Mastrogiacomo v Geoghan
2012 NY Slip Op 32896(U)
November 26, 2012
Sup Ct, Suffolk County
Docket Number: 09-29747
Judge: Jerry Garguilo
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SHORT FORM ORDER

INDEX No. 09-29747

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 7-16-12 (#006)
MOTION DATE 7-25-12 (#007)
ADJ. DATE 9-26-12
Mot. Seq. # 006 - MotD
007 - MD

PHILIP MASTROGIACOMO,

Plaintiff,

- against -

CRAIG M. GEOGHAN, JANET P. GEOGHAN, A. ULIANO & SONS, LTD, PETER CAPICOTTO, ATLANTIC TRAFFIC & DESIGN ENGINEERS, INC. COMMERCE BANK, NA, CUSTOM COMMERCIAL CONSTRUCTION CORP. and BOHLER ENGINEERING,

Defendants.

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Upon the following papers numbered 1 to 55 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17, 26 - 44; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 18 - 21, 45 - 48, 49 - 51; Replying Affidavits and supporting papers 22 - 25, 52 - 53, 54 - 55; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

JH

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this renewed motion by the defendant TD Bank, N.A., sued herein as Commerce Bank, NA, for an order pursuant to CPLR 3212 granting summary judgment on its cross claim for contractual indemnification over and against the defendant Custom Commercial Construction Corp. is granted on the condition that, and to the extent that, the defendant Custom Commercial Construction Corp. or its subcontractor are found liable to the plaintiff by virtue of a settlement in, or after a trial of, this action; and it is further

ORDERED that the renewed motion by the defendant Custom Commercial Construction Corp. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross claims against it; and granting it summary judgment on its cross claims against the defendant A. Uliano & Son, Ltd. for 1) contractual indemnification and breach of contract, and 2) common law contribution and indemnification, is denied.

By order dated May 31, 2012, this Court (Cohalan, J.) denied the parties' prior applications for summary judgment, without prejudice to renewal upon submission of copies of the pleadings. Now, having submitted the pleadings, the parties renew their requests for summary judgment as set forth above.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on July 15, 2008 on Portion Road, adjacent to a construction site located at 474 Portion Road, Lake Ronkonkoma, New York. The plaintiff was a passenger in a vehicle operated by the defendant Craig Geoghan, and owned by the defendant Janet P. Geoghan (collectively Geoghan). The Geoghan vehicle allegedly struck a construction vehicle operated by the defendant Peter Capicotto (Capicotto), and owned by the defendant A. Uliano & Son, Ltd. (Uliano), which was stopped on the shoulder, and possibly a portion of the lane of travel, of Portion Road, awaiting access to the construction site. The defendant TD Bank, N.A. (TD Bank) (identified and improperly pleaded as Commerce Bank, NA) was the owner of the site, which had undertaken to build a bank branch at the location (the project). The defendant Custom Commercial Construction Corp. (Custom) was the general contractor for the project, Uliano was a subcontractor hired by Custom to do excavation work at the site. The defendant Atlantic Traffic & Design Engineers, Inc. (Atlantic) was responsible for preparing the maintenance and protection of traffic plan (MTP Plan) for the construction site. The action against Bohler Engineering has been discontinued pursuant to a stipulation of discontinuance dated August 16, 2011, filed with the Court Clerk on February 14, 2012.[1]

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[1] TD Bank indicates that the action has also been discontinued against it and Atlantic. However, the stipulation submitted herein, allegedly discontinuing the action against TD Bank, is only signed on behalf of the plaintiff and two of the seven other defendants herein (CPLR 3217 [b]). In addition, the computerized records maintained by the Court do not reflect that the stipulations discontinuing the action against either TD Bank or Atlantic has been filed with the Clerk of the Supreme Court (*see* CPLR 3217 [a], [b]; Uniform Rules for Trial Cts [22 NYCRR] § 202.28).

