2011 WL 3204688 (N.Y.Sup.), 2011 N.Y. Slip Op. 31921(U) (Trial Order)
Supreme Court, New York.
Suffolk County

Lukasz BLACHNO, Plaintiff,
v.
HOME PROPERTIES STRATFORD GREENS, LLC, Home Properties, Inc., Home Properties. L.P., and Lipsky Construction Co., Inc., Defendants.;
Lipsky Construction Co., Inc., Third-Party Plaintiff,
v.
P.D. Quality Contracting, Inc., Third-Party Defendant.

No. 06-023173.
June 30, 2011.

CAL. No. 10-01849OT
Mot. Seq. # 006-MotD # 007 - MotD

West Headnotes (1)

[1] **Insurance** Contracts

Subcontractor was liable to general contractor for breach of contract, where contract required subcontractor to procure liability insurance and to designate general contractor as an additional insured under the policy, and subcontractor failed to obtain liability insurance and name general contractor as an additional insured.

Cases that cite this headnote

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[This opinion is uncorrected and not selected for official publication.]

Present: Hon. Jeffrey Arlen Spinner, Justice of the Supreme Court.

MOTION DATE 1-26-11

ADJ. DATE 3-16-11

Upon the following papers numbered 1 to 54 read on this motion *for partial summary judgment: and this motion for summary judgment;* Notice of Motion/Order to Show Cause and supporting papers 1 - 4; 5 - 16; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 17- 18; 19-20:21 -23:24-30, 31-49; Replying Affidavits and supporting papers 51 - 52; 53 - 54; Other *Defendant's Memoranda in further support of motion* (and for hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (#006) by defendant Lipsky Construction Co., Inc., and the motion (#007) by defendants Home Properties Stratford Greens, LLC, Home Properties Inc. and Home Properties, L.P.. are consolidated for the purpose of this determination; and it is

ORDERED that the motion by defendant Lipsky Construction Co., Inc. for an order pursuant to CPLR 3212 dismissing plaintiff's claims against it under Labor Law §§ 200, 240(2), 240(3), 241(l)(a), 241(l)-(5) and 241(6), and awarding judgment in its favor on its third-party claims for breach of contract and indemnification is granted as set forth herein and is otherwise denied; and it is further

ORDERED that the motion by defendants Home Properties Stratford Greens, LLC, Home Properties Inc., and Home Properties. L.P., for an order pursuant to CPLR 3212 dismissing plaintiff's claims against them under Labor Law §§ 200, 240(2), 240(3), 241(I)(a), 241(1)-(5), 241(6) and Rule 23 of the New York State Industrial Code, and awarding judgment in their favor on their cross claim for indemnification is granted as set forth herein and is otherwise denied.

Plaintiff Lukasz Blachno commenced this action to recover damages pursuant to Labor Law §§ 200, 240(2), 240(3), 241(l)(a), 241(l)-(5) and 241(6) for personal injuries he allegedly sustained on July 27, 2006 while working at a construction site owned by defendants Home Properties Stratford Greens, LLC, Home Properties Inc., and Home Properties, L.P., (hereinafter “the HPS defendants”). Plaintiff allegedly was injured when he fell from a ladder while performing work at the construction site. At the time of the accident, plaintiff was an employee of P.D. Quality Contracting Inc. (hereinafter “PDQ”), a subcontractor hired by the HPS defendants to perform construction and demolition services. Defendant Lipsky Construction Co., Inc. (hereinafter “LCC”) was retained by the HPS defendants as the general contractor for the project. On January 23, 2007, the HPS defendants commenced a third-party action for common law and contractual indemnification against LCC, which in turn, brought a fourth-party action against PDQ for breach of contract and common law and contractual indemnification. Plaintiff also commenced a separate action (index # 07-12605) against LCC for damages related to his injuries. By order of the Court (J. Baisley, Jr.) dated December 23, 2008, the third-party action by the (IPS defendants against LCC was converted to a cross claim, the separate action by plaintiff against LCC was consolidated with his original action, and the fourth party action by LCC against PDQ was converted to a third-party action.

