

**Wehrheim v McGovern-Barbash Assoc., LLC**

2015 NY Slip Op 31608(U)

August 3, 2015

Supreme Court, Suffolk County

Docket Number: 07-35912

Judge: Jr., Andrew G. Tarantino

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SHORT FORM ORDER

INDEX No. 07-35912  
CAL. No. 14-012900T

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 50 - SUFFOLK COUNTY

**PRESENT:**

Hon. ANDREW G. TARANTINO, JR.  
Acting Justice of the Supreme Court

MOTION DATE 1-6-15 (008)  
ADJ. DATE 2-17-15  
Mot. Seq. #008 - MotD

-----X  
JOHN WEHRHEIM and LYNN WEHRHEIM,

Plaintiffs,

- against -

McGOVERN-BARBASH ASSOCIATES, LLC,  
BARBASH ASSOCIATES, INC., THE VILLAGES  
WEST AT HUNTINGTON, THE VILLAGES WEST  
DEVELOPMENT CORP., VILLAGES AT  
HUNTINGTON DEVELOPMENT CORP., J.  
PETERMAN CONSTRUCTION CORP., TRUE  
MECHANICAL CORP, NESCONSET  
CONSTRUCTION, CO., INC., ACTIVE DOOR &  
WINDOW CORP., DEER PARK STAIRBUILDING  
& MILLWORK CO., INC., ALL SUFFOLK  
PLUMBING CONTRACTORS, INC., and  
MACCARONE PLUMBING & HEATING,

Defendants.

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Garden City, New York 11530

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Associates, Barbash Associates, The Villages West  
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Babylon, New York 11702

TRAUB LIEBERMAN STRAUS &  
SHREWBERRY LLP  
Attorney for Defendant J. Peterman Construction  
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Hawthorne, New York 10532

-----X  
McGOVERN-BARBASH ASSOCIATES, LLC,  
BARBASH ASSOCIATES, INC., THE VILLAGES  
WEST AT HUNTINGTON,

Third-Party Plaintiffs,

- against -

NEWBRIDGE ELECTRIC OF L.I. CORP.,

Third-Party Defendant.

MALAPERO & PRISCO LLP  
Attorney for Defendant True Mechanical Corp.  
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New York, New York 10017

BEE READY FISHBEIN HATTER &  
DONOVAN, LLP  
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Mineola, New York 11501

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers \_\_\_; Answering Affidavits and supporting papers 19 - 20, 21-22; Replying Affidavits and supporting papers 23 - 24; Other \_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by third-party defendant Newbridge Electric of L.I. Corp. for summary judgment dismissing the third party complaint against it is granted to the extent indicated herein, and is otherwise denied.

Plaintiff John Wehrheim commenced this action to recover damages for personal injuries he allegedly sustained on August 22, 2007, when he tripped and injured himself while working at the construction site of a new housing development known as "The Villages West," located in Melville, New York. The accident allegedly occurred when plaintiff, who was working as an electrician, tripped over a pile of wooden debris left on the floor of one of the town houses, known as Unit 407. At the time of the accident, plaintiff was employed by third-party defendant Newbridge Electric of L.I. Corp. ("Newbridge Electric"), a subcontractor hired to perform electrical work for the project. The project allegedly was owned and developed by defendants/third-party plaintiffs the Villages West at Huntington, Villages at Huntington Development Corp., Barbash Associates, Inc., and McGovern-Barbash Associates, LLC. (herein known as the "McGovern-Barbash"). Other defendants to this action include True Mechanical Corp, J. Peterman Construction Corp., Nesconset Construction Co. Inc. (hereinafter referred to as "Nesconset"), Active Door & Window Corp., Deer Park Stairbuilding & Millwork Co., All Suffolk Plumbing Contractors, Inc. (hereinafter referred to as "Suffolk Plumbing"), and Maccarone Plumbing and Heating. By way of an amended complaint, plaintiff alleges causes of action against defendants for common law negligence and violations of Labor Law §§ 200, 240 (1), and 241(6). The complaint also includes a derivative claim by plaintiff's wife, Lynn Wehrheim, for damages related to loss of services and the payment of medical expenses.

The McGovern-Barbash defendants/third-party plaintiffs joined issue denying plaintiff's claim and asserting affirmative defenses. Shortly thereafter, they brought a third-party action against Newbridge Electric, their insurance broker, Baldon Group, and its principal, Thomas Donahue. By order dated April 23, 2010, this court granted a motion by third-party defendants Baldon Group and Thomas Donahue for an order severing the third-party claims against them in this action, and consolidating such claims in the related declaratory judgment action brought by the McGovern-Barbash defendants. On July 26, 2010, plaintiff commenced a separate action against the McGovern-Barbash defendants. However, the court (LaSalle, J.) subsequently so-ordered a stipulation executed by the parties which consolidated that action with the instant proceedings. Following such consolidation, the parties executed other stipulations agreeing to discontinue the action against Active Door & Window Corp., Deer Park Stairbuilding & Millwork Co., Maccarone Plumbing and Heating, and Nesconset Construction Co. Inc.

By order dated January 14, 2014, this court granted motions discontinuing the complaint and cross claims against True Mechanical Corp., and J. Peterman Construction Corp. The court also granted partial summary judgment in favor of the McGovern-Barbash defendants/third-party plaintiffs, dismissing the action against the Villages West at Huntington, and the Villages at Huntington Development Corp. The action was continued against defendants/third-party plaintiffs McGovern-Barbash Associates, LLC, and Barbash Associates Inc.

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Third-party defendant Newbridge Electric now moves for summary judgment dismissing the third-party complaint on the ground its subcontract did not require it to provide indemnification and/or contribution to McGovern-Barbash. Newbridge Electric further asserts that an addendum to its subcontract, which purportedly contains language requiring it to indemnify McGovern-Barbash, should be disregarded as it is undated and there is no indication that it was meant to be effective on the date of plaintiff's alleged accident. McGovern-Barbash opposes the motion on the basis a triable issue exists as to whether Newbridge Electric agreed to the hold harmless clause contained in the addendum to its subcontract, as the use of such an addendum was customary between the parties, and became effective at the time Newbridge Electric commenced its work on the project. McGovern-Barbash's opposition papers include an affidavit by Susan Barbash, which states, in pertinent part, that consistent with the parties' customary practice, Newbridge Electric was presented with and signed an addendum to its subcontract containing an indemnification agreement prior to the commencement of its work on the project. Plaintiffs also oppose the motion, arguing that Newbridge Electric admitted, in its moving papers, that an ambiguity exists as to whether the addendum was valid, and if so, whether it was effective prior to the date of the alleged accident.

The purported addendum to the subcontract provides, in pertinent part, as follows:

Addendum to Contract dated July 1, 2004 by and between The Villages West Development Corp., hereinafter referred to as the "Owner" and Newbridge Electric of Long Island Corp., hereinafter referred to as "Subcontractor" as follows:

Owner will not pay any money to the subcontractor unless the subcontractor has previously filed with the Owner a current Certificate of Liability Insurance in an amount not less than \$1,000,000 per occurrence and a Workers' Compensation Certificate. The certificate must name the Owner as an additional insured.

The subcontractor agrees to the fullest extent allowable by law to indemnify and hold the Owner, including Owners agents and employees, harmless from and against any and all losses, damages, penalties or expenses, including reasonable attorneys' fees arising from bodily injury or death to any person and or property damage including loss of use arising out of or in any way relating to the work performed or omission caused by the subcontractor, agents, or employees of the subcontractor under this contract.

Although the addendum appears to have been signed by representatives of both parties, it is undated.

"As the parties seeking summary judgment, the defendants have the burden of demonstrating their entitlement thereto as a matter of law. Where a moving party fails to carry its burden, its motion should be denied without regard to the adequacy of the opposing papers. Most significantly, as a general rule, a party does not meet its burden in moving for summary judgment by pointing to gaps in the opponents' proof, but must affirmatively demonstrate the merits of its claim or defense" (*Doe v Orange-Ulster Bd. of Coop. Educ. Servs.*, 4 AD3d 387, 388-389, 771 NYS2d 389 [2d Dept 2004]; see also *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). In determining a motion for summary judgment, the

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*Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). In determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). Furthermore, "on a defendant's motion for summary judgment, opposed by plaintiff, a court is required to accept the plaintiff's pleadings as true and its decision must be made on the version of the facts most favorable to the plaintiff" (*see Henderson v New York*, 178 AD2d 129, 124, 576 NYS2d 562 [1st Dept 1991]; *Bulger v Tri-Town Agency*, 148 AD2d 44, 543 NYS2d 217 [3d Dept 1989]).

