STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

CALLANAN INDUSTRIES, INC.,

Plaintiff,

-against-

HUDSON RIVER CONSTRUCTION CO., INC.,

Defendant.

DECISION AND ORDER
RJI NO. 01-12-107317
INDEX NO. 403-12

Supreme Court Albany County All Purpose Term, July 20, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Couch White LLP
Melanie J. Lafond
Attorneys for Plaintiff
540 Broadway
P.O. Box 22222
Albany, New York 12201

Napierski, Vandenburgh, Napierski & O'Connor LLP
Eugene D. Hallock III
Attorneys for Defendant
296 Washington Avenue Ext. Ste. 3
Albany, New York 12203

TERESI, J.:

Plaintiff commenced this contractual indemnification action against Defendant, based upon the parties' April 28, 2006 Standard Subcontract (hereinafter "Subcontract"). Issue was joined, and Defendant now moves for summary judgment[1] dismissing Plaintiff's complaint. Plaintiff opposes the motion. Because Defendant demonstrated its entitlement to judgment as a

[1] Although Defendant's Notice of Motion states that it is made pursuant to both CPLR §§ 3212 and 3211, because Defendant made no CPLR §3211 arguments, Defendant's motion will be treated as one seeking summary judgment only.

matter of law and Plaintiff raised no issue of material fact, the motion is granted.

"On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (Vega v Restani Const. Corp., 18 NY3d 499, 503 [2012], quoting Ortiz v. Varsity Holdings, LLC, 18 NY3d 335 [2011][internal quotation marks omitted]). Initially, "the moving party bears the burden of establishing that no material issues of triable fact exist and that it is entitled to judgment as a matter of law." (U.W. Marx, Inc. v Koko Contr., Inc., __AD3d__ [3d Dept 2012]). Once this burden has been met, the opponent of the motion must "produce evidentiary proof in admissible form sufficient to raise a triable issue of fact." (Flynn v Toys 'R' Us, Inc., 31 AD3d 603, 604 [2d Dept 2006]).

For purposes of this motion, Defendant has not contested the underlying facts. Pursuant to the Subcontract, in 2006 Defendant was performing milling work for Plaintiff on a New York State Thruway Authority (hereinafter "Thruway Authority") highway project. Around the time and in the location of Defendant's work, Eddie Maldonado, Jr. (hereinafter "Maldonado") was injured in a motorcycle accident. To recover the damages he sustained, Maldonado commenced a personal injury action against the Thruway Authority. Plaintiff, obligated to defend and indemnify the Thruway Authority, defended the Thruway Authority in the Maldonado action. Such action resulted in a liability only verdict against the Thruway Authority. The Thruway Authority, by Plaintiff, then settled Maldonado's action for $70,000. Citing Subcontract Articles Five and Twelve, Plaintiff commenced this action to recover its settlement payment of $70,000, along with the attorneys fees and costs it expended in the Maldonado action.

The written terms of the Subcontract are likewise not at issue. Article Five, entitled "Insurance," required Defendant to procure general liability coverage for Plaintiff. Article

Twelve, the "Indemnification" provision, then defines Defendant's indemnification obligation. The first sentence states, in part, that:

> "To the fullest extent permitted by law, the [Defendant] shall indemnify and hold harmless the Owner and Architect and all of their agents and employees from and against all claims... arising out of or resulting from the performance of the [Defendant's] Work..." (emphasis added).

Article Twelve's second sentence then qualifies the above by requiring that it not be construed to "reduce any other indemnity right or obligation of indemnity." Lastly, Article Twelve's third sentence states that:

> "[Defendant] shall further indemnify and hold Callanan [(Plaintiff)] harmless from debts, dues, demands, or claims against the [Defendant] or any of its sub-subcontractors or suppliers for services or labor performed or materials, supplies, equipment furnished or used, or claims of any other character, including reasonable attorneys' fees, and in the event it is necessary for Callanan [Plaintiff] to file a bond or undertaking or take proceedings to facilitate the release of monies due because of such claims, then the cost of so doing shall be paid by the [(Defendant)], and if any such claims are made against Callanan [(Plaintiff)], Callanan [(Plaintiff)] shall have the right to withhold, from payments due or to become due the [Defendant], sufficient monies to indemnify Callanan [(Plaintiff)]." (emphasis added).

