

| |
|--|
| Vucetic v NYU Langone Med. Ctr. |
| 2020 NY Slip Op 30142(U) |
| January 21, 2020 |
| Supreme Court, New York County |
| Docket Number: 161936/2014 |
| Judge: James E. d'Auguste |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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 OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM

Justice

-----X

INDEX NO. 161936/2014

ANTE VUCETIC, MARIANNA VUCETIC,

Plaintiff,

MOTION DATE 06/11/2018,
06/22/2018

- v -

MOTION SEQ. NO. 004 005

NYU LANGONE MEDICAL CENTER, NYU HOSPITALS
CENTER, LEND LEASE (US) CONSTRUCTION LMB INC.,

Defendant.

**DECISION + ORDER
ON MOTION**

-----X

NYU HOSPITALS CENTER, LEND LEASE (US)
CONSTRUCTION LMB INC.

Plaintiff,

Third-Party
Index No. 595374/2015

-against-

ORION MECHANICAL SYSTEMS, INC.

Defendant.

-----X

NYU HOSPITALS CENTER, LEND LEASE (US)
CONSTRUCTION LMB INC.

Plaintiff,

Second Third-Party
Index No. 595294/2016

-against-

HORIZON CONTRACTING, LLC

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 159, 160, 161, 162, 163, 164, 165, 166, 171, 179, 180, 181, 183, 185, 191, 192, 193, 194

were read on this motion to/for

SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 005) 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 167, 168, 169, 170, 172, 175, 176, 177, 178, 184, 186, 195, 196, 201, 202

were read on this motion to/for

SUMMARY JUDGMENT

Hon. James E. d'Auguste

Upon the foregoing documents, motion sequence numbers 004 and 005, which are consolidated for disposition, are decided as follows:

In this personal injury action brought under the New York Labor Law, plaintiff fell from an unsecured A-frame ladder that broke while it was being used on a construction/renovation project at NYU Langone Medical Center's Tisch Cafeteria. The owner of the property was defendant NYU Langone and the general contractor was defendant Lend Lease. Lend Lease had subcontracted the HVAC work to third-party defendant Orion, which in turn, subcontracted a portion of the HVAC work to second third-party defendant Horizon. Plaintiff was employed at the time by Horizon.

On August 13, 2018, this Court (motion sequence 003) granted summary judgment on the issue of liability under Labor Law § 240(1). NYSCEF Doc. No. 173. On October 7, 2019, this Court (motion sequence number 006) severed the issue of plaintiffs' damages in the main action (161936/2014) from the third-party apportionment, indemnification and contribution action (595374/2015) and the second third-party apportionment, indemnification and contribution action (595294/2016). NYSCEF Doc. No. 225.

In motion sequence number 004, defendants NYU Langone and Lend Lease move for summary judgment seeking an order of contractual indemnification from third-party defendant Orion, as well as from second third-party defendant Horizon.

In motion sequence number 005, second third-party defendant Horizon seeks summary judgment dismissing NYU Langone and Lend Lease's third-party complaint seeking contractual indemnification from Horizon.¹

Horizon's motion for summary judgment dismissing Orion's claim for contractual indemnification from Horizon is denied. Workers' Compensation Law § 11 governs indemnity by subcontractors who are the employers of the injured party. Common law contribution or indemnity is barred except in cases in which the plaintiff has suffered a "grave injury" as defined in that section. However, contractual indemnity is specifically permitted by Workers' Compensation Law § 11 if "based upon a provision in a written contract entered into *prior to the accident or occurrence* by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered" (emphasis added). Despite the specific language in the statute requiring that the contract be entered into prior to the accident or occurrence, an indemnity provision or contract executed after a plaintiff's accident may be applied retroactively where the evidence establishes as a matter of law that the agreement pertaining to the contractor's work was made "as of" a date prior to the accident, and that the parties intended that it apply to a date prior to the accident. *Pena v Chateau Woodmere Corp.*, 304 AD2d 442 (1st Dep't 2003).

Triable issues of fact exist as to whether the indemnity agreement signed by Horizon and Orion, which would otherwise provide indemnity by Horizon to NYU Langone and Lend Lease, was in effect prior to the time of the accident. For instance, both Mr. Santos and Mr. Perisa testified

¹ Although there are no notices of cross-motion filed in relation to the instant motions, Orion, at the end of its opposition papers, requests relief in the form of summary judgment on the issue of contractual indemnification against Horizon (see, NYSCEF Doc. No. 160 at ¶ 29). This application is not properly before this Court and, in any event, is denied.

that it was the practice and procedure of both companies to enter into agreements for the work that included indemnity language wherein Horizon would cover Orion for claims arising out of the job. Additionally, there is at least one version of the "Indemnity Agreement and Agreement to Maintain Certain Insurance" that is signed by Orion and Horizon and is "dated" (or backdated) July 3, 2014, which is before the accident. This seems to indicate that even if the agreement was signed after the accident, there are triable issues of fact that the parties intended that it apply retroactively.