TD Bank now seeks summary judgment on its cross claim for contractual indemnification over and against Custom. 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 issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of its motion, TD Bank submits, among other things, the pleadings, a letter of intent authorizing Custom to begin work on the project, its construction contract with Custom, and the deposition transcript of Custom's vice president, John Riportella (Riportella). The Court notes that the deposition of Riportella is unsigned and uncertified, and that TD Bank has failed to submit proof that the transcript was forwarded to the witness for his review (*see* CPLR 3116 [a]). However, the Court will consider the unsigned and uncertified transcript of Riportella's deposition testimony as it has been adopted by the party deponent in its motion herein (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Ashif v Won Ok Lee***, *supra*; ***Wojtas v Fifth Ave. Coach Corp.***, *supra*).

The right to contractual indemnification depends upon the specific language of the contract between the parties (*see* ***Kielty v AJS Constr. of L.I., Inc.***, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]; ***Bellefleur v Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 888 NYS2d 81 [2d Dept 2009]; ***Kader v City of N.Y. Hous. Preserv. & Dev.***, 16 AD3d 461, 791 NYS2d 634 [2d Dept 2005]; ***Gillmore v Duke/Fluor Daniel***, 221 AD2d 938, 939, 634 NYS2d 588 [4th Dept 1995]). Thus, "[t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (***LaRosa v Internap Network Servs. Corp.***, 83 AD3d 905, 921 NYS2d 294 [2d Dept 2011] quoting ***George v Marshalls of MA, Inc.***, 61 AD3d 925, 930, 878 NYS2d 143 [2d Dept 2009]; ***Torres v LPE Land Dev. & Constr. Inc.***, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]; ***Canela v TLH 140 Perry St.***, 47 AD3d 743, 849 NYS2d 658 [2d Dept 2008]).

A review of the construction contract between TD Bank and Custom reveals that it includes a contractual indemnification provision. It is undisputed that, on or about August 27, 2008, TD Bank and Custom entered into a written contract for the construction project which included a form entitled "General Requirements for Construction Contract." Paragraph 6.1.1 of that form provides, in pertinent part:

> To the fullest extent permitted by law , and except to the extent otherwise provided in this Construction Contract, [Custom] hereby assumes entire responsibility and liability for any and all damages or injury of any kind or nature whatsoever (including death resulting therefrom) to all persons, whether employees of

> [Custom], its Subcontractors, or otherwise, and to all property, in each case caused by, resulting from, arising out of or in connection with the execution of the Work or the performance of [Custom]'s other obligations under this Construction Contract. Except to the extent, if any, expressly prohibited by statute and provided such damage or injury did not result solely from the negligence of [TD Bank] ... [Custom] shall indemnify and save harmless [TD Bank] ... from and against any and all claims, and further from any and all loss, cost, expense, liability, damage or injury, including legal fees and disbursements, that [TD Bank] may directly or indirectly sustain ... but only to the extent caused by the negligent acts or omissions of [Custom], the Subcontractors or anyone directly or indirectly employed by them ... and [Custom] shall and does hereby assume on behalf of [TD Bank], the defense of any action or proceeding ... brought against [TD Bank] ...

TD Bank acknowledges that the construction contract was signed more than one month after the plaintiff's accident. However, it contends that the indemnification agreement may nevertheless be applied retroactively. In its letter of intent dated July 1, 2008, TD Bank authorized Custom to commence work on the project, and offered it as a "commitment to contract for your services as General Contractor." The letter of intent indicated TD Bank's intention to enter into the formal contract "within the next two weeks."

