

**W & W Glass Sys., Inc. v Metal Sales Co., Inc.**

2012 NY Slip Op 30257(U)

February 1, 2012

Supreme Court, New York County

Docket Number: 117843/05

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN  
*Justice*

PART 57

Index Number : 117843/2005

INDEX NO. \_\_\_\_\_

BUCKLEY, JAMES

MOTION DATE \_\_\_\_\_

vs

CITY OF NEW YORK

MOTION SEQ. NO. \_\_\_\_\_

Sequence Number : 007

MOTION CAL. NO. \_\_\_\_\_

RENEWAL

The following papers, numbered 1 to 4 were read on this motion to/for renewal

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

1
2,3
4

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

**FILED**

FEB 03 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: Feb 1, 2012

Marcy S. Friedman  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: PART 57

\_\_\_\_\_  
JAMES BUCKLEY,  
Plaintiff,

- against -

THE CITY OF NEW YORK, THE NEW YORK CITY  
HEALTH AND HOSPITAL CORP., THE NEW YORK  
STAE DORMITORY AUTHORITY and,  
TDX/GILBANE A Joint Venture,

Index No.: 117843/05

Defendants.

**FILED**

\_\_\_\_\_  
THE CITY OF NEW YORK, THE NEW YORK CITY  
HEALTH AND HOSPITAL CORP., THE NEW YORK  
STATE DORMITORY AUTHORITY and TDX/GILBANE,  
A Joint Venture,

FEB 03 2012

Third-Party Plaintiffs,

NEW YORK  
COUNTY CLERK'S OFFICE

- against -

Third-Party Index No.  
590712/08

TOTAL SAFETY CONSULTING LLC and GREG  
BEECHE, LOGISTICS,

Third-Party Defendant.

\_\_\_\_\_  
TOTAL SAFETY CONSULTING, LLC,

Second Third Party Plaintiff,

- against -

Second Third-Party No.  
590093/10

W & W GLASS SYSTEMS, INC.,

Second Third-Party Defendant,

\_\_\_\_\_

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

**FILED**

FEB 03 2012

W & W GLASS SYSTEMS, INC., THE CITY OF NEW YORK,  
THE NEW YORK CITY HEALTH AND HOSPITALS CORP.,  
DORMITORY AUTHORITY OF THE STATE OF NEW YORK,  
and GILBANE/TDX, Joint Venture,

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiffs,  
- against -

Index No. 112249/06

METAL SALES CO., INC.,  
  
Defendant.

DECISION and ORDER

HON. MARCY FRIEDMAN, JSC

Movant Metal Sales Co., Inc. (Metal Sales or defendant) seeks to renew its motion for summary judgment dismissing the complaint against it. The motion was granted in part and denied in part by this court's decision filed on October 14, 2009 and served with Notice of Entry on November 18, 2009. (Order with Notice of Entry and Affidavit of Service, Ex. A to Metal Sales' motion.)<sup>1</sup>

Metal Sales is the defendant in this action for indemnification and breach of contract, related to an underlying personal injury action entitled Buckley v. City of New York, et al. (Supreme Court, New York County, Index No 117845/05 [the underlying action]). In that action, John Buckley, an employee of Metal Sales, sued the City of New York, the New York Health and Hospital Corp., the State Dormitory Authority, and TDX/Gilbane, the general contractor (collectively referred to as the TDX defendants) for injuries sustained during the course of his

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<sup>1</sup>All references are to exhibits filed on the instant motion, unless it is expressly stated that the references are to exhibits from the prior motion.

employment on a construction project. Neither Metal Sales nor W & W Glass Systems, Inc. (W & W), the contractor that subcontracted its work to Metal Sales on the project, was named as a defendant in the underlying action.

On the prior motion, this court determined that Mr. Buckley did not sustain a "grave injury" as defined under Workers' Compensation Law §11, and that W & W's causes of action against Metal Sales for common law indemnification and contribution should accordingly be dismissed. The court, however, denied summary judgment with respect to W & W's causes of action for contractual indemnification and failure to provide insurance. Although W & W had not then been sued in any action, the court found that Metal Sales was potentially liable to W & W for costs for the defense that W & W was providing to the TDX defendants in the underlying action. In reaching that determination, the court relied, as set forth below, upon the statements of opposing counsel and an affidavit provided by a representative of W & W's insurer, Travelers Insurance Company (Travelers), that it was providing the defense to the TDX defendants under a contract (W & W indemnification contract) in which W & W agreed to indemnify those defendants.

