**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: PART 35**

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LEONID GOLOVASHCHENKO and OLENA GOLOVASHCHENKO,

Index No.: 116388/10

Plaintiffs,

-against-

TELENTOS CONSTRUCTION CORPORATION and DORMITORY AUTHORITY OF THE STATE OF NEW YORK and THE CITY OF NEW YORK,

Defendants.

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TELENTOS CONSTRUCTION CORPORATION and DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

Third-Party Index No.: 590406/11

Third-Party Plaintiffs,

-against-

A.S.A.R. INTERNATIONAL CORP.,

Third-Party Defendant.

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A.S.A.R. INTERNATIONAL CORP.,

Fourth-Party Plaintiff,

-against-

DYNA CONTRACTING, INC.,

Fourth-Party Defendant.

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**Edmead, J.:**

This is an action to recover damages for personal injuries sustained by an asbestos removal worker on November 13, 2009, when he was struck by a loose plywood plank that blew

off a wheelbarrow/dolly while he was working at a construction site located on the roof of the Bird S. Coler Hospital on Roosevelt Island, New York (the Premises).

Fourth-party defendant Dyna Contracting, Inc. (Dyna) moves, pursuant to CPLR 3212, for summary judgment dismissing A.S.A.R. International Corp.'s (ASAR) fourth-party complaint against it sounding in contribution and common-law indemnification, as well as the cross claims asserted against it by defendants Telentos Construction Corporation (Telentos), Dormitory Authority of the State of New York (DASNY) and the City of New York (the City) sounding in contribution and common-law and contractual indemnification.

**BACKGROUND**

On the day of the accident, the City and DASNY owned the Premises where the accident occurred. Telentos served as general contractor on a project underway at the Premises, which entailed the renovation of the roof and parapet walls of the Premises, as well as the removal of asbestos from the roof (the Project). Telentos hired Dyna to perform the brick and roofing work, and it hired plaintiff's employer, ASAR, to remove the asbestos.

Dyna claims that it is entitled to dismissal of all claims against it, because it had nothing at all to do with plaintiff's asbestos abatement work or the defect that allegedly caused the accident, i.e., the unsecured piece of plywood that flew off a hand-propelled dolly and struck plaintiff.

Initially, it should be noted that only fourth-party plaintiff ASAR opposes Dyna's motion. Therefore, with the exception of those claims asserted against it by ASAR, Dyna is entitled to dismissal of all cross claims asserted against it.

***Plaintiff's First Deposition***

At his first deposition, which was held on February 11, 2010 (the First Deposition), plaintiff testified that he was hired by ASAR to remove asbestos from the roof of the Premises. Plaintiff explained that he was injured when, while returning to his work area after retrieving some materials, he was struck in the head by a single sheet of plywood that had been lying across the top of a "four-wheel barrow"/dolly (the First Deposition, plaintiff's tr at 10). Plaintiff described the plywood as measuring approximately "[t]en feet by five feet" (*id.* at 11). The plywood was one-half of an inch thick. At the time of the accident, ASAR's other workers were inside various asbestos containment tents located on the roof.

***Plaintiff's Second Deposition***

During plaintiff's second deposition, which was held on June 6, 2012 (the Second Deposition), plaintiff testified that he only took direction from his ASAR foreman. He explained that, on the day of the accident, there were at least six asbestos containment tents, which were comprised of plastic sheets, set up on the roof. Typically, because the conditions on the roof were "windy," the ASAR foreman attached pieces of plywood to the tents in order to protect the plastic from tearing when it was hit by the gusts of wind (the Second Deposition, plaintiff's tr at 73).

At the time of the accident, a piece of plywood was lying across a dolly, so as to create a platform for the transport of bags of asbestos. Plaintiff described the piece of plywood as having "always" been present on the dolly (*id.* at 82). The piece of plywood was not attached to the dolly in any way. Prior to the day of the accident, plaintiff never experienced any problems with the dolly or the plywood, and he never made any complaints regarding the same.

