[* 1]

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

PRESENT: Hon. Doris Ling-Cohan Justice PART 36

Index Number : 702513/2008
291 BROADWAY REALTY ASSOCIATES
VS.
WEATHER WISE CONDITIONING CORP.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	5, 6
Replying Affidavits 5/13/2011 stip.	7 8
Cross-Motion: ☑ Yes ☐ No	3, 4

Upon the foregoing papers, it is ordered that this motion ✓ cross-motion for summary judgment are decided in accordance with the attached memorandum decision.

(Motion denied; cross-motion withdrawn)

FILED

OCT 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/4/11

JUDGE DORIS LING-COHAN 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):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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291 BROADWAY REALTY ASSOCIATES, a/k/a
291 BROADWAY REALTY ASSOCIATES, LLC,
SUTTON MANAGEMENT CORP., and
STARBUCKS CORPORATION, d/b/a
STARBUCKS COFFEE COMPANY,
Third-Party Plaintiffs,

-against-

WEATHER WISE CONDITIONING CORP., and
GABE CONSTRUCTION CORP.,
Third-Party Defendants.

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Third-Party Index No.:
702513/2008
DECISION/ORDER

Motion Seq. No.: 001

FILED

OCT 12 2011

COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN, J.S.C.:

In this third-party indemnity action, third-party defendant Weather Wise Conditioning Corp. (Weather Wise) moves, and third-party defendant Gabe Construction Corp. (Gabe) cross-moves for summary judgment to dismiss the third-party complaint (motion sequence number 001). For the following reasons, the motion is denied and the cross motion is withdrawn on consent.

BACKGROUND

This third-party insurance action arose in the wake of a related personal injury/negligence action that was commenced on February 14, 2008 by Edwin Martinez (Martinez) under Index Number 102513/08. *See* Notice of Motion, Exhibit A. Martinez, a construction worker, alleged that, on August 31, 2007, he was injured when he fell from an elevated walkway through a ceiling panel and to the floor below in a building (the building) located at 291 Broadway in the County, City and State of New York. *Id.*, ¶ 32. The building is owned by third-party plaintiff 291 Broadway Realty Associates, a/k/a 291 Broadway Realty Associates, LLC (291 Broadway),

a New York limited liability corporation. *Id.*, ¶¶ 3, 11. Third-party plaintiff Sutton Management Corp. (Sutton), also a New York corporation, is the building's managing agent. *Id.* ¶¶ 5, 14. Third-party plaintiff Starbucks Corporation d/b/a Starbucks Coffee Company (Starbucks), a Washington State corporation that is licensed to do business in New York, is the tenant of the commercial premises in the building where Martinez was injured. *Id.*, ¶¶ 8, 16. Starbucks settled the personal injury/negligence action with Martinez on July 6, 2010. *Id.*; Rubenstein Affirmation, ¶ 2.

On December 7, 1999, Starbucks and third-party defendant Gabe had executed a "construction management agreement" (the Gabe contract) by which Starbucks engaged Gabe as the contractor for the build-out of Starbucks's commercial space in the building. *See* Notice of Cross Motion, Goins Affirmation, ¶ 10; Exhibit 1. The relevant portion of the Gabe contract provides as follows:

Article 8
Indemnification and Insurance

> 8.1 Indemnification. To the fullest extent permitted by law, Contractor [i.e., Gabe] shall indemnify, defend (at Owner's [i.e., Starbucks's] option) and hold harmless Owner, Owner's landlord [i.e., 291 Broadway] and each of the aforementioned parties' affiliated companies [i.e., Sutton] ... (collectively, "Indemnitees") for, from and against any and all claims, demands, causes of action, penalties, attachments, judgments, losses, damages, costs and expenses (including, without limitation, defense, settlement and attorney's fees), and liabilities (including, without limitation, claims and liabilities relating to bodily injury ...) (collectively, "Claims") directly or indirectly arising out of, resulting from or related to this agreement or the work, including, without limitation, any failure by Contractor to properly perform the work in accordance with the Contract Documents, or negligence or misconduct of Contractor or Contractor's officers, agents, employees or subcontractors, even if such Claims or liabilities are caused in part by the negligence of any Indemnitee.