Metal Sales contends that at the time of the prior motion it was not provided with clear or definitive evidence that the TDX defendants were being defended not in their capacity as contractual indemnitees pursuant to the W & W indemnification contract but, rather, in their capacity as additional insureds under W & W's Travelers policy. According to Metal Sales, it first received such proof that the TDX defendants were insured under the Travelers policy when Metal Sales' counsel was provided with an affidavit, in March 2011, from Travelers' claims representative that the TDX defendants "are being defended and indemnified as additional

insureds” under the Travelers policy. (See Ex. G Aff. of Pamela L. Burke sworn to on 3/10/11; see also Aff. In Support of Motion to Renew of Steven Zecca [Metal Sales’ attorney], ¶¶21-23.)

In support of the contention that this fact was not established at the time of the prior summary judgment motion, Metal Sales points to the complaint filed against it by the TDX defendants which merely states that W & W “is providing defense and indemnity” to those defendants. (Ex. B, Comp., ¶13.) Metal Sales also cites multiple assertions, by counsel and by a representative of Travelers in the papers in opposition to the prior motion, that Travelers was defending the TDX defendants pursuant to W & W’s indemnification contract. (Aff. of Warren T. Harris [TDX Ds.’ then attorney] in Opp. to Prior Motion, 2/12/09, ¶¶ 4, 22, 28, 29 and 30; Aff. of Michael Haber [Managing Member of W & W] in Opp., 2/12/09, ¶¶ 8-9 [both contained in Ex. C].)

In fact, at least two exhibits to the prior motion raised an issue as to whether the TDX defendants were additional insureds under W & W’s Travelers policy. The Dormitory Authority Contract (Ex. C [Ex. B to prior motion]) provided in §15.01A(2)(b) and (c) that TDX and all subcontractors must name the municipal and state defendants as additional insureds on all policies of insurance. The motion papers also contained a letter from a Travelers representative to another Travelers division, dated September 12, 2005, demanding defense and indemnification in the Buckley action, and stating: “I have enclosed a copy of the Certificates of Insurance naming the City of New York, City of New York Health & Hospital Corp., Forensic Biology Laboratory, Dormitory Authority State of New York, Gilbane/TDX Joint Venture as additional insureds on the policy issued to W & W Glass Systems by Travelers Indemnity Company.” (Ex. H to prior motion, included in Ex. C to instant motion.) Moreover, Metal

Sales contended in supplemental papers that “it is clear that in fact St Paul/Travelers, the carrier, for W & W Glass, is defending all of these entities as they are entitled to additional insured coverage under the policy issued by [sic]W & W Glass.” (Aff. of Thomas G. Chojnacki, [Metal Sales’ former attorney], dated 4/28/09, ¶7 [included in Ex. C].) Both W & W and the TDX defendants insisted, however, that the TDX defense was W & W’s responsibility pursuant to its contract with the Dormitory Authority requiring their indemnification; that Travelers was providing a defense on that basis; and that Metal Sales was liable to indemnify W & W for the defense costs under its indemnification contract with W & W. (Supp. Harris Aff. in Opp., dated 5/11/09, ¶¶ 7,9, 10, 12, 13, &17; Aff. of Pamela Diconsiglio [Travelers Claims Representative,] dated 5/\_/09 [both contained in Exhibit C].)

Notwithstanding the references in the record of the prior motion to the TDX defendants’ additional insured coverage, the court finds that leave to renew should be granted as to the contractual indemnification claim. CPLR 2221(e)(2) provides that a motion to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination . . . .” CPLR 2221(e)(3) further provides that the motion shall “contain reasonable justification for the failure to present such facts on the prior motion.” Renewal must ordinarily be “based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court.” (Foley v Roche, 68 AD2d 558, 568 [1st Dept 1979].) However, the court may, in its discretion, grant renewal “in the interest of justice, upon facts known to the movant at the time of the original motion.” (The Rancho Santa Fe Assn. v Dolan-King, 36 AD3d 460, 461 [1st Dept 2007] [and cases cited therein]. Where the rigorous requirements for renewal are not met, such

\* 7]  
relief may nevertheless be properly granted “so as not to defeat substantive fairness.( Id.)