Generally, a party will not have a viable claim for contractual indemnification against another where the contract between them is executed after the alleged loss (***Beckford v City of New York***, 261 AD2d 158, 689 NYS2d 98 [1st Dept 1999]). However, an indemnification agreement executed after an accident has occurred may be applied retroactively where it is established as a mater of law that the agreement was made prior to the occurrence of the accident and that the parties intended the contract to apply from the earlier date (***Lafleur v MLB Industries, Inc.***, 52 AD3d 1087, 861 NYS2d 803 [3d Dept 2008]; ***Quality King Distribs., Inc. v E & M ESR, Inc.***, 36 AD3d 780, 827 NYS2d 700 [2d Dept 2007]; ***Nephew v Klewin Bldg. Co.***, 21 AD3d 1419, 804 NYS2d 157 [4th Dept 2005]; ***Stabile v Viener***, 291 AD2d 395, 737 NYS2d 381 [2d Dept 2002]; *cf.* ***Regno v City of New York***, 88 AD3d 610, 931 NYS2d 71 [1st Dept 2011] (party failed to establish that indemnification agreement signed after accident was effective before accident and intended to have retroactive effect); ***Torres v LPE Land Dev. & Const., Inc.***, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008] (regarding undated contract, summary judgment denied where movant failed to demonstrate, from surrounding circumstances, the existence of an ongoing relationship in which party had agreed to indemnify movant).

A review of the construction contract reveals that the parties anticipated the possibility that work might commence prior to the signing of a formal contract. Section 10.21 of the contract, entitled "Prior Performance of the Work" provides:

> The parties acknowledge that, prior to the execution hereof, [Custom] and [TD Bank] may have performed certain of the

> obligations included within the scope of this Construction Contract, including but not limited to the payment of certain sums of money by [TD Bank] to [Custom]. Notwithstanding such performance, it is the intention of the parties that such obligations be included in and governed by the terms of this Construction Contract.

At his deposition, Riportella testified that he is the vice president and a part owner of Custom. He stated that Custom had completed approximately 20 similar jobs for TD Bank over the previous five or six years, that work occasionally began before the signing of a formal contract, and that the contract for this project was delayed because the person responsible for producing the contract was on vacation. He indicated that the construction contract for this project was similar to the contracts for the previous work done for TD Bank, that he was familiar with the terms of the contract, and that, when work began on this project, he intended it to be performed in accordance with the contract to be signed. Riportella further testified that Custom hired Uliano to perform the clearing and excavation work at the project site.

The Court finds that TD Bank has established that the indemnification agreement should be granted retroactive effect herein. However, "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, 871 NYS2d 654 [2d Dept 2009], citing General Obligations Law § 5-322.1; *see* ***McAllister v Constr. Consultants L.I., Inc.***, 83 AD3d 1013, 1014, 921 NYS2d 556 [2d Dept 2011]; ***Reynolds v County of Westchester***, 270 AD2d 473, 704 NYS2d 651 [2d Dept 2000]). Here, TD Bank has established that it is free from negligence herein. It is undisputed that the plaintiff has executed a stipulation discontinuing his action against TD Bank. A review of the complaint reveals that the allegations against TD Bank assert claims based on its vicarious liability as owner of the project.

In addition, TD Bank has met its prima facie burden of establishing that the underlying action arose out of or in connection with Custom's work at the project site. Generally, the phrase "arising out of" in an indemnification clause is interpreted to be broad and sweeping in its effect (*see e.g.* ***Hopes v New Amsterdam Restoration Group, Inc.***, 83 AD3d 784, 921 NYS2d 143 [2d Dept 2011]; ***Roldan v New York Univ.***, 81 AD3d 625, 916 NYS2d 162 [2d Dept 2011]; ***Giangarra v Pav-Lak Contracting, Inc.***, 55 AD3d 869, 866 NYS2d 332 [2d Dept 2008]; ***Lesisz v Salvation Army***, 40 AD3d 1050, 837 NYS2d 238 [2d Dept 2007]). Here, Custom agreed to indemnify and hold TD Bank harmless "in each case caused by, resulting from, arising out of or in connection with the execution of "Custom's work and other obligations under the construction contract. It is undisputed that the truck driven by Uliano's employee was involved in this accident while engaging in work for the project, and that Uliano was acting as Custom's subcontractor at the time.