[* 4]

Id.; Exhibit 1. Gabe's president, Ernest Bertuzzi (Bertuzzi), has submitted an affidavit[1] in which he states that Gabe completed all of its work for Starbucks as of July 18, 2000, including installing the platform in the ceiling that the HVAC unit rested on, and that it performed that work to the specifications that had been provided by Starbucks' construction manager, Otilio Rivera (Rivera). *Id.*; Exhibit G. Bertuzzi further states that Starbucks had hired a company called New York Design Architects to design, inspect and approve all of Gabe's work, including the aforementioned platform. *Id.* Bertuzzi finally states that, in the 10 years after Gabe had received its final payment, it did not receive any complaints relating to its work for Starbucks. *Id.*

Later, on December 20, 2006, Starbucks and Martinez's employer, third-party defendant Weather Wise, executed a "store services agreement" (the Weather Wise contract) whereby Starbucks engaged Weather Wise to perform ongoing maintenance and repair work on the HVAC system in Starbucks's commercial space. *See* Notice of Motion, Rubenstein Affirmation, ¶ 14, Exhibit G. The relevant portion of the Weather Wise contract provides as follows:

> 11. Indemnification. Contractor [i.e., Weather Wise] hereby indemnifies and holds harmless Starbucks, its officers, directors, employees, agents, subsidiaries and other affiliates, from and against any and all claims, damages, liability and expenses (including attorney's fees) incurred by reason of ... Contractor's (or its allowed subcontractor's) negligent and/or willful acts or omissions in carrying out its obligations under this agreement.

Id.; Exhibit G.

As previously mentioned, Martinez commenced the underlying action herein on February 14, 2008. *Id.*; Exhibit A. Thereafter, 291 Broadway, Sutton and Starbucks (third-party plaintiffs)

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[1] Neither of the third-party defendants was ever deposed, despite the court having issued a number of discovery orders that provided for them to be. *See* Notice of Cross Motion, Goins Affirmation, ¶ 10, n 1.

commenced the instant third-party action on April 7, 2010, by filing a summons and complaint that sets forth causes of action for: 1) contractual indemnification (against Weather Wise); 2) common-law indemnification/contribution (against Weather Wise); 3) breach of contract (against Weather Wise); 4) contribution (against Gabe); 5) common-law indemnification (against Gabe); and 6) contractual indemnification (against Gabe). *Id.*; Exhibit C. Both third-party defendants served timely answers. *Id.*; Exhibits D, E. By an order dated June 2, 2010, the court severed the third-party action from the underlying action. *Id.*; Exhibit H. As was also previously mentioned, Starbucks settled the underlying action with Martinez on July 6, 2010, for the sum of $675,000.00. *Id.*; Rubenstein Affirmation, ¶ 2.

Thereafter, Weather Wise and Gabe submitted the instant motion and cross motion for summary judgment to dismiss the third-party complaint (motion sequence number 001). By stipulation dated May 13, 2011, Gabe withdrew its cross motion on consent. Weather Wise's motion remains.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). Here, Weather Wise's motion seeks summary judgment to dismiss the three third-party claims asserted against it.

As previously mentioned, the first claim against Weather Wise is for contractual

indemnification, based on paragraph 11 of the Weather Wise contract. *See* Notice of Motion, Exhibit C, ¶¶ 20-28. Weather Wise argues that this claim must fail, as a matter of law, because the contractual indemnity provision upon which it is based is void for violating General Obligations Law § 5-322.1. *See* Notice of Motion, Rubinstein Affirmation, ¶¶ 15-18. Weather Wise specifically asserts that the fact that the indemnity provision of the Weather Wise contract does not contain "saving language" places it in violation of General Obligations Law § 5-322.1, therefore, it must be construed as an improper attempt to indemnify Starbucks against the consequences of its own negligence. *Id.*, ¶ 17. The third-party plaintiffs respond that Weather Wise's proposed construction of the instant indemnity clause is unjustified, because the plain language of that clause clearly contemplates only partial indemnity for "[Weather Wise's] (or its allowed subcontractor's) negligent acts and/or omissions." *See* Tompkins Reply Affirmation, ¶ 22. In its reply papers, Weather Wise notes that the issue of Starbucks' negligence was never litigated because of Starbucks's July 6, 2010 settlement of the underlying action by paying Martinez $675,000.00. *See* Rubinstein Reply Affirmation, ¶ 2. Weather Wise then argues that, the third-party "plaintiffs' claim of indemnification from Weather Wise ... is unenforceable, because Starbucks is seeking indemnity for its own negligence, or its own voluntary payment." *Id.*, ¶ 3.

