SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

JOHN DZIENIUS,

Plaintiff,

-against-

PJ MECHANICAL SERVICE & MAINTENANCE CORP., TISHMAN CONSTRUCTION CORP. OF NEW YORK, DELTA SHEET METAL, CORP. and FRESH MEADOW MECHANICAL CORP.,

Defendants.

----------X

TISHMAN CONSTRUCTION CORP. OF NEW YORK,

Third-party Plaintiff,

-against-

MBC INSULATION, INC.,

Third-party Defendant

----------X

Index No. 150741/15
Motion Seq. No. 002

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a Labor Law action, defendant Tishman Construction Corp. of New York (Tishman) moves, pursuant to CPLR 3212, for summary judgment on its claims for contractual indemnification against Delta Sheet Metal Corp. (Delta) and Fresh Meadow Mechanical Corp. (Fresh Meadow), as well as third-party defendant MBC Insulation (MBC).

BACKGROUND

On October 14, 2014 plaintiff John Dzienius was working on a construction project at Weill Cornell College on East 69th Street in Manhattan. Specifically, plaintiff, an employee of

MBC at the time, was in a crawlspace area, insulating ductwork that had previously been installed by Delta (plaintiff's tr at 20). Plaintiff testified that:

> "I was trying to -- my work was far enough where I couldn't reach the back. When I insulate the duct, you have to slide the piece of insulation in, and it was so tight in the area where we were working that we were cutting strips. So there was only a small strip that I had, and I had to slide it over, and I was reaching to pull the piece under, and I just fell. I just heard a ping and then dropped down"

(id. at 64).

The ping was the sound of a steam pipe rupturing and plaintiff alleges that he was injured by steam and hot water escaping from the pipe (amended complaint, ¶ 15). Delta hired MBC to perform the insulation work that plaintiff was engaged in when he was injured, while Fresh Meadow installed the subject steam pipe. Tishman's contracts with Fresh Meadow and Delta contain identical indemnification clauses, each of which provides:

> "To the fullest extent permitted by law, the Contractor shall indemnify, defend and hold harmless the owner, [Tishman] . . . from and against all claims or causes of action, damages, losses and expenses, including but not limited to attorneys' fees and legal and settlement costs and expenses (collectively "Claims"), arising out of or resulting from the acts or omissions of Contractor, or anyone for whose acts Contractor may be liable, in connection with the Contract Documents, the performance of, or failure to perform, the Work, or the Contractor's operations, including the performance of the obligations set forth in this clause. To the fullest extent permitted by law, Contractor's duty to indemnify . . . shall arise whether caused in part by the active or passive negligence or other fault of any of the Indemnitees, provided, however, that Contractor's duty hereunder shall not arise to the extent that any such claim, damages, loss or expense was caused by the sole negligence of the Indemnitees or an Indemnittee."

(Tishmant/Delta agreement, ¶ 7; Tishman/Fresh Meadow agreement, ¶ 7).

Delta's subcontract with MBC contained its own indemnity provision, which references Tishman:

> To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless [Delta], [Tishman], and Owner, and their directors, officers, employees, agents and representatives from and against all claims, damages, losses and expense, including, but not limited to, attorney's fees, arising out of or resulting

> from performance of the Work, including but not limited to, any such claims, damages, losses and expenses attributable to bodily injury, sickness, disease or death, or injury to or destruction of tangible property, including the loss of use of resulting therefrom provided such claim, damage, loss, or expense is caused in whole or in part by any act or omission by [MBC]"

(Delta/MBC agreement, ¶ 4.1).

In this motion, Tishman argues that all three provisions are triggered and that it is owed indemnification from Delta, Fresh Meadow, and MBC.

DISCUSSION

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413

NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

As to contractual indemnification: "A contract that provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently clear and unambiguous" (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 [2007] [internal quotation marks and citations omitted]).

Fresh Meadow

Tishman argues that Fresh Meadow's obligation to indemnify is clear, as Fresh Meadow installed the pipe that ultimately ruptured, injuring plaintiff. Thus, Tishman argues, as there is a clear causal relationship between Fresh Meadow's installation of the pipe and plaintiff's accident, this action arises out of the Fresh Meadow's work, triggering the obligation to indemnify Tishman.

In opposition, Fresh Meadow makes two arguments: that the indemnification provision is not triggered under the language of the provision, and that, even if it were, Tishman would not be entitled to summary judgment because there is a question of fact as to whether it caused plaintiff's accident through its own negligence. As to the first point, Fresh Meadow argues that it cannot owe contractual indemnification because it engaged in no culpable act that caused plaintiff's accident.

