SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

FREDDY HERNANDEZ,

Plaintiff,

- against -

ASPENLY CO. LLC, RANDALL HOUSE OWNERS CORP., SHOLOMO SOL KASSORLA and S.G.C. CONTRACTING CORP.,

Defendants.

- x

RANDALL HOUSE OWNERS CORP.,

Third-Party Plaintiff,

- against -

SOL KASSORAL,

Third-Party Defendant.

- x

SHOLOMO SOL KASSORLA i/s/h/a SOL KASSORAL,

Fourth-Party Plaintiff,

- against -

S.G.C. CONTRACTING CORP.,

Fourth-Party Defendant.

- x

Index No.: 7109/2015

Motion Date: 10/18/17

Motion No.: 90

Motion Seq.: 5

The following papers numbered 1 to 9 read on this motion by defendant/third-party plaintiff RANDALL HOUSE OWNERS CORP. for an Order pursuant to CPLR 3212 granting RANDALL HOUSE OWNERS CORP. summary judgment on its claim for contractual indemnification against defendant/third-party defendant/fourth-party plaintiff Sholomo Sol Kassorla i/s/h/a Sol Kassoral:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1 - 4
Sholomo Sol Kassorla i/s/h/a Sol Kassoral's Affirmation in Opposition-Exhibits	5 - 7
Affirmation in Reply	8 - 9

This personal injury action arises out of an incident that occurred on April 16, 2015 at the premises located at 63 East 9th Street, Apartment 3R, in New York County, New York. Plaintiff alleges that while working at a renovation project located on the third floor of the subject premises, he fell off a ladder.

Plaintiff commenced this action against Randall House Owners Corp. (Randall House) and Aspenly Co. LLC by filing a summons and complaint on June 10, 2015. Randall House joined issue by service of an answer dated September 15, 2015. Aspenly Co. LLC joined issue by service of an answer dated August 31, 2015. The action was discontinued against Aspenly Co. LLC by stipulation dated April 4, 2016. Randall House commenced a third-party action against Sol Kassoral (Mr. Kassorla) on December 3, 2015. Mr. Kassorla joined issue by service of an answer on February 24, 2016. On March 15, 2016, Randall House served a reply to Mr. Kassorla's counterclaims. Mr. Kassorla commenced a third-party action against SGC Contracting Corp. Plaintiff served an amended complaint on January 24, 2017. Randall House joined issue by service of an answer dated March 22, 2016, and Mr. Kassorla joined issue by service of an answer dated February 16, 2017.

Randall House now moves for summary judgment on its claim for contractual indemnification against Mr. Kassorla pursuant to the Proprietary Lease and Alteration Agreement. Randall House contends that plaintiff's incident did not involve any dangerous or defective condition on Randall House's premises and, thus, the incident was not caused by Randall House's negligence.

Plaintiff appeared for an examination before trial on May 8, 2017. He testified that the incident occurred on April 16, 2015 while he was performing demolition work on the third floor. He was supervised by Cesar, Lemon and Sal. He never spoke to any employees of the building such as a superintendent, handyman, or porter. He never spoke to anyone who works for the management or ownership of the building. Immediately before the incident and at the time of the incident, he was cutting mesh inside the wall using shears. He was using the shears in his right hand. As he was cutting the mesh, the ladder moved and he lost his balance. After the ladder moved, he fell off the ladder. The ladder also fell.

Sholomo Sol Kassorla i/s/h/a Sol Kassoral appeared for an examination before trial on May 15, 2017. He testified that he is the president of S.G.C. Contracting Corp. (S.G.C.) S.G.C. was plaintiff's employer on the date of the incident. He is a shareholder in the cooperative building located at the subject premises. He resides in Apartment 3R. A gut renovation of Apartment 3R was being performed by S.G.C. S.G.C. provided six foot A-frame ladders for the job. Segundo Guallan told him that plaintiff cut his hand on wire lathe on a wall. He confirmed that a proprietary lease for the apartment was in effect prior to the date of the incident. Randall House did not have anyone present at site other than the superintendent who would check in every so often.

Jan Vislocky appeared for an examination before trial on July 17, 2017. He testified that the building had a managing agent that maintains a file for work being performed by shareholders in the building. A copy of those files are given to the Building Superintendent. When work was being performed, the general procedure for the Building Superintendent was to go to the apartment one to two times a week to check how the process is going. The Building Superintendent was given the scope of work. The Building Superintendent did stop work a few times in another apartment. If the Building Superintendent saw something that he thought might be a hazard to the building, he had the authority to stop work. Mr. Vislocky also submitted an affidavit dated July 13, 2017. He affirms that he is employed by Randall House as the assistant superintendent for the subject building. He held the same position at the time of the incident. He was aware that work was being performed in Apartment 3R. The contractor performing the work was hired by Mr. Kassorla, the shareholder of the apartment. Randall House did not supply any tools, equipment, ladders, materials, man power, or supervision for the work being performed at the time of the incident.

