

Alvarez v 513 W. 26th Realty, LLC

2024 NY Slip Op 31266(U)

April 10, 2024

Supreme Court, New York County

Docket Number: Index No. 150516/2019

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC

PART 36

Justice

-----X

INDEX NO. 150516/2019

JONATHAN CRUZ ALVAREZ and BIANCA MARIE CRUZ
RAMIREZ,

MOTION SEQ. NO. 004

Plaintiffs,

- 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
Index No. 595683/2019

Third-Party Plaintiff,

-against-

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

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 175, 176, 177, 178, 192, 193, 202, 203, 204

were read on this motion to/for

SUMMARY JUDGMENT¹

Plaintiff commenced this action against defendants for injuries he sustained at a construction site located at 525 West 26th Street, New York, New York. Defendant/third-party plaintiff 513 WEST 26TH REALTY, LLC ("513"), the owner of the property, and INTEGRITY CONTRACTING, INC. ("Integrity"), the general contractor (collectively, "513/Integrity"), now move this court, pursuant to CPLR 3212, for an order dismissing the complaint in its entirety, along with any and all claims, cross-claims and counter claims that are asserted against them. In the alternative, 513/Integrity seek an award of contractual indemnification as against third-party defendants SC CONTRACTING MANAGEMENT CORP. ("SC") and ENVIRONMENTALLY CONSTRUCTION CORP. ("ECC").

This court notes that the arguments with respect to liability are rendered moot by the decision and order which, among other things, granted plaintiff summary judgment against defendants as to liability under Labor Law § 241(6) claim (Mot. Seq. 002). The court shall address the remaining arguments raised.

¹ This motion is decided together with Mot. Seq. Nos. 001; 002; and 003.

513/Integrity argues that the testimony and proof elicited demonstrates that plaintiff's accident arose out of, was in connection with and/or was a consequence of the work subject to the subcontract agreement between Integrity and SC, as well as the sub-subcontract between SC and ECC. According to 513/Integrity, both subcontracts contemplate that 513/Integrity, as the owner and contractor, are parties to be indemnified.

ECC opposes the motion. ECC argues that, according to the testimony of Manny Fernandez ("Fernandez"), Integrity's superintendent of construction, it was Integrity's responsibility, as general contractor, to shovel snow from the subject roof. (NYSCEF Doc. No. 130 at 102:21-103:15). Fernandez also testified that Integrity had the authority to stop work at the site in the event work was being performed in an unsafe manner. (Id. at 19:7-12). He also indicated that Integrity was responsible for ensuring that "rooms are cleaned everyday" and that there are no "trip[ing] hazards" (Id. at 25:2-7), as well as ""initiating, maintaining, and supervising all safety precautions and programs in connection with performance of the work." (Id. at 93:15-21). ECC further represents that Cecil Paul ("Paul"), Integrity's foreman, testified at his deposition that it was the duty of Integrity laborers to clear any snow (NYSCEF Doc. No. 132 at 161:12-19). Additionally, Paul testified that Integrity was responsible for sweeping or application of salt (Id. at 162:16-24). ECC maintains that Integrity's responsibility in clearing the snow at the site is further corroborated by the testimony of Davendra Deolal ("Deolal"), its supervisor at the project, who testified that Integrity was responsible for removing that snow and that they kept shovels on site (NYSCEF Doc. No. 134 at 149-150).

Like the arguments raised in the accompanying motions, ECC maintains that the sub-subcontract between SC and ECC does not refer to the project at issue and, consequently, there is no indication from the face of the agreement that ECC intended to indemnify SC, Integrity, or any other party for this project. Furthermore, it contends that James Duffy and Roberta Silva Aguiar, the individuals who executed the sub-subcontract agreement on behalf of SC and ECC, respectively, have not yet been deposed to establish that the agreement applied to the subject project. Assuming, *arguendo*, that the sub-subcontract applied to the project, ECC argues that 513/Integrity is not entitled to summary judgment because only Integrity's negligence could have caused plaintiff's injuries, and there is no showing that ECC was negligent. Thus, ECC argues that it has no legal duty to indemnify Integrity. It also claims that the sub-subcontract is missing several essential terms in that it does not contain any terms setting forth the consideration nor any details regarding performance of work, including the time or location of performance; thus, ECC maintains that the sub-subcontract is invalid. Even if the sub-subcontract agreement is not invalid, ECC argues that the record establishes that only Integrity's negligence could have caused the alleged injuries suffered by plaintiff, and there is no proof that ECC was negligent. Thus, ECC contends that issues of fact preclude summary judgment (NYSCEF Doc. No. 177).

SC also opposes the motion, arguing, in relevant part, that if this court grants plaintiff's motion on liability based on their own negligence and violations of the Labor Law, then 513/Integrity are no longer vicariously liable and, therefore, are not entitled to summary judgment on their contractual indemnification claim against SC. Additionally, SC argues that Fernandez's deposition testimony confirms that Integrity was responsible for placing and maintaining the tarps on the fifth floor, whose stated purpose was to prevent the elements, i.e., snow, ice, and rain, from entering the fifth-floor workplace, and that they failed in their purpose.

SC contends that “[Integrity’s] own negligence in allowing precipitation to enter the workspace and permitting workers to be present and working on a wet and slippery floor, precludes summary judgment in [513/Integrity’s] favor with respect to the common law negligence and Labor Law § 200 claims.” (NYSCEF Doc. No. 177).

In reply, 513/Integrity argues that ECC’s argument that the sub-subcontract does not apply to the project is belied by the proof, including SC’s response to 513/Integrity’s notice to admit, confirming that the subcontracts concerned the subject property. They further maintain that ECC’s duty to indemnify is triggered by virtue of the fact that plaintiff’s injuries arose out of the work being performed under the sub-subcontract. Moreover, even if, Integrity is found to be partially liable for plaintiff’s injuries, they argue that the indemnification provision is nevertheless triggered to the extent of ECC’s fault. Similar arguments are raised with respect to SC’s opposition. (NYSCEF Doc. Nos. 202-203).

A party seeking full contractual indemnification must establish “that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]). However, a court may grant conditional indemnification, which “serves the interest of justice and judicial economy in affording the indemnitee the earliest possible determination as to the extent to which he may expect to be reimbursed” (*Hong-Bao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 496-497 [1st Dept 2018] [internal quotation marks and citation omitted]). According to the First Department, an award of conditional indemnification is warranted where the indemnification provision does not purport to indemnify an indemnitee for his or her own negligence, even where there are issues of fact as to an indemnitee’s active negligence (see *Cerverizzo v City of New York*, 116 AD3d 469, 472 [1st Dept 2014]; *Hughey v RHM-88, LLC*, 77 AD3d 520, 522-523 [1st Dept 2010]).

Here, this court rejects ECC and SC’s contention that the subcontracts do not apply to the worksite and that they are otherwise invalid. The language of the sub-contract and sub-subcontract state as follows:

“To the fullest extent permitted by law, the Subcontractor agrees to indemnify, defend and hold harmless the Contractor, General Contractor, Owner, Architect, Consultants and their officers, directors, agents, employees and partners (hereinafter collectively “indemnities” [sic]) from and against any and all claims, suits, damages, liabilities, professional fees, including attorney’s 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 indemnities [sic] by any persons or firm, arising out of or in connection with or as a consequence of the performance of the Work of the Subcontractor under this agreement (contract), as well as any additional work, extra work, or add on work, whether caused in whole or in part by the Subcontractor including any subcontractors therefore and their employees. The parties expressly agree that this indemnification agreement contemplates: 1) full indemnity in the event liability is imposed against the Indemnitees without negligence and solely by reason of statute, operation of law or otherwise; and 2) partial indemnity in the event of any actual negligence on the part of the indemnities [sic] either causing or

contributing to the underlying claim in which case, indemnification will be limited to any liability imposed over and above the percentage attributable to actual fault whether by statute or operation of law, or otherwise.” (emphasis added).

There is no disputing that plaintiff’s injuries arose out of the work being performed at the project. Therefore, this court finds that the sub-contract and sub-subcontract are triggered insofar as plaintiff’s injuries arose out of the work performed at the construction site (see *Cresser v 345 Park Avenue, L.P.*, 193 AD3d 526, 527 [1st Dept 2021]; *Keena v Gucci Shops, Inc.*, 300 AD2d 82, 82-83 [1st Dept 2002]; *Velez v Tishman Foley Partners*, [1st 245 AD2d 155 [1st Dept 1997]). That being said, insofar as this court only found that 513/Integrity were vicariously liable under 241(6), and that issues of fact exist as to the remaining causes of action, 513/Integrity is entitled to a conditional indemnification. (see *Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 513 [1st Dept 2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349, 693 NE2d 1068, 670 NYS2d 816 [1998]). However, to what degree 513/Integrity will ultimately obtain indemnification from both SC and ECC based on its own level of fault, if any, is for a jury to decide (*Dejesus v Downtown Re Holdings LLC*, 217 AD3d 524, 527 [1st Dept 2023].)

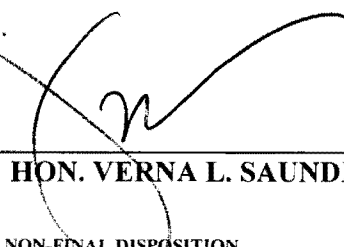
Insofar as there is no proof in the record that 513, the owner, was negligent, all claims premised on Labor Law § 200 and common-law negligence against 513 are dismissed. However, questions of fact remain with respect to Integrity’s negligence; thus, that branch of its motion is denied. Accordingly, it is hereby

ORDERED that the motion is granted solely to the extent that 513 WEST 26TH REALTY, LLC and INTEGRITY CONTRACTING, INC is granted conditional indemnification in accordance with this decision and order; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for 513 WEST 26TH REALTY, LLC and INTEGRITY CONTRACTING, INC. shall 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:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: