

Sicilia v City of New York

2013 NY Slip Op 33547(U)

January 18, 2013

Sup Ct, New York County

Docket Number: 103443/2003

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN

Justice

PART 21

Index Number : 103443/2003
SICILIA, STEPHEN
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 019
SUMMARY JUDGMENT

INDEX NO. 103443/03

MOTION DATE 5/17/13

MOTION SEQ. NO. 19

The following papers, numbered 1 to 8 were read on this motion for leave to amend and summary judgment

Notice of Motion— Affidavit of Service; Affirmation — Exhibits A-S_____	No(s). <u>1-2; 3</u>
Affirmation in Opposition — Affidavit — Affidavit of Service_____	No(s). <u>4-6</u>
Reply Affirmation — Exhibits A-F—Affidavit of Service_____	No(s). <u>7-8</u>

Upon the foregoing papers, it is ordered that this motion by defendants City of New York, New York City Transit Authority and Vertex Engineering Services is decided in accordance with the annexed memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

NOV 22 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/18/13
New York, New York


_____, J.S.C.

1. Check one:
2. Check if appropriate:..... MOTION IS:
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| <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER |
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- REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

FILED

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-----X
STEPHEN SICILIA,

Plaintiff,

- against -

COUNTY CLERK'S OFFICE
NEW YORK
Index No. 103443/2003

CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY, VERTEX ENGINEERING SERVICES, and JB
ELECTRIC LLC,

Decision and Order

Defendants.
-----X

HON. MICHAEL D. STALLMAN, J.:

In this action alleging violations of Labor Law § 241 (6), defendants City of New York, the New York City Transit Authority (NYCTA) and defendant Vertex Engineering Services (Vertex) again move for leave to amend their answer to assert cross claims against JB Electric Corporation, sued herein as JB Electric LLC (JB Electric), for common-law indemnification and contribution, for contractual indemnification and contribution, and for breach of an agreement to procure insurance. The City, the NYCTA and Vertex also seek summary judgment in their favor on their cross claims against JB Electric.

BACKGROUND

The background allegations of this action were set forth in Justice Beeler's decision and order dated November 24, 2009, which states, in pertinent part:

“The case arises from an accident during a renovation project where

Vertex, Mainco, JB Electric, and Prude Construction Corp. held different tasks in connection with the rehabilitation of the subway station at 181st Street.

Vertex is a general contractor, hired by New York City Transit Authority to rehabilitate the subway stations. JB Electric was the electrical subcontractor on the project. . . Sicilia was an employee of Mainco, another subcontractor on the project. . . . Another subcontractor, Prude Construction Corporation ('Prude'), employed carpenters at the site.

At the time of the accident, Sicilia was standing on the roof portion of an elevator. On that day, Prude and Vertex carpenters were installing gallery door hardware at each floor on the inside of the elevator shaft. . . . Plaintiff's sole responsibility was to operate the elevator with a device that enabled him to move the elevator up and down, so that the carpenters could install slam locks outside of the elevator. . .

Light was provided by a drop light, which was suspended by a hundred-foot extension cord, which was in turn attached to an outlet in the motor room one flight from street level. Plaintiff does not know when the drop light was set up or who installed it. He testified that the lighting was set up by 'a 100 foot extension cord plugged into an outlet. . . .' He further alleges that the cord was just 'plugged in,' and not secured or taped to the outlet. . . Plaintiff and Mainco allege that but for this drop light the surroundings were naturally dark, devoid of sunlight or permanent lighting. In direct contrast, JB Electric insists that it installed temporary lighting in the shaft, consisting of a string of lights that ran from the motor room down the side of the elevator shaft into the shaft way. According to JB Electric, these lights were placed 'every couple of feet' on the string. . . .