In support, Fresh Meadow cites to *Gentile v Merrill Lynch, Pierce, Fenner & Smith, Inc.*,

(2005 NY Slip Op 25426 [1st Dept 2005]), in which the Appellate Term held that the indemnification provision before it required a showing of negligence to be triggered. The provision stated that the indemnitor "would assume liability for any claims or losses 'in any manner arising out of the acts or omissions of [itself], its parent, subsidiaries, affiliates, or their officers, agents, directors, employees, or subcontractors.'" (*id.* at 1). *Gentile* specifically distinguished indemnification provisions that allow for indemnification-triggering causation that is not necessarily blameworthy or related to negligence, such as the provision before the Court of Appeals in *Brown v Two Exch. Plaza Partners* (*id.* at 2, *citing* 76 NY2d 172 [1990]).

The indemnification provision in *Brown* covered claims "arising out of, in connection with or as a consequence of the performance of the Work *and/or* any acts or omission of the Subcontractor or any of its ... subcontractors (76 NY2d at 178 [emphasis in original]). The Court of Appeals noted that the provision was triggered in two instances: (1) where a claim arose out of, in connection with or as a consequence of the performance" of the subject work and "(2) where a claim arose out of the acts or omissions" of the putative indemnitor (*id.*). "It provides," the Court held, "for indemnification when the claim arises out of the subcontractor's work even though the subcontractor has not been negligent" (*id.*).

Here, while the subject provision has "arising out of" language, it does not have the language that distinguishes the indemnification provision in *Brown* from the one in *Gentile*, the language that divorces the obligation to indemnify from negligence: "where a claim arose out of, in connection with or as a consequence of the performance" of the work. Thus, the language of the subject clause in the Tishman/Fresh Meadow contract is in line with the provision in *Gentile*, rather than the one in *Brown*. That is, courts have interpreted clauses that provide for indemnification where claims arise out of the "acts or omissions" of subcontractors to require a

showing of negligence or culpable conduct to be triggered (*see e.g. Matter of 91st St. Crane Collapse Litig.*, 133 AD3d 478, 480-481 [1st Dept 2015] [in evaluating a provision similar to the one between Tishman and Fresh Meadow, the First Department held that the putative indemnitees were not entitled to summary judgment on their claims for indemnification where "insufficient evidence was adduced as to whether the crane was either misused by (the putative indemnitor) or improperly maintained by the [the putative indemnitor's) employees"]).

Fresh Meadow, over two years before the subject incident, installed the pipe which ruptured, giving rise to plaintiff's claims. There is no evidence before the court that there was any negligence in Fresh Meadow's installation of the pipe. As a result, Tishman is not entitled to summary judgment on its claim for contractual indemnification against Fresh Meadow. Fresh Meadow, as discussed below, is also correct that Tishman cannot be granted summary judgment, as a question of fact remains as to whether Tishman's negligence is entirely responsible for plaintiff's accident.

Delta

Delta subcontracted MBC to perform the insulation work at the project. Initially, since there has been no showing of culpable conduct or negligence against Delta, Tishman is not entitled to summary judgment on its claim for contractual indemnification against it, as the indemnification provision in the agreement between Tishman and Delta is the same as the one between Tishman and Fresh Meadow. Thus, Tishman fails to make a *prima facie* showing of entitlement to summary judgment against Delta for the reasons articulated above in reference to Fresh Meadow.

However, Delta argues primarily that Tishman is not entitled to summary judgment because there is still a question of fact as to Tishman's negligence. The First Department has

held, in *Auriemma v Biltmore Theatre, LLC*, that "where the contractor's negligence has not been litigated and a triable issue of fact is raised, the contractor's request for summary judgment must be denied" (82 AD3d 1 [1st Dept 2011]).

Delta points to plaintiff's claims for negligence, which include allegations that defendants failed to order the priority of work such that plaintiff's work would have concluded before steam and hot water were turned on in the building. Plaintiff also alleges that defendants failed to coordinate the work in the area and provide safe means of ingress and egress. Delta submits the contract between Tishman and Weill Medical College of Cornell (Weill Cornell), which provides that Tishman "is responsible for performing, managing, supervising, directing, and coordinating the work" (Weill Cornell/Tishman agreement, § 4.3).

