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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

CHRISTOPHER RICCIARDI and MARIA RICCIARDI,
Plaintiffs,

-against-

BERNARD JANOWITZ CONSTRUCTION CORP., et al.,
Defendants.

Index No. 15466/03

Motion
Date May 1, 2012

Motion
Cal. No. 19

Motion
Sequence No. 11

BERNARD JANOWITZ CONSTRUCTION CORP.,
Third-Party Plaintiff,

-against-

JME FIRE SPRINKLER CORP.,
Third-Party Defendant.

WJ HARBOR RIDGE, LLC,
Second Third-Party Plaintiff,

-against-

ME FIRE SPRINKLER CORP.,
Second Third-Party Defendant.

WJ HARBOR RIDGE, LLC,
Third Third-Party Plaintiff,

-against-

ALL ISLAND CLEANING,
Third Third-Party Defendant.

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Upon the foregoing papers it is ordered that this order to show cause by third-party defendant JME Fire Sprinkler Corp. is decided as follows:

The relevant facts may be briefly stated. WJ Harbor Ridge, LLC ("Harbor Ridge"), an owner, contracted with defendant Bernard Janowitz Construction Corp. ("Janowitz"), a general contractor, to perform as a general contractor for a construction project. Janowitz hired third-party defendant JME Fire Sprinkler Corp. ("JME") as a subcontractor to install a fire sprinkler system. JME and Janowitz entered into an AIA Standard Form Agreement Between Contractor and Subcontractor agreement executed on September 25, 2002.

Paragraph 4.6.1 of the contract provides:

> To the fullest extent permitted by law, the *Subcontractor shall indemnify and hold harmless the Owner*, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including *but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract*, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, *but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor*, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 4.6. (Emphasis added)

The contract also contains a "Rider No. 2". Paragraph 5b of Rider No. 2 provides in pertinent part:

> *The Subcontractor agrees to protect, defend, indemnify and hold harmless the Owner,*

> Contractor, its agents, employees, representatives and successors *free and harmless from and against any and all losses, claims, liens, debts, personal injuries* (including employees of the various listed parties), death or damages to property (including property of the various listed parties) and without limitation by enumeration, all other claims or demands of every character occurring or in anywise incident to, in connection with or arising directly or indirectly from the said agreement. *The Subcontractor agrees to investigate, handle, respond to, provide defenses for and any such claim, demands or suit at its sole expense and agrees to bear all other costs and expenses related thereto, even if it (claims etc.) is groundless, false or fraudulent*. (Emphasis added)

Plaintiff was injured while working at the construction project and sued Harbor Ridge and Janowitz alleging negligence on the part of Harbor Ridge and Janowitz. Janowitz, in turn, filed a third-party action against JME. The third-party complaint sought common-law indemnification and contractual indemnification.

Although the contract required JME to name Harbor Ridge as an additional insured, from the record before the court there is no evidence that Harbor Ridge as an additional insured made a claim or demand to JME's insurance carrier for a defense and indemnification.

Harbor Ridge moved for summary judgment against Janowitz and JME respectively, seeking summary judgment as to both pursuant to contractual and common law indemnification. Pursuant to an order dated November 27, 2006, Harbor Ridge was granted contractual indemnification against third-party defendant, JME. Additionally, the Court granted conditional summary judgment against defendant Janowitz pending the outcome of any negligence on the part of Janowitz. In or about October 2, 2008, after a trial a jury found and apportioned liability between: Janowitz 95% and JME 5%. The case then proceeded to a damages trial which was settled for $5.25 million. In an order dated November 22, 2010 this court granted Harbor Ridge's motion for an order compelling JME and Janowitz to pay the reasonable attorneys' fees incurred by Harbor Ridge in defense of this action. As the issue of contractual indemnification has been previously decided, the Court finds that both Janowitz and JME are responsible to reimburse Harbor Ridge for its legal fees and expenses in this matter.

JME now moves by order to show cause for an order declaring

that JME "is obligated to pay not more than 5% of the attorneys fees that WJ Harbor Ridge, LLC can sufficiently prove to be reasonable..."

In support of the motion JME argues that its obligation to indemnify Harbor Ridge is limited to JME's 5% apportioned fault. According to JME, although Harbor Ridge was granted contractual indemnification from both Janowitz and JME, enforcement of the obligation to indemnify must be apportioned based on the respective parties fault and cannot be enforced jointly and severally pursuant to the contract between JME and Janowitz, citing *Frank v. Meadowlakes Dev. Corp.*, 6 NY3d 687 (2006). JME further argues that the indemnity provision in the Rider in which JME promises to indemnify Harbor Ridge for a third party's negligence is unenforceable and with no legal effect.

In opposition, Janowitz argues that JME and Janowitz have contractually promised to indemnify and defend Harbor Ridge and if Harbor Ridge's defense costs are to be apportioned between Janowitz and JME, then they should be apportioned equally, 50/50.

DISCUSSION

It is well settled that a contract between parties which provides for indemnification will be enforced where the intent that one party indemnifies the other is sufficiently clear and unambiguous (*Bradley v. Feiden*, 8 NY3d 265, 275 [2007]). Moreover, "when the intent is clear, an indemnification agreement will be enforced even if it provides indemnity for one's own or third party's negligence." *Id.* Furthermore, when the intent to indemnify is clear, a court will not interpret a contracted indemnification provision in a manner that will render it meaningless. *Id.*, 864, citing and quoting *Gross v. Sweet*, 49 NY2d 102, 108 (1979).