At 9:30 in the morning of February 4, 2002, Sicilia was on top of the elevator, operating it for the benefit of the carpenters, as previously described. Without warning, the drop light above him went out, leaving Sicilia in the dark. In response, he took out his own flashlight, and

inadvertently dropped it down the shaft while trying to turn it on. He then tried to reach for the drop light to see if it was unplugged. In attempting to do so, he fell on his back, landing on the elevator's recessed lighting. It is undisputed that he landed on the surface where he had been working, and that his body did not drop below the elevator cab's roof. . . . Sicilia later learned that the drop light's electrical cord had become unplugged from its socket.

Sicilia sued the City defendants, alleging that his injuries were due to the faulty lighting system and the elevator's uneven surface. . . .”

(Fink Affirm., Ex E [Beeler decision], at 3-6 [citations omitted].)

In that November 24, 2009 decision, Justice Beeler denied Mainco's motion for summary judgment in its favor against JB Electric for common-law indemnification, citing a prior decision dated December 13, 2007 by Justice Mills. (Beeler decision, at 23.) In that prior decision, Justice Mills denied JB Electric's motion for summary judgment dismissing Mainco's third-party action against JB Electric. Justice Mills stated,

“There are triable issues of material fact concerning which entity installed the drop light, and who unplugged the drop light. In addition, was the drop light within JB Electrical's subcontract to light the shaft? Moreover, there is even an issue of fact concerning which lights went out. Contrary to the plaintiff's assertion, it is far from clear that the temporary light installed by JB Electrical ever went out. At page 76 of the plaintiff's examination, he testified that the shaft was dark. However, at page 67, the plaintiff testified that only the drop light went out, not the shaft lights. Therefore, JB Electric's motion also must be denied.”

(*Sicilia v City of New York*, Sup Ct, NY County, Dec. 13, 2007, Mills, J., index No.

103443/2003 at 6.)

While this action was on the trial calendar, the NYCTA, the City, the NYCTA, and Vertex, which are represented by the same counsel,¹ sought leave to amend their pleadings to assert cross claims against JB Electric for common-law indemnification, contribution, contractual indemnification, and breach of an agreement to procure insurance.

By decision and order dated December 13, 2010, their motion was partially granted. The Court granted the City, the NYCTA, and Vertex leave to amend to assert cross claims against JB Electric for common-law indemnification and contribution. The Court also granted Vertex leave to amend to assert cross claims for contractual defense and indemnification and breach of an agreement to procure insurance, based on provisions in a subcontract between Vertex and JB Electric, the last page of which was missing. (*See Fink Affirm., Ex D.*) However, this Court denied the City and the NYCTA leave to amend to assert cross claims against JB Electric for contractual defense and indemnification and breach of an agreement to procure insurance. (*Id.*)

Thereafter, in January 2011, the City, the NYCTA, and Vertex apparently

¹ According to counsel for the City, the NYCTA, and Vertex, “Vertex, the general contractor, assumed the defense of the lessor-lessee TA/City as is common in such matters very early.” (Fink Reply Affirm. ¶ 7.)

served a verified amended answer with four cross claims against “JB Electric Corporation aka JB Electric LLC” on behalf of Vertex only. (Fink Affirm., Ex C.)

It is undisputed that, on October 20, 2011, the note of issue was vacated.

The City and the NYCTA now again seek leave to amend their answer to assert cross claims against JB Electric for common-law indemnification and contribution, for contractual indemnification and contribution, and for breach of an agreement to procure insurance. On this motion, movants submit a copy of the entire subcontract between Vertex and JB Electric, including the previously missing last page. The City, the NYCTA, and Vertex also move for summary judgment in their favor on their cross claims against JB Electric.