Plaintiff surmised that the accident occurred when the piece of plywood flew off the dolly and struck him. When asked if the plywood that struck him was the same as that used by ASAR workers, plaintiff replied, "Yes" (*id.* at 78). Plaintiff acknowledged that window contractors also used plywood on the job. However, when he was asked if the plywood that struck him could have belonged to them, plaintiff responded, "no, plywood like this big size struck me" (*id.* at 84).

***Plaintiff's Third Deposition***

During his third deposition, which was held on September 12, 2013, plaintiff testified that an ASAR employee was responsible for placing the subject piece of plywood on the dolly. Plaintiff explained that he knew that ASAR owned the dolly, because he remembered it from a previous job that he worked on for ASAR. Plaintiff also maintained that he "never saw such a dolly at any other company" (the Third Deposition, plaintiff's tr at 15). In addition, plaintiff knew that it was an ASAR employee who placed the plywood on the dolly, "[b]ecause A.S.A.R. worked in that area. Nobody else was there" (*id.* at 16). Plaintiff further explained that "[a]t the time [his] accident happened, the dolly was placed at a different area on the roof, far away from where [other] people were working," and "far away from where those people were doing their job. A totally different area of the roof" (*id.* at 17). Plaintiff never observed any of the workers performing the window and brickwork using the subject dolly.

***Deposition Testimony of Andrzej Szczech (ASAR's Vice President and Project Manager)***

Andrzej Szczech testified that he was ASAR's vice president and project manager on the day of the accident. Szczech explained that ASAR, a company specializing in asbestos abatement, was hired to work on the Project by Telentos, the general contractor on the Project. On the day of the accident, ASAR's duties included removing asbestos from certain portions of

the roof. While he was not sure whether any other companies were working on the roof on the day of the accident, he was generally aware that another company was hired to replace part of the building's parapet wall.

Szczech testified that plaintiff was injured when he was struck by a piece of plywood that originated from a dolly which was used "[t]o transfer the [asbestos] bags from the work area" (Szczech tr at 48). At first, he testified that he was not sure who owned the subject dolly and the piece of plywood, however, later in his deposition, Szczech noted that ASAR owned dollies that were similar in appearance to the dolly at issue in this case.

Szczech explained that, due to the risks associated with asbestos contamination, other contractors were not allowed in areas where ASAR performed their asbestos removal work, "plus 25 feet" (*id.* at 78). In fact, when asked which entities had access to the roof while ASAR was performing their work, Szczech replied, "Basically, nobody" (*id.*). He also asserted that ASAR work areas were "cordoned off" when their work was being performed (*id.* at 80). In addition, employees of other contractors were not allowed to use any of ASAR's equipment.

***Deposition Testimony of Tommy Demoneris (Telentos's President)***

Tommy Demoneris testified that DASNY hired Telentos, as general contractor, to renovate the roof and parapet walls at the Premises. This work included the removal of asbestos from the roof. Pursuant to their subcontracts, ASAR was hired to perform asbestos abatement, and Dyna was hired to perform brick and roofing work at the Premises. Demoneris testified that he did not know who owned the dolly involved in the accident. While Telentos owned dollies, it did not provide dollies for use on the Project, because all of the work was subcontracted out to other companies.

Demoneris testified that only ASAR workers were allowed to be present in the asbestos containment areas while the asbestos removal work was in progress. After asbestos removal work was completed, a "clearance report" was necessary before any roofing work could continue (Demoneris tr at 72). Typically, there was at least a two-hour gap between asbestos removal work and the resumption of roofing work. He acknowledged that, although log books indicate that Dyna worked on the roof during the two days preceding the accident, Dyna did not perform any work on the roof on the day of the accident due to rain.

***Affidavit of Ricardo Caballos (ASAR Asbestos Worker)***

In his affidavit, Ricardo Caballos stated that he was employed as an ASAR asbestos removal worker on the day of the accident. He stated that "there was only [one] green dolly on the rooftop, and it was owned and used by ASAR" (Dyna's notice of motion, exhibit Q, Caballos aff). In addition, "[o]nly ASAR workers were allowed to use [the dolly]" (*id.*). The ASAR workers used the dolly to move bags of asbestos.

