

<b>Chimborazo v Blue Woods Mgt. Group, Inc.</b>
2018 NY Slip Op 33434(U)
November 14, 2018
Supreme Court, Queens County
Docket Number: 705135/2014
Judge: Denis J. Butler
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12  
Justice

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LUIS R. CHIMBORAZO,  
Plaintiff(s),

Index  
Number: 705135/2014

-against-

BLUE WOODS MANAGEMENT GROUP, INC. and  
299 OWNERS CORP.,

Motion Date:  
September 25, 2018

Defendant(s).

Motion Seq. No.: 13

-----x  
BLUE WOODS MANAGEMENT GROUP, INC. and  
299 OWNERS CORP.,

Third-Party Plaintiff,

-against-

XINOS CONSTRUCTION CORP.,

Third-Party Defendant

-----x  
XINOS CONSTRUCTION CORP.,

Second Third-Party Plaintiff

-against-

NEW CITY CONSTRUCTION CORP.,

Second Third-Party Defendant.

-----x  
BLUE WOODS MANAGEMENT GROUP, INC. and  
299 OWNERS CORP.,

Third Third-Party Plaintiff

-against-

NEW CITY CONSTRUCTION CORP.,

Third Third-Party Defendant

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The following papers were read on this motion by third-party defendant/second third-party plaintiff Xinos Construction Corp. ("Xinos") for an order, pursuant to CPLR 2221, granting leave to renew its August 23, 2017 motion for summary judgment on its claim for contractual indemnification against second third-party defendant/third third-party defendant New City Construction Corp. ("New City"), and, upon renewal, pursuant to CPLR 3212, granting the prior motion for summary judgment by Xinos.

	Papers
	<u>Numbered</u>
Notice of Motion, Affirmation, Affidavit, Exhibits.....	E377-386
Affirmation In Opposition, Affidavit.....	E388-389
Partial Affirmation In Opposition, Affidavit, Exhibits..	E390-399
Reply Affirmation, Affidavit.....	E460-461

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Plaintiff commenced this action to recover for personal injuries allegedly sustained in a construction site accident when a wooden scaffolding plank fell and struck his right hand and right foot. At the time of the accident, plaintiff was removing garbage bags with debris from under the scaffold.

General contractor Xinos now moves to renew its August 23, 2017 motion for summary judgment on its claim for contractual indemnification against subcontractor New City, and, upon renewal, granting said prior motion. The prior summary judgment motion was denied by decision and order (Butler, J.) dated November 28, 2017.

Pursuant to CPLR 2221 (e), a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." The motion must be predicated upon new or additional facts that were not known to the party seeking renewal or, in the discretion of the court, on facts or material known to such party at the time of the original motion (see *Cioffi v S. I. Foods, Inc.*, 9 AD3d 888 [2d Dept 2015]).

Here, Xinos has sustained its burden of showing that its motion to renew is based upon evidence that was not available to it at the time of its original motion for summary judgment. New City had failed to appear for court-ordered depositions on May 19, 2017, and June 26, 2017. Since that time, but after the original summary judgment motion was submitted, New City employees Cesar Monge and Guillermo Chimborazo appeared for depositions on February 23, 2018, and June 1, 2018, respectively.

The November 28, 2017 decision and order, which denied the original summary judgment motion by Xinos, provided as follows:

"Xinos fails to offer sufficient evidence in admissible form to establish that plaintiff's injuries arose from the manner in which New City's work was performed. The testimony of plaintiff merely establishes that he was struck by a wooden plank that fell from the scaffolding structure above him while he was looking down."

"The right to contractual indemnification depends upon the specific language of the contract" (*Bermejo v New York City Health and Hosp. Corp.*, 119 AD3d 500, 503 [2d Dept 2014]). "The 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" (*Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491-492 [1989]; see *Reyes v Post & Broadway, Inc.*, 97 AD3d 805, 807 [2d Dept 2012]). "A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed" (*Jardin v A Very Special Place Inc.*, 138 AD3d 927 [2d Dept 2016], quoting *Arriola v City of New York*, 128 AD3d 747, 748-749 [2d Dept 2015]). "The party seeking contractual indemnification must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability" (*Arriola*, 128 AD3d at 749; *Van Nostrand v Race & Rally Constr. Co., Inc.*, 114 AD3d 664, 667 [2d Dept 2014]). Indeed, General Obligations Law § 5-322.1 prohibits enforcement of a contractual indemnification provision only if the party seeking indemnification was negligent or had the authority to supervise, direct, or control the work that caused the injury (*Naranjo v Star Corrugated Box Co.*, 1 1 AD3d 436,438 [2004]; see also *Brennan v R.C. Dolner, Inc.*, 14 AD3d 639 [2005]; *Marano v Commander Elec., Inc.*, 12 AD3d 571 [2004]).

Here, according to the plain language of the contract, New City must indemnify Xinos in the event plaintiff's injuries were caused by the negligent acts or omissions of New City. The indemnity provision contained in paragraph 4.6 of the contract between Xinos and New City provides as follows:

"To the fullest permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor...and agents employees of them from and against claims, damages, losses, including by not limited to attorneys' fees, arising out of or resulting from performance of Subcontractors work under this Subcontract, provided that such claim ...is attributable to bodily injury ...but

only to the extent caused in whole or in part to by negligent acts or omissions of the subcontractor... anyone directly employed by them or anyone for whose they may be liable, regardless of whether such claims . . . is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or otherwise reduce other rights or obligations of indemnity, which would otherwise exists as to a party or a person described in this paragraph."

Further, the newly adduced evidence shows that the accident was not caused by any negligence on the part of Xinos (see *Jardin*, 138 AD3d at 930-931; *Van Nostrand*, 114 AD3d at 667-668; *Jamindar v Uniondale Union Free Sch. Dist.*, 90 AD3d 612, 616-17 [2d Dept 2011]). At the time of the accident, plaintiff was underneath a scaffold that had been erected by his employer, New City, when a wooden plank fell from the scaffold and struck him. Two New City employees were working on the scaffold when the plank fell. The scaffold was under the direction, control, and supervision of New City. At no time before plaintiff's accident did anyone from Xinos direct, supervise, or control the means or method of New City's work at the site.

Cesar Monge, president of New City at the time of the accident, testified that plaintiff was an employee of New City as of April 28, 2014, and Guillermo Chimborazo was the foreman for New City at the site. Guillermo Chimborazo testified that, as foreman, he was in charge of supervising the work and employees. Guillermo Chimborazo additionally testified that Xinos' project manager never provided any direction or instruction to New City employees and was not present on the date of the accident. The court thus finds that the accident arose out of New City's work.

A party is entitled to full contractual indemnification provided that the "intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Margolin v New York Life Ins. Co.*, 32 NY2d 149 [1973]; see also *Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153 [1977]). The facts surrounding plaintiff's accident coupled with the language of the indemnification clause in the contract indicate that Xinos is entitled to conditional contractual indemnification against New City.

The November 28, 2017 decision and order stated that "the Court cannot discern the precise terms of the parties' agreement concerning indemnification based upon the evidence submitted." Xinos asserts that, due to a clerical error in the reproduction of the contract, part of the indemnification provision was illegible

as provided in its prior summary judgment motion. Xinos has included the complete provision in the instant motion.

Accordingly, the motion by Xinos for leave to renew its August 23, 2017 motion, and, upon renewal, summary judgment on its claim for contractual indemnification against New City is **GRANTED**.

This constitutes the decision and order of the court.

Dated: November *14*, 2018



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Denis J. Butler, J.S.C.