DISCUSSION

Leave to Amend

Leave to amend is granted to the City and the NYCTA to assert cross claims against JB Electric for common-law indemnification and contribution. The Court’s prior decision and order dated December 13, 2010 already granted these defendants leave to amend to assert such cross claims. The prior decision and order stated, in pertinent part, “it is ordered that this motion by defendants to amend the answer to assert cross claims is granted to the extent that defendants may amend their answer

to add cross claims *by all defendants against JB Electric LLC for common-law indemnification and contribution. . .*” (Fink Affirm., Ex D.) However, it appears that when the City, the NYCTA, and Vertex served their amended answer with cross claims, cross claims for common-law indemnification and contribution were asserted only on behalf of Vertex. (Fink Affirm., Ex C.) Given the passage of time, absence of prejudice and for the reasons stated in the Court’s prior decision and order and the reasons stated herein, the City and the NYCTA are once again granted such leave.

As to the proposed cross claims against JB Electric for contractual indemnification and for breach of an agreement to procure insurance, the City and the NYCTA maintain that their proposed claims against JB Electric are based on extensive provisions contained in paragraph 7 of a subcontract between Vertex and JB Electric. (Fink Affirm., Ex I.) In the prior decision and order dated December 13, 2010, this Court ruled,

“On its face, the contract is between Vertex and JB Electric, and the indemnification provision requires ‘the Subcontractor,’ which is named in the contract as ‘Five Star Electric/JB Electric LLC’ to indemnify ‘the Contractor,’ i.e., Vertex, and ‘the Owner,’ which is named in the contract as ‘St. Paul Surety.’ The City of New York and the New York City Transit Authority do not appear to be indemnitees. They cannot be considered as officers, agents, or servants of either Vertex or St. Paul Surety to fall within the scope of the indemnity.”

(Fink Affirm., Ex D, at 3.)

On this motion, the City, the NYCTA and Vertex submit a copy of the subcontract between Vertex and JB Electric that appears to be fully executed, which was not previously submitted on their prior motion for leave to amend. (Fink Affirm., Ex I.) They also submit a copy of a 1953 Lease Agreement between the City and the NYCTA. (Fink Affirm., Ex G.) In Section 6.8 of the 1953 Lease Agreement, the NYCTA agreed to “be responsible for the payment of, discharge of, defense against, and final disposition of, any and all claims or judgments . . . resulting from any accident or occurrence arising out of or in connection with the operation, management and control by the [NYCTA]” of the NYCTA’s transit facilities. (Fink Affirm., Ex G.) Counsel states, “This is why the City and TA’s interests are merged and the TA defended the City in this action.” (Fink Affirm. ¶ 9.)

The City and the NYCTA also assert that the NYCTA had originally entered into a contract with another contractor to perform the renovation work, but that contractor had terminated its performance under the agreement. (Fink Affirm. ¶ 10.) As a result, bond companies associated with the project, Seaboard Surety Company and St. Paul Fire and Marine Insurance purportedly entered into a takeover agreement with the NYCTA, and Seaboard Surety Company and St. Paul entered into a Completion Contract dated May 27, 1999 with Vertex. (*Id.*)

Contrary to JB Electric’s argument, this branch of motion for leave to amend

is not a late motion to reargue the prior motion for leave to amend. The City, the NYCTA, and Vertex's motion is based on additional documents that were not submitted on the prior motion.

However, leave to amend is denied. "In order to recover upon a theory of [contractual] indemnity, a party must have a contractual relationship with the entity from which indemnification is sought." (*SSDW Co. v Feldman-Misthopoulos Assocs.*, 151 AD2d 293, 295 [1st Dept 1989].) As indicated in the Court's prior decision and order, neither the City nor the NYCTA is a party to the contract between Vertex and JB Electric. On its face, the contract is between Vertex and JB Electric, and the indemnification provision requires "the Subcontractor," which is named in the contract as "Five Star Electric/JB Electric LLC" to indemnify "the Contractor," i.e., Vertex, and "the Owner," which is named in the contract as "St. Paul Surety."² The

² It is curious that "Owner" in the subcontract refers only to St. Paul Surety, and does not also include either the title owner nor the lessee of the area where JB Electric was to perform the work, because the title owner and lessee presumably would be considered "owners" within the meaning of Labor Law § 241. One might surmise that "Owner" would have referred to the NYCTA, if a surety had not taken over the construction project to complete the work with a completion contractor.