LCC now moves for partial summary judgment dismissing plaintiff's claims under Labor Law §§ 200, 240(2), 240(3), 241(l)(a), 241(l)-(5) and 241(6), and for an order awarding it judgment on the issue of liability with respect to its third party action against PDQ for common law and contractual indemnification, and its alleged failure to procure insurance covering LCC in accordance with the parties' agreement. The UPS defendants seek identical relief with respect to plaintiff's Labor Law claims, as well as dismissal of his claim under Rule 23 of the New York State Industrial Code. The HPS defendants further request an order granting them summary judgment in their favor on their cross claims against LCC for common law and contractual indemnification. Plaintiff has indicated in his opposition papers that he agrees with the portion of defendants' motions seeking dismissal of his claims under Labor Law §§ 200, 240(2), 240(3), 241 (1)(a), 241(l)-(5), 241(6) and Rule 23 of the New York State Industrial Code. However, plaintiff requests that his claim under Labor Law § 240(1) be continued against the defendants as they have not sought its dismissal.

PDQ opposes the branch of LCC's motion seeking partial summary judgment on the issue of liability on its third-party claims for common law and contractual indemnification, and PDQ's alleged failure to procure liability insurance covering LCC. PDQ asserts that material triable issues exist as to whether LCC was actively negligent in causing plaintiff's accident, and as to whether the contract requiring it to procure liability on behalf of LCC was in effect on the date of plaintiff's accident. LCC

opposes the branch of the motion by the HPS defendants seeking summary judgment on the cross claim for indemnification, arguing triable issues exists as to the extent of supervision and control of the job site exercised by the HPS defendants at the time of plaintiff's accident.

Initially, the Court notes plaintiff has indicated in his opposition papers that, with the exception of his cause of action pursuant to Labor Law § 240(1), he agrees that the Labor Law claims asserted in his complaint should be dismissed. Therefore, the branches of the motions by the HPS defendants and LCC seeking dismissal of plaintiff's causes of action predicated upon, inter alia, Law §§ 200, 240(2). 240(3), 241(l)(a), 241(l)-(5) and 241(6) and Rule 23 of the New York State Industrial Code are granted. Plaintiff's Labor Law § 240(1) claim continues as against LCC and the HPS defendants as the parties failed to address the claim in their moving papers.

The first paragraph of the subcontract agreement between LCC and PDQ states that the agreement was entered into on July 17, 2006. Paragraph 21 of the agreement provides that the agreement "shall be effective as of the year and day first written above," Paragraph 6 of the agreement states, in pertinent part, that "[t]he subcontractor shall purchase and maintain such insurance as will protect Contractor and additional insureds from claims ... for damage or personal injury ... which may arise from operation under this subcontract. Subcontractor's policy shall have an endorsement naming Contractor as additional insured." Paragraph 7 further states as follows:

> To the maximum extent permitted by law, Subcontractor hereby assumes entire responsibility and liability for any and all damages and expenses or injury of any kind ... to all persons, whether employees of the subcontractor or otherwise,... connected with the work, the design and execution of the work, or the subcontractor's failure to perform his obligations under ... this subcontract... the Subcontractor agrees to indemnify and save harmless the Owner or the Contractor ... from and against any and all loss, expense (including court costs, attorneys fees ... discovery costs) damage, or injury that the Owner or the Contractor ... may sustain as a result of any such claim but only to the extent that such claim, damage or loss is not caused by the negligence of the Owner and/or Contractor.

In addition. Paragraph 11 of the subcontract provides "[t]he Subcontractor agrees that the prevention of accidents to workmen engaged in Subcontract Work is solely its responsibility. Subcontractor shall comply with all applicable safety laws ... the review of any safety plan by Contractor shall not be deemed to release Subcontractor or in any way diminish its liability, by way of indemnity, or otherwise, as assumed by it under this subcontract".

