

**Racanelli Constr. Co., Inc. v Allied Contr. II Corp.**

2016 NY Slip Op 32806(U)

November 21, 2016

Supreme Court, Nassau County

Docket Number: 601497/15

Judge: Vito M. DeStefano

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**  
Justice

TRIAL/IAS, PART 11  
NASSAU COUNTY

**RACANELLI CONSTRUCTION COMPANY, INC.,**

**Decision and Order**

**Plaintiff,**

**MOTION SEQUENCE: 03**  
**INDEX NO.:601497/15**

**-against-**

**ALLIED CONTRACTING II CORP.,**  
**PARAGON BUILDING SOLUTIONS CORP.,**  
**and RICHARD LAGNESE,**

**Defendant.**

**The following papers and the attachments and exhibits thereto have been read on this motion:**

Notice of Motion (Seq. #01)	1
Affirmation in Support	2
Memorandum of Law in Support	3
Affirmation in Opposition	4
Reply Affidavit	5

In an action to recover damages for, *inter alia*, breach of contract and breach of a guaranty, third-party defendant George Kyriak moves for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the third-party complaint.

## Background

On April 19, 2013, plaintiff Racanelli Construction Company, Inc. ("Racanelli") entered into a construction agreement with nonparty Castle Port Chester, LLC to act as construction manager for a construction project in Port Chester, New York (the "Project").

On August 9, 2013, Richard Lagnese, on behalf of subcontractors Allied Contracting II Corp. ("Allied") and Paragon Building Solutions Corp. ("Paragon"), signed separate letters of intent with Racanelli whereby Allied and Paragon would furnish labor, material, work, and other services to Racanelli in connection with the Project. The letters of intent contained a guaranty by both Allied and Paragon. Lagnese signed the guarantees on behalf of both Allied and Paragon (Ex. "A" to Opposition; Ex. "C" to Motion at ¶¶ 11-13, 28-30).

On October 24, 2013, Allied and Paragon each entered into identical separate subcontractor agreements with Racanelli for work to be performed on the Project. Each of the subcontractor agreements were executed by Michael Racanelli as "Project Executive" for Racanelli and Richard Lagnese as "Executive Vice President" of both Allied and Paragon. Both subcontractor agreements also contained an "absolute, unconditional and irrevocable guaranty of the performance of the [subcontractor's] Obligations" (Exs. "A" and "B" to Motion at p 18). The guaranties were signed by Lagnese above a line calling for the signature "Richard Lagnese".

Notably, Richard Lagnese was employed by both Allied and Paragon to act as their "representative in connection with the Project" (Ex. "C" to Motion at ¶ 5).

On October 9, 2014, Lagnese resigned from both Allied and Paragon. According to the complaint, Lagnese's resignation was "prompted" by his "suspicion that Kyriak was siphoning funds away from the project for use on other projects, rendering it impossible for" Allied and Paragon "to meet their contractual obligation to Racanelli" (Ex. "C" to Motion at ¶¶ 20, 36).

On March 6, 2015, Racanelli commenced the instant action against Allied and Paragon for breach of contract, and as against Lagnese based upon his liability under the guaranties.

On April 22, 2016, Lagnese commenced a third-party action against George Kyriak, an officer of both Allied and Paragon, asserting claims for indemnification. According to the third-party complaint, Kyriak "directed Lagnese to sign" the subcontractor agreements on behalf of Allied and Paragon and "directed Lagnese to sign a 'Guaranty' . . . in his capacity as an officer of" both Allied and Paragon (Ex. "C" to Motion at ¶¶ 14-15, 30-32).

According to Lagnese, he signed the guaranties "without noticing that it was his name under the signature line rather than the name of" Allied or Paragon; no one "advised" him that

“his signature would be asserted to be a personal guaranty by him”; and he “never intended to personally guaranty performance” of the subcontractor agreements, “which at all times was controlled by Kyriak and over which Lagnese had no control” (Ex. “C” to Motion at ¶¶ 16-17, 33-34).

Lagnese further alleges in his complaint that although he had the title of “executive vice president”, he had no authority to sign checks, had no financial interests in any profits or losses arising from the subcontracts with Racanelli, and, further, that it was Kyriak who “retained the exclusive authority to make financial and other major decisions for the Project” (Ex. “C” to Motion at ¶¶ 7-9).

In the first cause of action, a claim for common law indemnification, Lagnese asserts that Kyriak, as the purported owner of Allied and Paragon, directed all major decisions of both Allied and Paragon, including the allocation of resources to work at the Project and the payment of sub-subcontractors and supplies; that he, Lagnese, “acted solely in his capacity as an officer of Allied and Paragon”, and “carried out the directives of Kyriak, including the execution of the contract documents reviewed and approved by Kyriak”; and that if, by virtue of the guaranties, Lagnese is liable to Racanelli for any damages, that “Lagnese is entitled to indemnification from and judgment against third-party defendant Kyriak for all or part of any verdict or judgment Racanelli may recover against Lagnese” (Ex. “C” to Motion at ¶¶ 39-42).

Kyriak moves to dismiss the third-party complaint pursuant to CPLR 3211(a)(1) and (7) arguing, in effect, that the complaint is an “attempt to circumvent Lagnese’s liability under the personal guaranties he individually executed” (Memorandum of Law in Support at p 1). Specifically, according to Kyriak, “Lagnese has \* \* \* sought to avoid his contractual obligations by now alleging that Mr. Kyriak should somehow be bound under the terms of the guaranty” but that “Lagnese fails to satisfy his burden” to show that “Kyriak is responsible under the guaranties” (Affirmation in Support at ¶¶ 4, 6).

### **The Court’s Determination**

The principle of common-law indemnification permits a party who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages the party paid to the injured party (*Arrendal v Trizechahn Corp.*, 98 AD3d 699 [2d Dept 2012]). “[T]he key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is ‘a separate duty owed the indemnitee by the indemnitor’” (*Konsky v Escada Hair Salon, Inc.*, 113 AD3d 656 [2d Dept 2014]).

Common law indemnification is generally available in favor of one who is held

responsible solely by operation of law because of his or her relation to the actual wrongdoer. One is entitled to implied indemnification where he or she has committed no wrong but is held vicariously liable for the wrongdoing of another. A person who is liable for an injury only vicariously or by imputation of law may seek indemnity from the tortfeasor primarily liable for the injury.

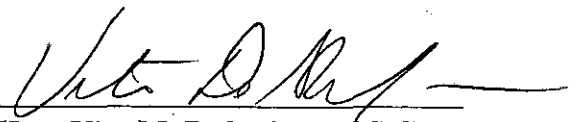
Lagnese's argument in favor of indemnification is predicated upon the claim that Kyriak is the wrongdoer, having allegedly siphoned and misdirected funds from the Project to fund other projects which, in turn, caused Allied and Paragon to breach the construction agreements with Racanelli, triggering Lagnese's liability to Racanelli by virtue of the guaranties.

Here, Lagnese's liability, if any, is not vicarious but, rather, is based upon his guaranties. Under these circumstances, Lagnese is not entitled to common law indemnification from Kyriak.

Accordingly, the motion is granted and the third-party complaint is dismissed.

This constitutes the decision and order of the court.

Dated: November 21, 2016

  
Hon. Vito M. DeStefano, J.S.C.

**ENTERED**

NOV 22 2016

NASSAU COUNTY  
COUNTY CLERK'S OFFICE