Nevertheless, based on the clear and unambiguous words of paragraph 7 of the subcontract, the parties must have intended that JB Electric indemnify only Vertex and St. Paul Surety. Although a literal reading of "Owner" as referring only to St. Paul Surety leads to the result that neither the City nor the NYCTA are indemnitees under the subcontract, "that, by itself, does not render the result here absurd." (*Jade Realty LLC v Citigroup Commercial Mortg. Trust 2005-EMG*, 20 NY3d 881, 884 [2012], citing *Matter of Wallace v 600 Partners*, 86 NY2d 543 [1995].)

City and the NYCTA therefore are not indemnitees under the subcontract.

Neither are the City and the NYCTA intended third-party beneficiaries of the extensive provisions of paragraph 7 of the subcontract between Vertex and JB Electric. Paragraph 7 expressly states, in pertinent part, “The provisions of this Paragraph 7 are not intended to create a contract for the benefit of any person other than the Contractor [Vertex] and the Owner [St. Paul Surety], and shall not be deemed to create any new right of action in favor of third parties against the Subcontractor [JB Electric], the Contractor or Owner.”

Because the City and the NYCTA are not parties to the subcontract between Vertex and JB Electric, and they are not indemnitees under the extensive provisions of paragraph 7, leave to amend their answers to add cross claims against JB Electric for contractual defense and indemnification and for breach of an agreement to procure insurance is denied.

It appears that, pursuant to paragraph 13 of the Completion Contract between Seaboard Surety Company and St. Paul Fire and Marine Insurance Company and Vertex, Vertex agreed to indemnify the “Owner” referred in the Completion Contract as the NYCTA, “against all loss, liability, costs, expenses, and attorney’s fees on account of any injury or claimed injury to persons or property arising out of or claimed to arise out of any act or omission by the Completion Contractor, its agents, servants, employees, or subcontractors.” (Fink Affirm., Ex H.) In addition, the City and the NYCTA, which both face possible liability under Labor Law § 241, seek common-law indemnification and/or contribution against JB Electric.

Summary Judgment in Vertex's favor against JB Electric on its cross claims

A. Contractual Defense and Indemnification against JB Electric

Paragraph 7 of the subcontract between Vertex and JB Electric states, in pertinent part:

“The Subcontractor [JB Electric] shall indemnify and save harmless the Contractor [Vertex] and the Owner [St. Paul Surety], its officers, agents or servants, may be *[sic]* one of them, from all damages or liability to which the Contractor and/or the Owner, its officers, agents or servants may be subjected by reason of injury, including death at any time resulting therefrom, to the person or property of others *resulting from the performance of the work of the Subcontractor hereunder, or through the negligence, act, or omission of the Owner, Contractor or the Subcontractor or any of their agents, servants or employees or any other person on or near the site of the project with the consent of the Subcontractor* or through any improper or defective machinery, implements, or appliances used by the Subcontractor in the project, . .

In the event of suit being brought against the Contractor [Vertex] for any claim growing out of any of the above causes, *the Subcontractor shall pay all expense of such litigation as soon and as often as incurred*, and in the event of judgement being entered against the defendant in any such action, the Subcontractor shall and hereby agrees immediately after the entry thereof to pay to the Contractor the amount of such judgement; failure to pay any such expenses or judgement in the manner above stated shall be construed as a breach of this Agreement.”

(Fink Affirm., Ex I [movants' emphasis].)

The City, the NYCTA, and Vertex contend that the site's temporary lighting power sources and connections were installed, inspected and controlled exclusively

by JB Electric. They therefore argue that JB Electric's acts and/or omissions were a proximate cause of plaintiff's injuries, and that Vertex should therefore be entitled to contractual defense and indemnification from JB Electric.