Delta also refers to plaintiff's testimony that, along with his own foreman from MBC, he took instruction Tishman:

> Q: ...was there someone else who gave you instruction about what work to do [other than the foreman]?
> A: Usually, yes.
> Q: When you say 'usually,' was there someone else who gave you instruction about what work to do?
> A: Well, for the work I was doing, we had to go visit the Tishman first.
> Q: When you say you had to go visit Tishman first, what do you mean by that?
> A: I had to go see them, talk, just make sure which level was okay to go to.
> Q: Why was that?
> A: Um, that's what we did every day.

(Dzienius tr at 17-18).

Delta also refers to the testimony of Timor Nasseri (Nasseri), MBC's owner, who testified that Tishman would have directed plaintiff to MB3, the level where his accident happened, as that "was an area that you could not get access [to] without direction from Tishman (Nasseri tr at 61). Greg Ronzo (Ronzo), Delta's own project director, testified that, if hot water

pipes needed to be shut down, it would Tishman that would be in charge of shutting down the pipes (Ronzo tr at 29). Christopher Milone (Milone), a project manager for Fresh Meadow, also testified that, if the hot water needed to be turned off, he believed Tishman would be responsible for doing so (Milone tr at 82). As for Tishman's witness, John Mangini, a lead super, he testified that he did not remember if Tishman coordinated the turning on of the hot water at the subject building, but stated that, generally, Tishman "would be involved" with turning on the hot water in a newly constructed building (Mangini tr at 34).

In reply, Tishman argues that it was not negligent because Weill Cornell had the final authority as to whether to turn on or off the hot water in the building. In support, it cites to other sections of Mangini's testimony:

> Q: In terms of turning off the hot water, whose responsibility would it be to ensure that it was completely turned off?
> ...
> A: The owner.
> Q: The owner does the manual turn-off?
> A: Yes.
> Q: Is this pursuant to Tishman's recommendation or something else?
> A: Like I said before, between the subcontractor, Tishman, and the owner.
> Q: Who has final say?
> A: The owner.
> ...
> Q: Are there ever any circumstances where the subcontractor and/or Tishman recommend the turning off of the hot water but the owner does not?
> A: I don't remember.
> Q: Do you recall the owner turning off the hot water every time it was recommended?
> A: I don't remember.

(Mangini tr at 68-69).

Mangini also testified that Tishman did not have authority to turn on or turn off the hot water on the project (Mangini tr at 101). Here, there is conflicting testimony as to whether Tishman had authority to shut off the hot water. Even if there were not, there would still be, at

least, questions of fact as to whether Tishman was negligent in (1) scheduling plaintiff's insulation work after the hot water had been turned on and (2) failing to recommend to the Weill Cornell that the water be turned off before plaintiff's work.[1] If such negligence were found, there would be another question of fact as to whether such negligence was a proximate cause of plaintiff's accident.

As questions remain as to whether Tishman's negligence was a proximate cause of plaintiff's accident, Tishman's application for summary judgment on its claims for contractual indemnification against Delta must be denied. This would be true even if the indemnification clause in the contract between Tishman and Delta were triggered, which it is not, as discussed above.

MBC

The language of the Delta/MBC subcontract, which has an indemnification clause covering Tishman for claims "arising out of or resulting from performance of the Work" (Delta/MBC agreement, ¶ 4.1). This neutral language puts the clause in the *Brown*--rather than the *Gentile*--line of indemnification provisions where no showing of culpability or negligence is required (*see Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 273 [1st Dept 2007] [using a purely causal, rather than a negligence analysis, to apply a provision similar to the one at issue here]).

Thus, the indemnification is triggered, as plaintiff's claims clearly arise, from a causal point of view, from MBC's performance of work on the project. However, for the reasons discussed above with respect to Delta, Tishman is not entitled to contractual indemnification against MBC, at this point, as there is still a question of fact as to whether Tishman's negligence was a proximate cause of plaintiff's accident. Thus, the branch of Tishman's motion seeking

[11] There may be other questions of fact not fully threshed out here, such as whether Tishman failed to provide a safe means of ingress and egress for plaintiff's insulation work.

summary judgment on its contractual indemnification claims against MBC must be denied.

CONCLUSION

Accordingly, it is

ORDERED that defendant Tishman Construction Corp. of New York's motion for summary judgment on its claims for contractual indemnification is denied; and it is further

ORDERED that counsel for Tishman shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the order and decision of the Court.

Dated: November 17, 2017

ENTER:

Hon. CAROL R. EDMEAD, JSC

HON. CAROL R. EDMEAD
J.S.C.