With regard to the branch of LCC's motion seeking summary judgment on its claim against PDQ for breach of contract based upon PDQ's failure to procure liability insurance naming it as an insured, an agreement to purchase insurance coverage is clearly distinct from and treated differently from an agreement to indemnify *(see Kinney v G.W. Lisle* Co., 76 N.Y.2d 215, 557 N.Y.S.2d 283 [1990]; *McGili v. Polytechnic Univ.*, 235 AD2d 400, 651 NYS2d 99 [2d Dept 1997]). Where the required insurance is not purchased, the non-purchasing party is responsible for all resulting damages, including any liability to third parties *{see Kinney v G.W. Lisle Co., supra).* An insurance procurement clause is entirely independent of indemnification provisions in contracts, and a final determination for failure to procure insurance need not await a tactual determination as to whose negligence caused a plaintiff's injuries *(see Kennelty v. Darlind Constr., Inc.,* 260 A.D.2d 443, 688 N.Y.S.2d 584. 260 A.D.2d 443, 688 N.Y.S.2d 584 [2d Dept 1999]; *McGill v Polytechnic Univ., supra).*

Here, LCC established its prima facie entitlement to summary judgment on its breach of contract claim based upon PDQ's failure to procure liability insurance and to designate it as an additional insured under said policy *(see Kennelty v Darlind Constr., Inc., supra; Kinney v G. W. Lisle Co., supra).* In opposition, PDQ does not deny the subcontract agreement required it to add LCC as an additional insured on its policy. Rather, PDQ argues that the motion should be denied, as a triable issue exists as to whether the agreement, which allegedly was signed on July 28, 2006, was in effect at the time of the plaintiff's accident. However, an examination of the subcontract executed by the parties reveals that while the subcontract was signed and dated July 28, 2006, the first paragraph of the agreement provides that the agreement "is made on the 17th day *of* July 2006." Paragraph 21 of the

agreement further states that “the agreement shall be effective as of the year and day first written above.” Thus, it is clear from the contract that the parties intended that the contract be given retroactive effect prior to the date of plaintiff's alleged accident *(see Pena v. Chateau Woodmere Corp.,* 304 A.D.2d 442, 759 N.Y.S.2d 451 [1st Dept 2003]; *Stabile v. Viener,* 291 AD2d 395, 737 NYS2d 387 [2d Dept 2002]). Moreover, the bare conclusory affidavit of PDQ's principal, Przemyslaw Dabkowski, alleging he was tricked into signing the subcontract is insufficient to warrant denial of the motion *(see Pena v Chateau Woodmere Corp., supra).* Mr. Dabkowski's affidavit is inconsistent with his written statement to the State Insurance Fund, and presents a feigned factual issue designed to avoid the consequences of his earlier sworn statements *(see Tejada v. Jonas.* 17 A.D.3d 448, 792 N.Y.S.2d 605 [2d Dept 2005]; *Novoni v. La Parma Corp.,* 278 A.D.2d 393, 717 N.Y.S.2d 379 [2d Dept 2000]).

With regard to the branch of LCC's motion seeking summary judgment on their cross claims against PDQ for common law and contractual indemnification, New York's Worker's Compensation Law § 11 prohibits third-party indemnification claims against employers, except where the employee sustains a grave injury or the claim is based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer expressly agreed to contribution or indemnification *(see Rodrigues v. N&S Blg. Contrs., Inc.,* 5 N.Y.3d 427, 805 N.Y.S.2d 299 [2005]; *Majewski v. Broadalbin-Perth Cent. School Dist.,* 91 N.Y.2d 577, 673 N.Y.S.2d 966 [1998]). Moreover, to establish a claim for common-law indemnification “the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability, but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law, such as the nondelegable duty imposed by Labor Law 240 (1)” *(Correia v. Professional Mgmt., Inc.,* 259 A.D.2d 60, 65, 693 N.Y.S.2d 596 [1st Dept 1999]), In the absence of any negligence on the part of the proposed indemnitor, liability for common-law indemnification against the indemnitor may be established by demonstrating the indemnitor had the authority to direct, supervise, and control the work giving rise to the injury(see *Mendeishohn v. Goodman,* 67 A.D.3d 753, 889 N.Y.S.2d 608 [2d Dept 2009]; *Benedetto v. Carrera Realty Corp.,* 32 A.D.3d 874, 822 N.Y.S.2d 542 |2d Dept 2006]; *Coque v. Wildflower Estates Dev.,* 31 AD3d 484, 81 8 NYS2d 546 [2d Dept 2006]).