As is applicable to interpreting the above contractual "indemnity provision, the language must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." (Luby v Rotterdam Sq., L.P., 47 AD3d 1053, 1055 [3d Dept 2008], quoting Hooper Assoc. v. AGS Computers, 74 NY2d 487 [1989]). Moreover, each sentence within Article Twelve "must be read in harmony to determine its meaning." (Bombay Realty Corp. v Magna Carta, Inc., 100 NY2d 124, 127 [2003]).

Here, Defendant established that Plaintiff is not entitled to indemnification, under the Subcontract, for the Maldonado claim. Considering first Article Five, its title and language explicitly refer to Defendant's obligation to obtain insurance for Plaintiff. Despite its otherwise

broad declaration of responsibility, "[a]n agreement to procure insurance is not an agreement to indemnify or hold harmless, and the distinction between the two is well recognized." (Kinney v G.W. Lisk Co., Inc., 76 NY2d 215, 218 [1990]). Thus, Article Five provides no basis for Plaintiff's indemnification claim.

Nor is Plaintiff entitled to indemnification under Article Twelve. As set forth above, Article Twelve contains two distinct indemnification obligations. The first sentence refers to Defendant's obligation to indemnify "Owner and Architect and all of their agents and employees;" whereas, the third sentence specifically defines Defendant's indemnity obligation to "Callanan [(Plaintiff)]." This distinction is critical. (Bombay Realty Corp. v Magna Carta, Inc., supra). By naming Plaintiff in the third sentence but not the first, it establishes the parties' intent to exclude Plaintiff from the first indemnity provision. (*see generally* Tonking v Port Auth. of New York and New Jersey, 3 NY3d 486 [2004]). Thus, according to the third sentence's indemnity provision, Defendant must indemnify Plaintiff only "from debts, dues, demands, or claims against the [Defendant] or any of its sub-subcontractors or suppliers..." Because the Maldonado action was not such a claim, Defendant established as a matter of law that Plaintiff is not entitled to indemnification from it. (Toledo v Long Is. Jewish Med. Ctr., 309 AD2d 921 [2d Dept 2003]).

With the burden shifted, Plaintiff failed to raise a material issue of fact. Due to the above Article Twelve analysis, Plaintiff's reliance on Article Twelve's first sentence's indemnification obligation is unavailing and raises no issue of fact. Nor is its construction of Article Twelve's third sentence. Its proposed construction inappropriately disregards the "from... for" distinction that the sentence explicitly makes. Because, as stated above, the third sentence's indemnity

obligation arises only "from debts, dues, demands, or claims against the [Defendant] or any of its sub-subcontractors or suppliers" Plaintiff raised no issue of fact by its proposed construction.

In light of the foregoing, Plaintiff's allegations relative to its providing Defendant with notice of Maldonado's claim are irrelevant. Nor has Plaintiff made any "evidentiary showing suggesting that completion of discovery will yield material and relevant evidence" that necessitates denial of Defendant's summary judgment motion pursuant to CPLR §3212(f). (Saratoga Assoc. Landscape Architects, Architects, Engrs. & Planners, P.C. v Lauter Dev. Group, 77 AD3d 1219, 1222 [3d Dept. 2010], quoting Zinter Handling, Inc. v. Britton, 46 AD3d 998 [3d Dept. 2007]).

Accordingly, Defendant's motion for summary judgment is granted.

This Decision and Order is being returned to the attorneys for the Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: August 14, 2012
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated July 27, 2012; Affidavit of Eugene D. Hallock, III, dated June 27, 2012, with attached Exhibits A-H
2. Affirmation of Melanie LaFond, dated July 11, 2012, with attached Exhibits 1-2.