Caballos explained that, "[s]hortly before the accident, ASAR workers were using the dolly to move plywood to the asbestos containment tents in order to brace them, because the wind had become strong" (*id.*). He maintained that ASAR workers were responsible for placing the subject plywood on the dolly prior to the accident. He surmised that the plywood that struck plaintiff "could have been a piece of plywood that had been lying on top of the green dolly and was then lifted off by a strong gust of wind" (*id.*).

Caballos further stated that Dyna had nothing to do with the dolly or the plywood that allegedly struck plaintiff. He also maintained that no one from Dyna ever directed or controlled the work of any of the ASAR employees. In addition, while ASAR workers performed their

asbestos abatement work, no other contractors were allowed in the area "because of the danger of airborne asbestos . . . and the need for special protective gear when working with asbestos" (*id.*).

***The Accident Report***

The accident report, which was signed by plaintiff in his capacity as the shop steward and the injured worker, contained the following comment:

> "Four wheel dolly that was not a property of the company, was missing a middle part and was covered with plywood and was not tied down to the dolly"

(defendants' opposition, exhibit 2, the Accident Report).

**DISCUSSION**

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

***The Common-law Indemnification and Contribution Claims Against Dyna***

Dyna moves for dismissal of all common-law indemnification and contribution claims

and cross claims asserted against it. "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'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (*Chapel v Mitchell*, 84 NY2d 345, 347 [1994]).

In this case, the testimonial evidence conclusively establishes that Dyna had nothing to do with plaintiff's asbestos abatement work, the dolly or the placement of the unsecured piece of plywood on the dolly. In fact, ASAR owned the subject dolly, and it was one of ASAR's workers who was responsible for placing the plywood on the dolly without properly securing it against the wind. In addition, not only did ASAR solely direct plaintiff's work, due to the dangerous nature of airborne asbestos, Dyna employees were not even allowed anywhere near ASAR's work areas while its asbestos abatement work was underway.

Thus, as no negligence on the part of Dyna proximately caused the accident, it is entitled to dismissal of the contribution and common-law indemnification claims against it.

***The Contractual Indemnification Claims Against Dyna***

Dyna also moves for dismissal of all contractual indemnification claims asserted against it. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the

surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Tonking v Port Auth. of N.Y. & N.J*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and that "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant' [citation omitted]" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

As discussed previously, Dyna did not supervise or control plaintiff's work, nor did it have anything at all to do with the hazardous condition that caused the accident. Therefore, as it has not been established that the accident "arose from an action, omission, or negligence on the part of [Dyna]," Dyna is entitled to dismissal of all claims asserted against it sounding in contractual indemnification (*Lawson v R&L Carriers, Inc.*, 126 AD3d 944, 945 [2d Dept 2015]).

It should be noted that, contrary to ASAR's contention in opposition to Dyna's motion, Dyna's "motion was not premature, as [ASAR] failed to offer an evidentiary basis to suggest that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of [Dyna] [internal citation omitted]" *(Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760 [2d Dept 2006]; *Adams v Glass Fab*, 212 AD2d 972, 974 [4th Dept 1995]). "The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion" (*Flores v City of New York*, 66 AD3d 599, 600 [1st Dept 2009]).

The court has considered ASAR's remaining contentions in opposition to the motion and finds them to be without merit.

**CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that fourth-party defendant Dyna Contracting, Inc.'s (Dyna) motion, pursuant to CPLR 3212, for summary judgment dismissing the fourth-party complaint and all cross claims asserted against it is granted, and the fourth-party complaint and all cross claims are severed and dismissed as against Dyna with costs and disbursements to Dyna as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of Dyna.

DATED:December 16, 2016

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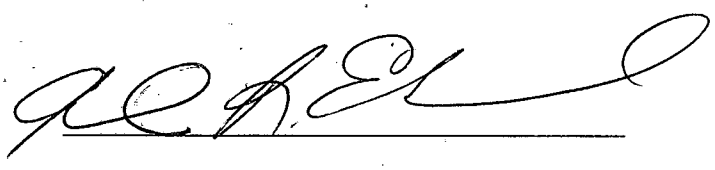

Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.