The provisions of paragraph 5b of Rider 2 clearly and unambiguously require JME to defend Harbor Ridge and Janowitz at it own expense and **without regard to an apportionment of liability**. This promise by JME conflicts with its promise under paragraph 4.6.1 of the contract which limits JME's obligation to defend **"only to the extent cause in whole or in part by negligent acts or omissions** [JME] ... regardless of whether or not such claim damage, loss or expense is caused in part by [Harbor Ridge or Janowitz]." (Emphasis added).

Insofar as provisions of paragraph 4.6.1 of the contract can be reconciled with provisions of paragraph 5b of Rider No. 2, each must be construed so as to give effect to the contractual provisions. Generally, no provision of a contract should be left without force and effect (*see, Hooper Associates, Ltd. v. AGS*

Computers, Inc., 74 NY2d 487 [1989]). Because of this, contracts should be interpreted so that every part of it is given effect, or so that each part has meaning (*see, Acme Supply Co., Ltd. v. City of New York*, 39 AD3d 331 [1st Dept 2007]; *see also, Corhill Corp. v. S.D. Plants, Inc.*, 9 NY2d 595, 599 [1961] ["a court should not adopt an interpretation' which will operate to leave a provision of a contract ... without force and effect"]). If it can consistently and reasonably be done, such an interpretation must be adopted as will render the whole agreement operative, and so far as possible, effect will be given to all the language (*see, Taylor v. Muss* 13 AD2d 245 [1st Dept 1961] *affd* 11 NY2d 685).

In the case at bar, the competing hold harmless clauses are conflicting. The terms of the AIA Standard Form contract limit JME's damages for indemnification to damages caused in whole or in party by its own negligence. The terms of the rider, however, are broad and open and contain no such restrictions. The limiting language of the contract's indemnification clause cannot, therefore, be reconciled with the subsequent provisions of the rider.

Because the provisions of paragraph 4.6.1 of the contract conflict with the provisions of paragraph 5b of Rider No. 2, then as a matter of law, the provisions of Rider No. 2 should be deemed to be controlling. The general rule in New York is that additional terms written by hand, or type written on a printed contract, or attached as a rider to a printed contract are controlling when those terms conflict with the printed portion of the contract (*see, e.g., Heyn v. New York Life Ins. Co.*, 192 NY1 [NY 1908]; *see also, Harper v. Albany Mut. Ins. Co.*, 17 NY 194 [1858] ["the written part of a policy shall always prevail over the printed part, in cases of repugnancy"]; *Mercantile Paper Products Co. v. 1491 Third Avenue Realty Corp.*, 230 AD 436 [1st Dept 1930] *affd* 255 NY 640 ["[the] rule is that an added typewritten clause such as is contained on the unnumbered rider supersedes the printed form and will prevail"]; *Ebbecke v. Bay View Envir. Servs., Inc.*, 145 AD2d 524 [2d Dept 1988]; *Laurino v. Hewman*, 10 AD2d 725 [2d Dept 1960]).

In the case at bar, the printed AIA Standard Form contract limits JME's liability for indemnification to those damages caused in whole or in part by JME's negligence. However, Rider No. 2 contains a provision that JME shall defend Harbor Ridge (and Janowitz) at its sole cost. The Rider does not limit JME's obligation to defend based on any apportionment of liability. Because Harbor Ridge was not at fault for the plaintiff's accident, paragraph 5b of Rider No. 2 is fully enforceable against JME. Moreover, as a matter of law, inasmuch as paragraph 5b of Rider No. 2 conflicts with the language of paragraph 4.6.1

of the printed contract, the language of paragraph 5b is controlling since it is contained in a rider attached to the printed contract form.

The next question that the court is faced with deciding is as between JME and Janowitz what percentage of Harbor Ridge, LLC's attorney's fees is JME obligated to pay. In deciding this issue the court must decide under what legal principle is the amount determined. Is JME obligated to pay the total amount without contribution by Janowitz, or and without apportionment based upon fault. If the court looks to the clear and unambiguous language of the contract it would appear that JME agreed to pay for all of Harbor Ridge's defense, without contribution by Janowitz.

APPORTIONMENT OF ATTORNEY'S FEES FOR DEFENSE OF WJ HARBOR

In this case JME does not dispute that it is contractually obligated to indemnify Harbor Ridge. JME asserts that pursuant to paragraph 4.6.1 its obligation is limited to its 5% apportioned fault.

JME contractually promised to defend Harbor Ridge. The promise to defend was not conditioned upon a finding of negligence against JME. JME had an unconditional obligation to defend Harbor Ridge, without apportionment. As it relates to Harbor Ridge, JME had a contractual obligation to defend Harbor Ridge. This contractual obligation cannot be abridged or otherwise reduced merely because Janowitz or other 3rd party also contractually promised Harbor Ridge it would defend it. Both JME and Janowitz contractually promised to defend Harbor Ridge, and as such, each is jointly and severally obligated to pay for Harbor Ridge's defense, without any regard to apportionment based upon fault or negligence.

Accordingly, IT IS HEREBY ORDERED and DECLARED that JME Fire Sprinkler Corp. and Janowitz are jointly and severally obligated to pay the reasonable and necessary attorney's fees and expenses related to the defenses of the instant action of WJ Harbor Ridge, LLC without regard to apportionment based upon fault or negligence.

Dated: August 13, 2012

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Howard G. Lane, J.S.C.