Although the City, the NYCTA, and Vertex's motion for summary judgment is directed to Vertex's cross claims against JB Electric, this is the third time that the Supreme Court has been called upon to determine the circumstances of the alleged incident, and the responsibility of those who might be involved.

When JB Electric sought summary judgment dismissing Mainco's third-party action against it, Justice Mills ruled,

"There are triable issues of material fact concerning which entity installed the drop light, and who unplugged the drop light. In addition, was the drop light within JB Electrical's subcontract to light the shaft? Moreover, there is even an issue of fact concerning which lights went out. Contrary to the plaintiff's assertion, it is far from clear that the temporary light installed by JB Electrical ever went out."

(*Sicilia v City of New York*, Sup Ct, NY County, Dec. 13, 2007, Mills, J., index No. 103443/2003 at 6.)

When the City, the NYCTA, and Vertex sought summary judgment dismissing plaintiffs' Labor Law § 241 (6) claims based on a violation of 12 NYCRR 1-30, which sets forth lighting requirements, Justice Beeler denied summary judgment as well, citing the same issues of fact raised in Justice Mills's prior decision. Justice

Beeler stated,

“Plaintiff has sufficiently alleged violations of § 23-1.30 and has presented triable issues of fact as to these violations. Plaintiff alleges that the lighting in the shaft consisted of only an ad hoc setup consisting of a single drop light, dangling a hundred feet down the shaft and precariously secured to a socket. But for this light, plaintiff alleges, his working area would be completely dark. Third-party defendant Mainco also maintains this position. These specific allegations, if proven true, would indicate that the illumination was insufficient under § 23-1.30, and by extension, § 241 (6). Although City defendants [the City, the NYCTA and Vertex] and third party JB Electric dispute these allegations, *these factual disputes only highlight the inappropriateness of summary judgment at this stage.*”

(Beeler decision, at 17 [emphasis supplied].) Justice Beeler also denied Mainco’s motion for summary judgment in its favor against JB Electric for common-law indemnification, citing a prior decision dated December 13, 2007 by Justice Mills.

(Beeler decision, at 23.)

In sum, JB Electric and Mainco were denied summary judgment with respect to claims against each other. Neither were the City, the NYCTA, and Vertex found entitled to summary judgment dismissing plaintiff’s claims for violations of 12 NYCRR 23-1.30.

On this motion, the context is different; the City, the NYCTA, and Vertex are seeking summary judgment in Vertex’s favor against JB Electric for contractual indemnification, based on deposition testimony that was previously submitted to

Justice Beeler, which was cited in his prior decision. They believe that it is possible for the Court to find that, as between a contractor (Vertex) and subcontractor (JB Electric), JB Electric was, as a matter of law, the entity that installed, inspected, and controlled temporary lighting sources where plaintiff was working, and that JB Electric's acts and/or omissions were a substantial factor in causing plaintiff's injuries.

However, such findings would go further than just the cross claims between a contractor and subcontractor. They would be tantamount to a finding that, as a matter of law, JB Electric violated 12 NYCRR 23-1.30, and thereby violated Labor Law § 241 (6).

The disputed issues of fact that were present in the two prior motions still remain on this motion: "Who was responsible for providing the drop light in the elevator shaft"; "Whether the drop light provided the sole illumination in the elevator shaft, such that plaintiff was in the dark after it went out" and "How the drop light became unplugged." (Beeler decision, at 7.) Justice Beeler indicated that there was a triable issue of fact as to what lighting was available in the elevator shaft, and whether such lighting was adequate.

"Plaintiff and Mainco allege that but for this drop light the surroundings were naturally dark, devoid of sunlight or permanent lighting. In direct contrast, JB Electric insists that it installed temporary lighting in the

shaft, consisting of a string of lights that ran from the motor room down the side of the elevator shaft into the shaft way.”

(Beeler decision, at 4.) This factual question cannot be resolved on the instant motion, and bears upon whether JB Electric’s acts and/or omissions were a substantial factor in causing the alleged incident. If the drop light had become unplugged, was there other temporary lighting in the elevator shaft that provided the illumination required under the Industrial Code?

If the drop light were the only lighting in the elevator shaft, then which entity had responsibility for the drop light? That is, which entity was responsible for making sure that the drop light remained on while plaintiff was working in the elevator shaft? In the prior motions, Justice Mills and Justice Beeler found disputed issues of fact as to whether Mainco or JB Electric had provided the drop light.

On this motion, the City, the NYCTA, and Vertex contend that, even if Mainco had supplied the drop light, it was JB Electric’s responsibility, as the electrical contractor, to warn and to prevent the drop light’s extension cord from being unplugged or pulled out.

However, JB Electric denies that it was required to provide temporary lighting for the workers of other trades. (Lender Aff. ¶ 6.) JB Electric points out that, by letter dated May 6, 1999, Vertex specifically excluded temporary lighting and

temporary power from its Completion Contract with Seaboard Surety Company and St. Paul Fire and Marine Insurance Company. (*See* Fink Affirm., Ex H [Exhibit 3 to Completion Contract].) JB Electric also points out that the scope of work set forth in its subcontract with Vertex did not expressly include temporary lighting and power. JB Electric therefore contends that, as Vertex's subcontractor, its scope of work excluded temporary lighting and temporary power for other trades.

In reply, the City, the NYCTA and Vertex counterargue, "the very reason Vertex excluded temporary electrical work from its agreement with the TA for *itself* . . . is that it hired a subcontractor [JB Electric] to perform it." (Fink Reply Affirm. ¶ 5.) They essentially maintain that JB Electric necessarily supplied temporary lighting and temporary power because it was the only electrical contractor at the construction site.

Based on the record, there are unresolved and disputed questions of fact that warrant denial of summary judgment in Vertex's favor against JB Electric for contractual defense and indemnification.

The City, the NYCTA, and Vertex appear to contend that JB Electric's contractual duty to defend under paragraph 7 of its subcontract with Vertex is triggered by plaintiff's allegation that the lighting was insufficient, coupled with evidence that JB Electric had responsibility for temporary lighting. (*See* Fink Affirm.

¶ 40 [“All that matters . . . here, under the agreement, is that plaintiff *alleges* that it happened”].) Because JB Electric is not an insurer, “its duty to defend is no broader than its duty to indemnify.” (*Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 809 [2d Dept 2009].) The City, the NYCTA and Vertex submit no authority supporting the proposition that the provisions in paragraph 7 of the subcontract that pertain to contractual defense should be read as extensively as an insurer’s duty to defend.

The City, the NYCTA, and Vertex also argue that, on this motion, the Court may not consider any evidence that Mainco, plaintiff’s employer, either provided the drop light or caused the drop light to be disconnected, because this case falls within an exception under CPLR Article 16. The City, the NYCTA, and Vertex assert that this case falls under the exception of CPLR 1602 (4). They conclude that, by virtue of that exception, JB Electric “cannot introduce evidence regarding the share of fault of plaintiff’s employer (Mainco) for CPLR Article 16 liability purposes.” (Fink Affirm. ¶ 50.)

With some exceptions,

“CPLR 1601(1) limits the liability that can be imposed upon a defendant that is jointly and severally liable for noneconomic loss in instances where that defendant’s liability is found to be 50% or less of the total liability assigned to all persons liable. Under such circumstances, the joint and several liability of such a defendant shall not exceed its

proportionate share of the total liability for the noneconomic loss.”