Initially, the court notes that, where, as here, it is undisputed that plaintiff did not sustain a "grave injury" as that term is defined by Workers' Compensation Law § 11, the branch of Newbridge Electric's motion for summary judgment dismissing the third-party claims against it for common law indemnification or contribution is granted (*see Flores v Lower East Side Serv. Ctr.*, 4 NY3d 363, 795 NYS2d 491 [2005]; *Masiello v 21 East 79th St. Corp.*, 126 AD3d 596, 7 NY3d 35 [2d Dept 2015]).

With respect to the third-party claim for contractual indemnification, Workers' Compensation Law § 11 permits third-party claims for contractual indemnification against employers where such employers enter a contract containing a "hold harmless" provision expressly agreeing to indemnification for injuries sustained by their employees during work on the project (*see Trombley v Socha*, 113 AD3d 921, 922, 980 NYS2d 588 [3d Dept 2014]; *quoting Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 429-430, 805 NYS2d 299 [2005]; *see Meabon v Town of Poland*, 108 AD3d 1183, 1184, 970 NYS2d 648 [2013]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491, 549 NYS2d 365 [1989]). However, "indemnity contracts must be viewed with reference to the purpose of the entire agreement and the surrounding facts and circumstances" (*Podhaskie v Seventh Chelsea Assocs.*, 3 AD3d 361, 362, 770 NYS2d 332 [1st Dept 2004], *quoting Szalkowski v Asbestospray Corp.*, 259 AD2d 867, 869, 686 NYS2d 243 [1999]). Indeed, "[t]he common-law rule – which authorizes review of the course of conduct between the parties to determine whether there was a meeting of minds sufficient to give rise to an enforceable contract – governs the validity of a written indemnification agreement under Workers' Comp. Law § 11" (*Flores v Lower East Side Serv. Ctr.*, *supra* at 370). Furthermore, where, as here, "the [parties'] intent must be determined by disputed evidence or inferences outside the written words of the instrument . . . a question of fact [is] presented" (*Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 291, 344 NYS2d 925 [1973]; *see Moyano v Gertz Plaza Acquisition, LLC*, 110 AD3d 612, 973 NYS2d 623 [1st Dept 2013]; *Brighton Inv., Ltd. v Har-zvi*, 88 AD3d 1220, 932 NYS2d 214 [3d Dept 2011]).

Here, viewing the evidence in the light most favorable to the non-moving party, Newbridge Electric failed to establish its prima facie entitlement to summary judgment dismissing the third-party complaint by eliminating triable issues from the case (*see Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Significantly, Newbridge Electric did not submit any evidence demonstrating that the addendum in question was signed after the occurrence of plaintiff's alleged accident. Rather, Newbridge Electric impermissibly relies on gaps in the third-party plaintiffs' proof to meet its burden on motion (*see Doe v Orange-Ulster Bd. of Coop. Educ. Servs.*, *supra*; *Valequez v Gomez*, 44 AD3d 649, 843 NYS2d 368 [2d Dept 2007]; *Peskin v New York City Tr. Auth.*, 304 AD2d 634, 757 NYS2d 594 [2d Dept 2003]). Moreover, viewing the evidence submitted in support of the

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circumstances, Newbridge Electric's own submissions raise triable issues as to whether the execution of the addendum was contemporaneous with the commencement of plaintiff's work on the project (*see Flores v Lower East Side Serv. Ctr., supra; Tullino v Pyramid Cos.*, 78 AD3d 1041, 912 NYS2d 79 [2d Dept 2010]; *Martelle v City of New York*, 31 AD3d 400, 817 NYS2d 504 [2d Dept 2006]). In particular, the undated addendum explicitly references the July 1, 2004 subcontract executed by the parties, and contains language requiring Newbridge Electric to obtain private liability insurance naming the Villages West Corp. as an additional insured, as a pre-requisite for its receipt of payment for any of the work it performed during the course of the project. Furthermore, while Susan Barbarash testified that she did not recall the date when the addendum was signed, she indicated that she regarded the execution of the addendum in question as "good business practice." Indeed, in an affidavit by Ms. Barbash submitted in opposition to the motion, she opines it was customary business practice between her business and subcontractors such as Newbridge Electric that addendums like the one in question would have taken effect prior to the commencement of the subcontractor's work on the project.

Accordingly, the branch of the motion by third-party defendant Newbridge Electric for summary judgment dismissing the third-party claim against it for contractual indemnification is denied.

Dated: Aug 3 2015

  
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 A.J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION

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