Upon review of the within submissions and arguments with respect to the validity of the subject indemnity clause, Weather Wise contract's indemnity clause does *not* violate General Obligations Law § 5-322.1. In *Kowalewski v North Gen. Hosp.* (266 AD2d 114, 114-115 [1st Dept 1999]), the Appellate Division, First Department, held that an "indemnification clause [that] provides indemnity only to the extent of loss caused by the negligent acts of the subcontractor and/or its agents ... is ... enforceable under General Obligations Law § 5-322.1."

Here, too, the Weather Wise contract's indemnity clause plainly obligates Weather Wise to provide indemnity *only* against "Contractor's [i.e., Weather Wise's] (or its allowed subcontractor's) negligent and/or willful acts or omissions in carrying out its obligations under this agreement." *See* Notice of Motion, Exhibit G. There is simply no language contained in such clause that could be read as obligating Weather Wise to provide any other indemnity to any other party. Therefore, the court rejects Weather Wise's argument that the instant indemnity provision violates General Obligations Law § 5-322.1, and thus, Weather Wise's motion for summary judgment dismissing the first third-party claim against it on this ground is denied.

The second third-party claim against Weather Wise is for contribution/common-law indemnification. *See* Notice of Motion, Exhibit C, ¶¶ 29-33. Weather Wise notes that, because it was Martinez's employer, Worker's Compensation Law § 11 bars such claims unless the plaintiff has suffered a "grave injury," within the statutory definition of that term. *See* Notice of Motion, Rubinstein Affirmation, ¶ 19. Weather Wise then argues that the instant claim is barred because Martinez's complaint does not allege that he suffered any such "grave injury." *Id.* The court notes that the third-party plaintiffs do not address this argument in their opposition papers. However, the court also notes that the Appellate Division, First Department, held in *Altonen v Toyota Motor Credit Corp.* (32 AD3d 342, 343 [1st Dept 2006]) that "[i]t is ... the burden of the party seeking summary judgment to show, by competent admissible evidence, that the plaintiff's injuries were not 'grave [internal citation omitted].'" There, the Court specifically rejected the defendant's argument that the plaintiff's bill of particulars and deposition testimony could afford sufficient evidence to establish, as a matter of law, that the plaintiff's injuries were not "grave." *Id.* Here, similarly, Weather Wise merely argues that Martinez's bill of particulars does not allege that he suffered a "grave injury," but does not offer any independent evidence regarding

the "grave" (or not "grave") nature of Martinez's injury. Based on the rule of *Altonen*, the court rejects Weather Wise's argument, as Weather Wise has failed to meet its burden of proof with respect to its request for summary judgment dismissing the second third-party claim asserted against it herein; thus, summary judgment is denied as to such claim.

The final claim against Weather Wise is for breach of contract; specifically, that Weather Wise breached the Weather Wise contract by failing to obtain insurance that named Starbucks as an additional insured with respect to Weather Wise's work at the building. *See* Notice of Motion, Exhibit C, ¶¶ 34-42. Although Weather Wise's motion purports to seek summary judgment dismissing this claim, its papers are devoid of any legal argument as to why the claim should be dismissed. Therefore, the court deems that Weather Wise has abandoned its request, and denies it on that ground. Accordingly, Weather Wise 's is denied in its entirety.

DECISION

ACCORDINGLY, for the foregoing reasons, it is

ORDERED that the motion, pursuant to CPLR 3212, of third-party defendant Weather Wise Conditioning Corp. is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of third-party defendant Gabe Construction Corp. be withdrawn on consent; and it is further

ORDERED that within 30 days of entry of this order, third-party plaintiffs shall serve a copy upon all parties with notice of entry.

Dated: New York, New York
October 4, 2011

Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\291broadwayvweatherwise.lane.wpd