Horizon's motion for summary judgment dismissing NYU Langone's and Lend Lease's claim for contractual indemnification from Horizon is denied. In addition to the reasons set forth above denying dismissal of Orion's claims for indemnification, which also apply with respect to NYU Langone and Lend Lease, Horizon's additional argument that the Horizon-Orion Indemnification Agreement lacks required specificity to provide indemnification to these non-signatory third parties is unavailing. Although NYU Langone and Lend Lease are not mentioned in the agreement by name, the subject agreement specifies indemnification for the "Owner" and the "Contractor" and it seems very unlikely that the parties were not well aware of who those were, particularly in light of a purchase order also dated July 3, 2014 identifying the project as "NYU Langone Medical Center Tisch Cafeteria Project."

The Court finds there are also triable issues of fact as to whether Orion and Horizon breached any contractual obligation to obtain certain levels of insurance coverage for NYU Langone and Lend Lease. Accordingly, Horizon's motion for summary judgment dismissing NYU Langone's and Lend Lease's breach of contract claims is denied. Conversely, NYU Langone and Lend Lease's motion for summary judgment on their breach of contract claims against Horizon and Orion are also denied.

NYU Langone's and Lend Lease's motion for summary judgment seeking an order of indemnification from Horizon is denied. Horizon's purported obligation to indemnify NYU Langone and Lend Lease is premised upon the Orion-Horizon Indemnification Agreement. As stated herein, there are triable issues of fact as to whether this agreement was in effect prior to the date of the accident, or that the parties intended for the agreement to retroactively over the date of the agreement to the extent that it was entered into after that date.

NYU Langone's and Lend Lease's motion for summary judgment seeking an order of indemnification from Orion is granted. A party is entitled to full contractual indemnification wherein the party can demonstrate that full contractual indemnification was the intention implied from the language and the purpose of the entire agreement and the surrounding facts and circumstances. *Vrzewinski v. Atlantic Scaffold & Ladder Co. et al.*, 70 N.Y.2d 774 (1987). The Court of Appeals has further held that such indemnification is owed wherein there is no evidence of any fault or wrongdoing on the part of the party seeking to be indemnified. *Brown v. Two Exchange Plaza Partners*, 76 N.Y.2d 172 (1990).

NYU and Lend Lease's claim for indemnification is based on the Lend Lease-Orion Subcontract (NYSCEF Doc. No. 153), which contains a clear and unambiguous intent for Orion to indemnify NYU Langone and Lend Lease to the fullest extent permissible by law. It is not disputed that the accident involved an Orion ladder and the method and means of the work was supervised by Horizon supervisors with an Orion supervisor also present at the site at the time. Nobody from NYU Langone or Lend Lease supervised or controlled the work plaintiff Ante Vucetic was performing at the time of his accident and admitted he did not even see anyone from these defendants on the jobsite. Thus, there are no triable issues of fact of any fault or wrongdoing on the part of NYU Langone or Lend Lease, and should these defendants be found liable, such

liability would be statutory or vicarious arising from the work subcontracted to Orion, a portion of which was sub-subcontracted to Horizon. Under such circumstances, NYU Langone and Lend Lease are entitled to contractual indemnification from Orion. *Colozzo v. National Center Foundation*, 30 A.D.3d 251 (1st Dep't 2006) (a party is entitled to full indemnification if the party seeking indemnification establishes that the plaintiff's injuries are not attributable to negligence on its part and that its liability was vicarious and purely statutory). Further, unlike Horizon, Orion was not plaintiff's employer and, as a result, the restrictions imposed by WCL § 11 regarding retroactivity are not applicable with respect to this third-party defendant.

Accordingly, it is hereby


ORDERED that NYU Langone's and Lend Lease's motion for summary judgment seeking an order of contractual indemnification from third-party defendant Orion is granted; and it is further

ORDERED that NYU Langone's and Lend Lease's motion for summary judgment seeking an order of contractual indemnification from second third-party defendant Horizon is denied; and it is further

ORDERED that second third-party defendant Horizon's motion for summary judgment seeking dismissal of NYU Langone's and Lend Lease's second third-party complaint seeking contractual indemnification from Horizon is denied.

This constitutes the decision and order of this Court.

1/21/2020
DATE


JAMES EDWARD D'AUGUSTE, J.S.C.

| | | |
|-----------------------|--|--|
| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| | <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED | <input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE |