

Gigauri v One Hudson Yards Owner LLC

2024 NY Slip Op 31534(U)

April 18, 2024

Supreme Court, Kings County

Docket Number: Index No. 501648/2019

Judge: Carolyn E. Wade

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: HON. CAROLYN E. WADE, JSC

-----X
GEORGE GIGAURI,

Plaintiff,

-against-

ONE HUDSON YARDS OWNER LLC, HUDSON
YARDS CONSTRUCTION LLC, and STRUCTURE
TONE, LLC,

Defendants.

-----X
ONE HUDSON YARDS OWNER LLC and
STRUCTURE TONE, LLC,

Third-Party Plaintiffs,

-against-

FREEDOM ELECTRICAL & DATA, INC.,

Third-Party Defendant.

-----X
FREEDOM ELECTRICAL & DATA, INC.,

Second Third-Party Plaintiff,

-against-

MASS MERCHANDISING,

Second Third-Party Defendant.
-----X

ORDER

Index No.: 501648/2019

WS# 7.8

By Notice of Motion filed on June 28, 2023 (Motion Sequence #7), third-party
defendant/second third-party plaintiff FREEDOM ELECTRICAL & DATA, INC.

("FREEDOM") moves for an Order, pursuant to CPLR § 3212, granting it, among other things,
summary judgment and dismissing defendants/third-party plaintiffs ONE HUDSON YARDS

OWNER LLC ("ONE HUDSON") and STRUCTURE TONE, LLC's ("STRUCTURE TONE") Third-Party Complaint. Alternatively, FREEDOM moves for summary judgment on its common law indemnification and contribution claims against second third-party defendant MASS MERCHANDISING.

By Notice of Cross-Motion, filed on August 10, 2023 (Motion Sequence #8), ONE HUDSON and STRUCTURE TONE move for an Order pursuant to CPLR § 3212 granting, among other things, summary judgment on their Third-Party Complaint for contractual defense, indemnification and insurance procurement from FREEDOM.

The following documents were considered:

Notice of Motion	Papers (NYSCEF)
Affidavits (Affirmations) _____	ECF No. 209-225
Opposing Affidavits (Affirmations) _____	ECF No. 242-244
Reply Affidavits (Affirmations) _____	ECF No. 247
Notice of Cross-Motion	
Affidavits (Affirmations) _____	ECF No. 226-235
Opposing Affidavits (Affirmations) _____	ECF No. 236-239; 245
Reply Affidavits (Affirmations) _____	ECF No. 246

After oral argument, the Order of this Court is as follows:

ORDERED, that the branch of third-party defendant/second third-party plaintiff FREEDOM ELECTRICAL & DATA, INC.'s motion seeking summary judgment and dismissing the Third-Party Complaint is granted solely to the extent that all common law claims against it are dismissed. All other requested relief is denied.

ORDERED, that the defendants/third-party plaintiffs ONE HUDSON YARDS OWNER LLC and STRUCTURE TONE, LLC's cross-motion for summary judgment seeking contractual defense, indemnification, and insurance procurement from FREEDOM is granted.

LEGAL ANALYSIS

Contractual indemnification arises not out of an agreement to perform work but out of an agreement to indemnify (see *Cox v. Cordice*, 90 AD2d 297 [1st Dept 1982]). Where the contract is unambiguous there is little need for a jury's input on the matter (see *Lopez v. Consol. Edison Co. of New York*, 40 NY2d 605 [1976]).

If the words of the agreement, given their ordinary meaning, show intent to indemnify for "all" claims, loss or liability, then there will be indemnity (see *Levine v. Shell Oil Co.*, 28 NY2d 205 [1971]; see also *Hawthorne v. S. Bronx Cmty. Corp.*, 78 NY2d 433, 582 NE2d 586 [1991]; *Drzewinski v. Atl. Scaffold & Ladder Co.*, 70 NY2d 774 [1987]; *Weinstock v. Jenkin Contracting Co.*, 134 AD2d 254 [2d Dept 1987]; *Williams v. Mobil Oil Corp.*, 83 AD2d 434 [2d Dept 1981]).

Where there is a broad indemnity agreement providing for indemnification "against all claims, acts, damages and costs," the indemnitee is entitled to costs, including counsel fees, incurred in the defense of both the main action as well as any third-party action(s) (see *Perchinsky v. State*, 232 AD2d 34 [3d Dept 1997]; see also *Quinonez v. Manhattan Ford, Lincoln-Mercury, Inc.*, 62 AD3d 495 [2d Dept 2009]).

The indemnity clause found in the Terms and Conditions, Point 11.2 section of the FREEDOM subcontract states as follows:

To the fullest extent by Law, [FREEDOM] will indemnify and hold harmless [STRUCTURE TONE], the owner of the project, the owner of the property [ONE HUDSON] where the job/project is located, and all parties required to be indemnified by the prime

owner of the property [ONE HUDSON] where the job/project is located, and all parties required to be indemnified by the prime contract entered into by [STRUCTURE TONE] in connection with the job/project work, and any of their trustees, officers, members, directors, agents, affiliates, parents, subsidiaries, and servants and employees from and against any and all claims [emphasis added], suits, liens, judgments, damages, losses and expenses including reasonable legal fees and costs arising in whole or in part and in any manner from the acts, omissions, breach or default of [FREEDOM] [emphasis added], sub-subcontractors, its officers, directors, agents, employees and [FREEDOM] in connection with the performance of any work by [FREEDOM] [emphasis added], its employees and subsubcontractors pursuant to this Subcontract/Purchase Order or a related Proceed Order. [FREEDOM] will defend and bear all costs of defending any action or proceedings brought against [STRUCTURE TONE] and or Owner, their officers, directors, agents and employees, arising in whole or in part out of any such acts, omission, breach or defaults. see ECF No. 220 at p. 5.

Boiled down, FREEDOM owes contractual defense, indemnification, and insurance procurement to ONE HUDSON and STRUCTURE TONE from and against any and all claims arising from any of FREEDOM's acts in connection with the performance of any work by FREEDOM. Id. These terms are unambiguous and fairly broad. The terms do not require the claim to have been specifically caused by an act of FREEDOM for the clause to trigger. Rather, the terms of the contract simply require that the claim to arise out of any of FREEDOM's acts so long as they are connected in some way to FREEDOM's work. Most importantly, the language of the indemnification provision clearly reveals that there is no negligence trigger.

It is undisputed that FREEDOM was performing work at 55 Hudson Yards at the time of the alleged accident, and that plaintiff was acting within the scope of his work and employment for FREEDOM at the time the alleged accident occurred. See ECF No. 220; Exhibit "D"; ECF No. 211, pp. 2-4; ECF No. 210. By virtue of the alleged accident occurring while plaintiff was working for FREEDOM, the claim arose out FREEDOM's act.

The Second Department granted contractual defense and indemnification to an indemnitee on numerous occasions where the claim “arose out of” acts related to work performed by the indemnitor regardless of any question of negligence (*see Capstone Enterprises of Port Chester, Inc. v. Bd. of Educ. Irvington Union Free Sch. Dist.*, 106 AD3d 853 [2d Dept 2013]; *Cortes v. Town of Brookhaven*, 78 AD3d 642 [2d Dept 2010]; *Reisman v. Bay Shore Union Free Sch. Dist.*, 74 AD3d 772 [2d Dept 2010]; *Giangarra v. Pav-Lak Contracting, Inc.*, 55 AD3d 869 [2d Dept 2008]; *Lesisz v. Salvation Army*, 40 AD3d 1050 [2d Dept 2007]).

Most recently in *Selis v. Town of N. Hempstead*, 213 AD3d 878 [2d Dept 2023], the Second Department granted contractual defense and indemnification to an indemnitee where plaintiff was performing work for an indemnitor when she tripped and fell over a plugged-in space heater that did not belong to the indemnitor. *Id.* at 880. Based on the “arising out of” indemnity clause in the contract the indemnitor was obligated to indemnify the indemnitee despite the fact the accident was not caused by them or their work. *Id.* Similarly here, while plaintiff’s alleged accident and injuries were the result of MASS MERCHANDISING’ workers dropping a scaffold frame, FREEDOM still owes contractual indemnity to ONE HUDSON and STRUCTURE TONE, as plaintiff worked for FREEDOM at the time of the alleged accident.