Based on the adduced evidence, TD Bank has established its prima facie entitlement to summary judgment on its cross claim seeking contractual indemnification from Custom and for an order dismissing all cross claims against it. Thus, it is incumbent upon the nonmoving parties to produce evidence in admissible form sufficient to require a trial of material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*).

In opposition to the instant motion, Custom submits the affirmation of its attorney, a copy of its contract with Uliano, and a copy of the previously submitted letter of intent dated July 1, 2008. In his affirmation, the attorney for Custom contends that the letter of intent is an "agreement to agree," which is unenforceable, and that the indemnification agreement is not applicable because the automobile accident herein did not arise out of Custom's work on the project. The Court finds that Custom has not raised an issue of fact regarding the parties' agreement to proceed under the terms of the construction contract prior to the date of the accident and to be bound as of that earlier date.

In addition, while acknowledging that there has not been a determination that Custom or Uliano were negligent herein, the Court finds that TD Bank is entitled to conditional summary judgment herein. It is undisputed that Uliano, acting as subcontractor for Custom, was engaged in site work at the time of this accident, and that the truck involved in the plaintiff's accident was involved in that work. However, only a determination that the plaintiff's injuries were caused by an act or omission by Custom or Uliano would trigger the subject indemnification agreement.

Accordingly, TD Bank's motion for summary judgment is granted on the condition that, and to the extent that, Custom or Uliano are found liable to the plaintiff by virtue of a settlement in, or after a trial of, this action.

Custom now moves for summary judgment dismissing the complaint and all cross claims against it; and granting it summary judgment on its cross claims against Uliano for contractual indemnification, breach of contract, and common law contribution and indemnification. In support of its motion, Custom submits, among other things, the pleadings, Riportella's deposition, the depositions of the plaintiff, Geoghan, and Uliano, its contract with Uliano, and an unauthenticated copy of a police accident report, Form MV-104A. The police accident report record relied on by the plaintiff is plainly inadmissible and has not been considered by the Court in making this determination (*see* CPLR 4518 [c]; ***Cover v Cohen***, 61 NY2d 261, 473 NYS2d 378 [1984]; ***Cheul Soo Kang v Violante***, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]). ***Mooney v Osowiecky***, 235 AD2d 603, 651 NYS2d 713 [3d Dept 1997]; ***Szymanski v Robinson***, 234 AD2d 992, 651 NYS2d 826 [4th Dept 1996]; ***Aetna Cas. & Sur. Co. v Island Transp. Corp.***, 233 AD2d 157, 649 NYS2d 675 [1st Dept 1996]; ***Cadieux v D.B. Interiors***, 214 AD2d 323, 624 NYS2d 582 [1st Dept 1995]). In addition, the Court notes that the submitted depositions are certified but unsigned, and that Custom has failed to submit proof that the transcripts was forwarded to the witnesses for their review (*see* CPLR 3116 [a]). However, the Court may consider the unsigned deposition transcripts submitted in support of the motion as the parties have not raised any challenges to their accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also* ***Bennet v Berger***, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; ***Zabari v City of New York***, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]).

The plaintiff was deposed on March 30, 2010. However, his testimony is of little help in determining the facts surrounding the happening of this accident as he testified that he was asleep when this accident occurred. At his deposition, Geoghan, the driver of the motor vehicle which struck the truck, testified that the accident occurred at 6:47 a.m. on the morning of July 15, 2008. The plaintiff was a passenger in his vehicle. They were traveling eastbound on Portion Road in Ronkonkoma, New York

when his vehicle struck the rear of a truck stopped partially in the main lane of travel. Geoghan further testified that the truck extended about three feet into the lane of travel, that he did not see any flashing lights, cones or barricades as he approached the truck, and that he did not see the truck before the accident because the sun was in his face, obscuring his vision.

At his deposition, Anthony Uliano, testified that he is the owner of Uliano, and that the defendant Peter Capicotto was an employee of the company. He stated that Uliano had a business relationship with Custom from 2003 to 2008 pursuant to a blanket contract agreement, that Custom did not supervise Uliano's work, and that he was parked across the road when he heard the collision involving one of his trucks. He ran towards the car involved, and observed two boys in the car and the truck facing eastbound on Portion Road, "on the roadway, I would say towards the grass area on the right-hand side." He indicated that there was a "Men Working" sign posted west of the construction site, and that cones are used when Uliano works on the shoulder of a roadway. Uliano further testified that he had traveled eastbound on Portion Road before the accident occurred, and that he had had trouble with "sun glare."

At his deposition[2], Riportella testified that Custom had worked with Uliano for approximately 15 years before this project, that Uliano was hired to perform the clearing and excavation work for the job, and that Uliano was the only trade working at the site while performing the clearing and excavation work. He stated that Custom had a job superintendent, Vincent Chrillie (Chrillie) at the project site every day. However, the accident happened before Chrillie arrived at the site. Riportella further testified that the blanket contract agreement dated November 19, 2003 (Agreement) was in effect for this project, that Uliano was hired by delivery of a purchase order/work authorization, and that the Agreement provided that Uliano "shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with his work." He stated that Custom had rules in place which indicated that Uliano was supposed to park its vehicles "on site." He indicated that the site development plan for the project states that "the contractor shall take all appropriate measures to protect pedestrians and vehicle traffic during removal activity," that Uliano's work was removal activity, and that Custom was the general contractor for the project. Riportella acknowledged that Custom did not have a member of its organization at the project site, other than Chrillie, who was responsible for the prevention of accidents.

A review of the record, including the subject construction contract, reveals that there are issues of fact regarding Custom's responsibility for maintaining safety for vehicles on Portion Road, and its responsibility to supervise the activities of its subcontractor, Uliano. The construction contract names Custom as the "Contractor," and the attached site development plan sets forth Custom's obligation to protect vehicle traffic. Paragraph 1.16.1 of the General Requirements for Construction Contract (General Requirements) provides that:

> Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with

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[2] Those portions of Riportella's testimony which were relevant to TD Bank's motion are summarized above. Those portions relevant to the instant motion are set forth here.

> the Work, including safety of all persons and property during performance of the Work. This requirement shall apply continuously throughout the course of the Work and shall not be limited by normal working hours. Contractor shall take all reasonable precautions and safety measures, including those listed in the Contract Documents, for the safety of, and shall provide reasonable protection to prevent damage, injury or loss to:
>
> (a) all employees of Contractor and Subcontractors and all other persons who may be affected by the Work ...

In addition, paragraph 1.16.6 of the General Requirements provides that:

> Contractor shall designate a responsible member of Contractor's organization at the Project Site whose duty shall be the prevention of accidents and enforcement of safety codes and regulations. This person shall not be Contractor's superintendent unless otherwise approved in writing by Owner.

Here, it is undisputed that Custom did not have anyone other than its superintendent, Chrillie, on site to prevent accidents, and it has not submitted any evidence that TD Bank approved that arrangement in writing. There are multiple issues of fact regarding the plaintiff's allegations that Custom failed to provide adequate safety precautions for the site, failed to supervise Uliano, and was otherwise negligent. In addition, despite Custom's contention that Geoghan was the sole proximate cause of this accident, the Court is not able to make that determination as a matter of law. Thus, Custom has failed to establish its entitlement to summary judgment dismissing the complaint and all cross claims against it. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Accordingly, that branch of Custom's motion which seeks to dismiss the complaint and all cross claim against it is denied.

The Court now turns to those branches of Custom's motion which seek summary judgment on its cross claims for breach of contract, and contribution. A review of Custom's answer reveals that it has not asserted a cross claim for breach of contract against Uliano. In addition, a review of the record reveals that Custom has not submitted any admissible evidence that Uliano failed to obtain insurance, or failed to name TD Bank and Custom as additional insureds, in breach of its contract with Custom. Moreover, contribution is a fact question for the jury as to the degree of responsibility each wrongdoer must bear for causing another's injury (***County of Westchester v Welton Becket Assoc.,*** 102 AD2d 34, 478 NYS2d 305 [2d Dept 1984] *affd* 66 NY2d 642, 495 NYS2d 364 [1985]; ***Mercado v New Continent Realty LLC***, 2012 NY Slip Op 32039[U], [Sup Ct, New York County 2012]; ***Scholtz v Catholic Health Sys. of Long Is., Inc.***, 21 Misc 3d 1126[A], 873 NYS2d 515, [Sup Ct, Suffolk County 2008]). Accordingly, the subject branches of Custom's motion are denied.

Finally, the Court turns to those branches of Custom's motion which seek summary judgment for common-law indemnification and contractual indemnification. Custom's request for summary judgment on its cross claim for common-law indemnification is denied as premature, as there are issues of fact as to whose negligence, if any, caused plaintiff's accident (*see* ***Bellefleur v Newark Beth Israel Med. Ctr.***, *supra*; ***Holub v Pathmark Stores, Inc.***, 66 AD3d 741, 887 NYS2d 215 [2d Dept 2009]; ***George v Marshalls of MA, Inc.***, 61 AD3d 925, 878 NYS2d 143 [2d Dept 2009]).

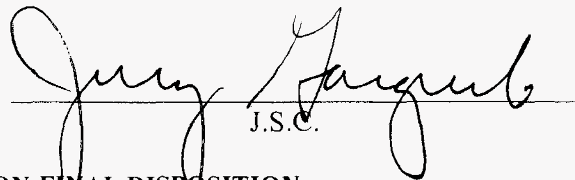
Custom's right to contractual indemnification depends upon the specific language of its contract with Uliano (*see* ***Kielty v AJS Constr. of L.I., Inc.***, *supra*; ***Bellefleur v Newark Beth Israel Med. Ctr.***, *supra*). The blanket contract agreement dated November 19, 2003, Section XXIV, entitled "Contractual Indemnification Agreement" provides:

> The Subcontractor shall indemnify, hold harmless and defend the Owner and/or Custom ... from and against all claims, damages, losses and expenses including attorney's fees arising out of or resulting from the performance of the Work, provided such claim, damage, loss or expense is a) attributable to bodily injury, sickness, disease or death to any person ... and, b) caused in whole or in part by any negligent act or omission of the Subcontractor, any Sub of a Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party Indemnified hereunder.

Although Uliano agreed to provide indemnification pursuant to the agreement, Custom is not entitled to summary judgment or even conditional summary judgment on its cross claim for contractual indemnification against Uliano as there are issues of fact as to whose negligence, if any, caused plaintiff's accident (*see* ***Cava Constr. Co., Inc. v Gealtec Remodeling Corp.***, *supra*; ***McAllister v Construction Consultants L.I., Inc.***, *supra*; *see also* ***Dalvano v Racanelli Constr. Co., Inc.***, 86 AD3d 550, 926 NYS2d 658 [2d Dept 2011]). In addition, Custom also failed to establish, as a matter of law, that it was free from negligence herein, and that any alleged negligence on its part did not contribute to plaintiff's alleged accident (*see* ***Perez v 347 Lorimer, LLC***, 84 AD3d 911, 923 NYS2d 138 [2d Dept 2011]; ***Poracki v St. Mary's R.C. Church***, 84 AD3d 1192, 920 NYS2d 233 [2d Dept 2011]; ***Cava Constr. Co., Inc. v Gealtec Remodeling Corp.***, *supra*). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Accordingly, Custom's motion for summary judgment dismissing the complaint and all cross claims against it and granting it summary judgment on its cross claims against the defendant A. Uliano & Son, Ltd. is denied.

Dated: 11/26/12



J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

HON. JERRY GARGUILO