Here, as there is no dispute that plaintiff did not suffer a grave injury; any claims for indemnification from PDQ will depend on its contractual obligation. Since the contract clearly calls for indemnification for claims arising from PDQ's negligent act or omission, any conditional order must be predicated on a finding that a negligent act of PDQ or the plaintiff's own action was a proximate cause of his accident *(see Farduchi v. United Artists Theatre Circuit, Inc.,* 23 A.D.3d 613, 804 N.Y.S.2d 786 [2d Dept 2005]). Notwithstanding LCC's assertion that it should be granted summary judgment on its contractual indemnification claim, because PDQ is absolutely liable for any violation of Labor Law § 240 (1). inasmuch as no determination has been made as to whether the accident resulted from a negligent act of PDQ or the plaintiff's own action, an award of summary judgment in LLC's favor would be premature at this time *(see D ‘Angela v. Builders Group,* 45 A.D.3d 522, 524-525, 845 N.Y.S.2d 814 [2d Dept 2007]; *Farduchi v United Artists Theatre Circuit, Inc., supra).* The portion of LCC's motion seeking summary judgment on its common law indemnification claim against PDQ also is denied. While LCC's liability, if any, is strictly vicarious, an award of summary judgment would likewise be premature in the absence of any determination as to whether the accident resulted from a negligent act of PDQ or the plaintiff's own action *(see Correia v Professional Mgmt., Inc., supra; see also Blake v. Neighborhood Hous. Servs. of N.Y. City.* 1 N.Y.3d 280, 771 N.Y.S.2d 484 [2003]). Therefore, the branch of the motion by LCC seeking summary judgment on its third-party claims against PDQ for contractual and common law indemnification is denied.

With regard to the motion by the HPS defendants seeking conditional summary judgment in its favor on its claims for contractual and common law indemnification against LCC, the contract between the I IPS defendants and LLC expressly provides that LCC “agrees to defend, indemnify and hold harmless [the HPS defendants] ... from and against any and all claims ... that may arise in whole or part from [LCC's] work.” The agreement further states that LCC “must comply with applicable Federal and State laws and regulations ... and shall indemnify and save harmless the [the HPS defendants] against any claim or liability arising from or based upon the violation of any such law ... whether such violation be by [LCC] or any lower tier contractor.” Thus, much like the indemnification provision contained in the subcontract agreement between LCC and PDQ discussed above, contractual indemnification is predicated upon a finding of some negligence by the indemnitor. Since there has been no finding that the proximate cause of plaintiff's accident arose from the negligent act of LCC, PDQ or plaintiff himself, the claim for

contractual indemnification is premature *(see D'Angelo v Builders Group, supra; Kader v. City of N.Y. Hous, Preserv. & Dev.*, 16 A.D.3d 461, 791 N.Y.S.2d 634 [2d Dept 2005]). Further, since a claim for common-law indemnification is dependent upon a showing that, among other things, the proposed indemnitor also was guilty of some negligence that contributed to the cause of the accident *(see Benedetto v. Carrera Realty Corp.*, 32 A.D.3d 874, 822 N.Y.S.2d 542 [2d Dept 2006]; *Perri v. Gilbert Johnson Enters. Ltd.*, 14 A.D.3d 681, 790 N.Y.S.2d 25 [2d Dept 20051; *Priestly v. Montefiore Med. Ctr./Einstein Med. Or.*, 10 A.D.3d 493, 781 N.Y.S.2d 506. 495. 10 A.D.3d 493, 781 N.Y.S.2d 506 [1st Dept 2004]). the claim by the HPS defendants for common law indemnification is premature. Accordingly, the motion by the HPS defendants seeking summary judgment on their cross claims for common-law and contractual indemnification over and against LCC is denied.

Dated: JUN 20 2011

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J.S.C.

___ FINAL DISPOSITION *X* NON-FINAL DISPOSITION

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