In *Tobio v. Bos. Properties, Inc.*, 54 A.D.3d 1022 [2d Dept 2008], plaintiff, an employee of Structure Tone subcontractor Hudson-Shatz Painting, “was injured when a piece of plywood on which he was standing broke in half while he was working at an elevated worksite at commercial office space in Manhattan.” *Id.* at 1023. While the Supreme Court originally denied full indemnification to Structure Tone from Hudson-Shatz as issues of fact remained with respect to Hudson-Shatz’s negligence, the Second Department reversed. *Id.* at 1024. Specifically, the Second Department noted that the indemnification clause, which contained the exact language as

in the instant matter, did not, “by its terms, limit indemnification only to claims arising out of the negligence of Hudson-Shatz in the performance of [it’s] work.” *Id.* Therefore, in the absence of any negligence by Structure Tone, it was entitled to full contractual indemnification by Hudson-Shatz. *Id.* The Second Department has since applied the same ruling to circumstances where the subcontractor was not negligent at all in *Bermejo v. New York City Health & Hosps. Corp.*, 119 AD3d 500 [2d Dept 2014] and *Mohan v. Atl. Ct., LLC*, 134 AD3d 1075 [2d Dept 2015]).

The indemnification provision in *Tobio, supra*, contained the exact same language as the one in the instant matter; thus, this Court will apply the same analysis as the Second Department did in *Tobio, supra*. Specifically, (1) it is undisputed that ONE HUDSON and STRUCTURE TONE were not negligent, and (2) the alleged accident was during plaintiff’s work for FREEDOM. Consequently, FREEDOM must contractually defend and indemnify ONE HUDSON and STRUCTURE TONE even if FREEDOM is free from negligence.

A promise to indemnify will be found where it can be “clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances” (see *Hooper Associates v. AGS Computers*, 74 NY2d 487, 491-492 [1989]). It is well settled law that a contractual indemnification clause will be valid and enforceable under New York law provided the intent to indemnify is clearly set forth in the agreement and the party to be indemnified is free of negligence (see *Brooks v. Judlau Contr., Inc.*, 11 NY3d 204 [2008]; *Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997]; *Brown v. Two Exch. Plaza Partners*, 76 NY2d 172 [1990]; *Amante v. Pavarini McGovern, Inc.*, 127 AD3d 516 [1st Dept 2015]; *Guryev v. Tomchinsky*, 114 AD3d 723 [2d Dept 2014]; *Babiak v. Ontario Exteriors, Inc.*, 106 AD3d 1448 [4th Dept 2013]; *Burton v. CW Equities, LLC*, 97 AD3d 462, 463 [1st Dept 2012]; *Hernandez v. Argo Corp.*, 95 AD3d 782 [1st Dept 2012]).

Urbina v 26 Ct. St. Assoc., LLC, 46 AD3d 268 [1st Dept 2007] involved an indemnification provision with “arising in whole or in part and in any manner” language. *Id.* at 273. This provision is identical to the present indemnification agreement. The *Urbina* Court further noted that “the term ‘arising out of,’ in its most common sense, has been defined as originating from, incident to or having connection with.” *Id.* at 274. This comports with the facts of the instant action where the plaintiff was allegedly injured while working at the site under the STRUCTURE TONE subcontract with FREEDOM.

This Court finds that FREEDOM acted in a manner to be bound by the terms of the contract, which is further evidenced by its procurement of insurance as mandated by the contracts. FREEDOM’s Certificate of Insurance names STRUCTURE TONE and ONE HUDSON as additional insureds as required in the contracts. FREEDOM’s conduct clearly indicated acceptance of the terms of the subcontract and Master Subcontractor Agreement.

Turning to ONE HUDSON and STRUCTURE TONE’s common law claims for negligence and contribution, it is undisputed that Plaintiff, who was employed by FREEDOM, did not allege a grave injury. Consequently, all common law claims against FREEDOM are barred by Workers’ Compensation Law § 11.

Lastly, this Court credits MASS MERCHANDISING’s contention that FREEDOM is not entitled to contribution and common law indemnification from it. With respect to contribution, FREEDOM’s liability for the accident derives from its contract with STRUCTURE ONE and ONE HUDSON, and not as a joint tortfeasor that caused injury to the Plaintiff.

Moreover, since FREEDOM is not subject to statutory or vicarious liability for the plaintiff's accident, and its only liability arises out of its contractual obligations to the defendants, it cannot seek common law indemnification from MASS MERCHANDISING.

The instant motion and cross-motion are granted to the extent set forth above.

This constitutes the Decision and Order of the Court.



4/18/2024

HON. CAROLYN E. WADE, JSC

KINGS COUNTY CLERK
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