In denying Metal Sales’ motion for summary judgment dismissing W & W’s contractual indemnification claim, this court relied on the statements of the entities best situated to know the basis of Travelers’ defense of the TDX defendants, – that is, that they were being defended by Travelers as W & W’s contractual indemnitees. Review of the record on the prior motion reveals, moreover, that the provision of the defense to the TDX defendants as Travelers’ insureds was far from established. In light of the court’s reliance on a fact that has now been disproved, the motion to renew will be granted in the interests of justice. Upon renewal, W & W’s exposure to liability in the underlying action must be reevaluated.

At the time of the prior summary judgment motion, W & W was not exposed to liability based on its contractual obligation to indemnify the TDX defendants, as Travelers was defending them as additional insureds. Put another way, W & W’s indemnification contract was not implicated. The prior order will therefore be modified to dismiss W & W’s contractual indemnification cause of action against Metal Sales.

Subsequent to the filing of the motion to renew, the TDX defendants commenced an action against W & W “seeking common law and contractual indemnification in excess of the primary limits of coverage being afforded to them by W & W’s primary policy.” (Aff. of Brian T. Deveny [TDX Ds.’ Attorney] In Opp., dated 9/26/11, at 14 [emphasis in original]; Ex. A thereto [Third Party Summons and Complaint].)

W & W claims that the anti-subrogation rule bars direct claims by the TDX defendants against W & W, but only up to the limits of coverage. W & W then argues: “Thus, in the event that the plaintiff obtains a judgment against the TDX Defendants that is in excess of the coverage



being made available to them under the W & W Glass primary and excess policies, then the TDX Defendants would face no anti-subrogation bar to pursue W & W Glass for the shortfall. This would likewise result in a loss to W & W Glass for which it could seek recovery from Metal Sales.” (Aff. of Anthony Lugara [W & W’s Attorney] In Opp., dated 6/3/11, ¶38.)

This newly asserted basis for W & W’s exposure to liability to the TDX defendants under its contractual indemnification contract cannot serve as a basis for maintenance of W & W’s contractual indemnification claim in this action against Metal Sales, given that W & W has litigated its claim against Metal Sales through summary judgment on the basis of a different exposure (provision of a defense to the TDX defendants in their capacity as indemnitees rather than as additional insureds). However, the grant of summary judgment dismissing W & W’s contractual indemnification cause of action against Metal Sales will be without prejudice to other proceedings by W & W, if so advised, for contractual indemnification from Metal Sales for defense costs and other damages exceeding the primary and excess policies. Nothing in this decision shall be construed as a finding as to the merits of such claim.

The court declines to grant leave to renew as to the failure to procure insurance claim. Metal Sales offers no excuse for its delay in providing proof of insurance.

For the foregoing reasons, it is hereby

ORDERED that the motion of defendant Metal Sales Co., Inc. for leave to renew its prior motion brought under Index Number 1122249/06, which case was subsequently consolidated with related actions, is granted as to W & W’s contractual indemnification claim only; and it is further

ORDERED that, upon renewal, the court adheres to its prior order dated October 2, 2009

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and filed with the clerk of the court on October 14, 2009, to the extent that summary judgment is granted (1) dismissing in their entirety the claims of plaintiffs the City of New York, the New York City Health and Hospital Corp., the Dormitory Authority of the State of New York, and Gilbane/TDX Joint Venture; and (2) dismissing the claims of plaintiff W & W Glass Systems, Inc., for common law indemnification and contribution; and it is further

ORDERED that the court's prior order of October 2, 2009 is modified to the extent that summary judgment is granted dismissing the claims of W & W Glass Systems, Inc. against defendant Metal Sales Co., Inc. for contractual indemnification; and it is further

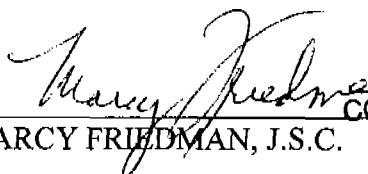
ORDERED that dismissal of plaintiff W & W Glass Systems, Inc.'s claims against defendant Metal Sales Co., Inc. for contractual indemnification is without prejudice to other proceedings by W & W for contractual indemnification from Metal Sales for defense costs and other damages exceeding primary and excess insurance coverage.

This constitutes the decision and order of the court. The Clerk shall enter judgment accordingly.

Dated: New York, New York  
February 1, 2012

**FILED**

FEB 03 2012

  
NEW YORK  
COUNTY CLERK'S OFFICE  
MARCY FRIEDMAN, J.S.C.