Dept 2021]; *Adiogo v New York State Urban Dev. Corp.*, 168 AD3d 602, [1st Dept 2019].) Additionally, ECC has failed to establish that the project was not subject to the indemnification provision. Furthermore, in its response to 513/Integrity’s notice to admit, this court notes that SC affirms

that the subcontract pertained to the subject project. Therefore, that branch of ECC's motion seeking summary judgment on the contractual indemnification claims is denied.

That branch of the motion seeking dismissal of the claim for failure to procure insurance is granted. ECC argues, albeit in its statement of material facts, that ECC procured the necessary insurance pursuant to the subcontract agreement. It submits proof of same as an exhibit to its motion. In opposition, SC fails to contest the validity of said proof and, instead, attempts to raise an issue of fact by arguing that, because ECC's carrier has ignored its tender for defense, there is, at the very least, a question of fact as to whether ECC has procured the requisite insurance. This argument is unavailing. The carrier's lack of response does not contest ECC's proof that adequate insurance was obtained in accordance with the subcontract. Accordingly, it is hereby

ORDERED that the motion of Environmentally Construction Corp. is granted to the extent it seeks dismissal of all claims premised on negligence, common law contribution, common-law indemnification, and failure to procure insurance, but it is denied as to claims for contractual indemnification; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for Environmentally Construction Corp. will serve a copy of this decision and order, with notice of entry, upon all parties.

This constitutes the decision and order of this court.

April 10, 2024


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NONFINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<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"/>		<input type="checkbox"/>	REFERENCE