(*Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 254 [2d Dept 2012].) To the extent that the City, the NYCTA and Vertex argue that an exception to CPLR Article 16 bars the Court from considering evidence about Mainco on this motion, the argument does not make sense. An exclusionary rule that bars consideration of testimonial, documentary, or other evidence on a motion for summary judgment does not logically follow from a limitation of liability on damages under CPLR Article 16, regardless of whether such limitation is applicable here.

Therefore, summary judgment in Vertex’s favor against JB Electric for contractual defense and indemnification is denied.

B. Failure to Procure Insurance

Paragraph 7 of the subcontract between Vertex and JB Electric states, in pertinent part:

“Before commencing work thereunder, the subcontractor shall at his own cost and expense procure and keep in full force and effect during the performance of the work and up to the date of final acceptance thereof Workmen’s Compensation Insurance and also Fire Insurance, Public Liability, Property Damage, Owner’s Protective Liability and Property Damage, Contractual Liability and Contingent Liability Insurance and insurance covering special hazards and all other types of insurance required by the “Construction Contract”, covering and indemnifying the Contractor [Vertex] and the Owner [St. Paul Surety] as required by the “Construction Contract” with the limits not less than those specified in the “Construction Contract” and said insurance shall

be so written that the same cannot be canceled without at least ten day's notice in writing to the Contractor.”

(Fink Affirm., Ex I.) In support of its contention that JB Electric failed to procure insurance on Vertex's behalf, the City, the NYCTA and Vertex submit a letter dated January 15, 2013 from counsel to Utica National Assurance Company, which denied the City, the NYCTA, and Vertex's request for additional insured coverage. (Fink Affirm., Ex S.) The letter disputes the contention of the City, the NYCTA, and Vertex that the subcontract between JB Electric and Vertex required JB Electric to provide additional insured coverage. It states, “that document does not specifically require any entity to provide additional insured coverage.” (*Id.*)

The insurer's disclaimer of coverage does not, in itself, establish that JB Electric failed to procure insurance on Vertex's behalf. (*See Perez v Morse Diesel Intl.*, 10 AD3d 497, 498 [1st Dept 2004].)

In addition, based on the record presented, it cannot be determined as a matter of law what insurance coverage, if any, the subcontract between JB Electric and Vertex required JB Electric to obtain for Vertex. On its face, the relevant provisions of paragraph 7 of the subcontract require the subcontractor, i.e., JB Electric, to “procure and keep in full force and effect during the performance of the work and up to the date of final acceptance” certain kinds of insurance and insurance “covering

special hazards and all other types of insurance required by the “Construction Contract”, covering and indemnifying the Contractor [Vertex] and the Owner [St. Paul Surety].” Although the provisions might be construed to require JB Electric to procure insurance “covering and indemnifying” Vertex, they incorporate by reference the insurance requirements of a “Construction Contract.” The recitals of the subcontract refer to the “Construction Contract” as a contract entered into on “the 28th day of July, 1999” between “the Contractor [Vertex] and St. Paul Surety.” (*See Fink Affirm., Ex I.*) Such a July 28, 1999 “Construction Contract” was not submitted on this motion. Although the City, the NYCTA, and Vertex submitted a “Completion Contract” (*see Fink Affirm., Ex H*), the Completion Contract states that it was entered into on “27th day of May, 1999.”

Therefore, this branch of the motion, seeking summary judgment, is denied.

CONCLUSION

Accordingly, it is hereby


ORDERED that the motion by defendants City of New York, New York City Transit Authority, and Vertex Engineering Services is granted only to the extent that leave to amend is granted to the City of New York and New York City Transit Authority to assert cross claims against defendant JB Electric LLC and/or JB Electric Corporation for common-law indemnification and contribution, and the remainder of

the motion is otherwise denied; and it is further

ORDERED that movants shall serve the amended answer asserting such cross claims within 30 days after entry of this decision and order.

Dated: November 6, 2013
New York, New York

ENTER:



J.S.C.

FILED

NOV 22 2013

COUNTY CLERK'S OFFICE
NEW YORK