Based on the above deposition testimony, Randall House contends that the Labor Law § 200 claims and common law negligence claims against Randall House must be dismissed because plaintiff does not allege that any dangerous or defective condition of the building caused or contributed the accident. Moreover, Randall House did not direct or control plaintiff's work and did not supply any equipment or tools to plaintiff.

In opposition, Mr. Kassorla contends that Randall House failed to meet its burden as the Building Superintendent would visit the apartment once or twice a week to check on the progress and had the authority to stop work on site.

Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." (Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). It follows that the party charged with responsibility must have the authority to control the activity that caused the injury, or have actual or constructive notice of the alleged unsafe condition to be liable under common-law negligence and/or Labor Law § 200 (see id.; Gallagher v Resnick, 107 AD3d 942 [2d Dept. 2013]; Acosta v Hadjigavriel, 18 AD3d 406 [2d Dept. 2005]). It is well settled that "the right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (Gasques v State of New York, 59 AD3d 666, 668 [2d Dept. 2009]).

The evidence in the record demonstrates that Randall House did not supervise, direct, or control the method or manner in which plaintiff performed his work (see Lofaso v J.P. Murphy Assoc., 37 AD3d 769, 771 [2d Dept. 2007]). Plaintiff testified that he was supervised by Cesar, Lemon and Sal, not any Randall House employees. Additionally, Randall House did not supply any equipment or tools to plaintiff. Mr. Kassorla testified that the ladder was provided to plaintiff by S.G.C. In opposition, Mr. Kassorla failed to raise a triable issue of fact. The ability to stop work, without more, is insufficient to raise a triable issue of fact. As such, plaintiff's Labor Law § 200 and common law negligence claims are dismissed as against Randall House.

Turning to that branch of the motion seeking contractual indemnification from Mr. Kassorla, Random House submits the Proprietary Lease and Alteration Agreement. Paragraph 17 of the Alteration Agreement, signed by Mr. Kassorla on February 10, 2015, provides, in pertinent part:

> You agree to indemnify and hold harmless the Corporation . . . against . . . claims or liability for damage to . . . persons . . . suffered as a result of the Alterations, which are not the result of the Indemnified Parties negligence or willful misconduct.

Based on the Proprietary Lease and Alteration Agreement, and as Randall House is free from negligence, Randall House contends that it is entitled to contractual indemnification because this claim is a direct result of the alteration work.

In opposition, Mr. Kassorla contends that Randall House is not entitled to contractual indemnification because the indemnification provisions contained in the Proprietary Lease and Alteration Agreement are not limited to Mr. Kassorla's acts or omissions and do not make exceptions for Randall House's own negligence.

"[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (Cava Constr. Co., Inc. v Gealtec Remodeling Corp., 58 AD3d 660, 662 [2d Dept. 2009]; see Bellefleur v Newark Beth Israel Med. Ctr., 66 AD3d 807 [2d Dept. 2009]). "[A]n indemnification clause that purports to indemnify a party for its own negligence may be enforced where the party to be indemnified is found to be free of any negligence and its liability is merely imputed or vicarious" (see Lesisz v Salvation Army, 40 AD3d 1050, 1051 [2d Dept. 2007][internal citations omitted]; Balladares v Southgate Owners Corp., 40 AD3d 667 [2d Dept. 2007]).

Here, Randall House is entitled to contractual indemnification according to the express terms of the contract because it is not seeking to be indemnified for its own negligence. The indemnity provision contained in the Alteration Agreement specifically states that the indemnity is for claims "which are not the result of the Indemnified Parties negligence". To the extent Mr. Kassorla argues that the Alteration Agreement is unenforceable because it was not signed by Randall House, Mr. Kassorla authenticated the Alteration Agreement at his deposition. Moreover, it is undisputed that the alterations to Mr. Kassorla's apartment were being performed under the terms of the Alteration Agreement.

Accordingly, for the reasons stated above, it is hereby

ORDERED, that defendant/third-party plaintiff RANDALL HOUSE OWNERS CORP.'s summary judgment motion is granted, plaintiff's Labor Law § 200 and common law negligence claims are dismissed as against RANDALL HOUSE OWNERS CORP., and RANDALL HOUSE OWNERS CORP. is entitled to contractual indemnification from Sholomo Sol Kassorla i/s/h/a Sol Kassoral.

Dated: October 31, 2017
Long Island City, NY

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ROBERT J. McDONALD
J.S.C.