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| Ilkhomov v 133 Greenwich St. Assoc., LLC |
| 2020 NY Slip Op 34443(U) |
| February 5, 2020 |
| Supreme Court, Kings County |
| Docket Number: 508494/15 |
| Judge: Karen B. Rothenberg |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 x
 JAKHONGER ILKHOMOV,

Plaintiff(s),
 -against- :

Index No: 508494/15

133 GREENWICH STREET ASSOCIATES, LLC,
 HIDROCK REALTY, INC., BAY RIDGE
 MECHANICAL CORPORATION, CAVA
 CONSTRUCTION & DEVELOPMENT INC., and
 CAVA CONSTRUCTION CO., INC.,

DECISION AND ORDER

Defendant(s)

 133 GREENWICH STREET ASSOCIATES, LLC
 s/h/a GREENWICH STREET ASSOCIATES, LLC

Third-Party Plaintiff(s),

-against-

BAY RIDGE MECHANICAL CORPORATION,

Third-Party Defendant(s),

 BAY RIDGE MECHANICAL CORPORATION,

Second Third-Party Plaintiff(s),

-against-

PARKSIDE CONSTRUCTION BUILDERS, CORP.,

Second Third-Party Defendant(s).

 CAVA CONSTRUCTION & DEVELOPMENT INC., and
 CAVA CONSTRUCTION CO., INC.,

Third Third-Party Plaintiff(s),

-against-

PARKSIDE CONSTRUCTION BUILDERS, CORP.,

Third Third-Party Defendant(s).

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Recitation as required by CPLR 2219(a), of the papers considered in 133 Greenwich Street Associates, LLC and Hidrock Realty Inc.’s motion for summary judgment.

| Papers | NYSCEF Doc. Nos. |
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| Order to Show Cause/Motion and Affidavits Annexed. | 267-287 |
| Cross-motion and supporting papers..... | |
| Answering Affidavits..... | |

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

In this action to recover damages for personal injuries, 133 Greenwich Street Associates, LLC [133 Greenwich] and Hidrock Realty, Inc. [Hidrock] move pursuant to CPLR 3212 for summary judgment (1) dismissing plaintiff Jakhonger Ilkhomov’s claims; and (2) granting its cross-claims and/or third-party claim against Bay Ridge Mechanical Corp. [Bay Ridge], Cava Construction & Development Inc. and Cava Construction Co. Inc. [collectively Cava] and Parkside Construction Builders, Corp. [Parkside] for contractual and/or common-law indemnification.

Bay Ridge and Parkside worked as subcontractors pursuant to contracts with the general contractor, Cava, on the construction of a Marriott Hotel on the property owned by 133 Greenwich in lower Manhattan. The plaintiff, an employee of non-party GNT Mechanical LLC, a subcontractor of Bayridge, commenced this action against 133 Greenwich, Hidrock, Cava, and Bayridge to recover for personal injuries he allegedly sustained while working on the project. The plaintiff’s complaint asserted causes of action for common law negligence and for violations of Labor Law §§ 200, 240(1) and 241(6). 133 Greenwich asserted cross-claims against Parkside and commenced a third-party action against Bayridge for common-law and contractual indemnification. Hidrock asserted cross-claims against Bayridge and Parkside strictly for common-law indemnification.

Subsequent to the filing of this motion, plaintiff settled his claims against all the defendants including 133 Greenwich. 133 Greenwich has since withdrawn this motion as against plaintiff. 133 Greenwich and Hidrock continue this motion solely as against Bayridge and Parkside for contractual and/or common-law indemnification for their defense costs in this litigation (*see American Ref-Fuel Co. of Hempstead v Resource Recycling, Inc.*, 307 AD2d 939 [2d Dept 2003] [a party is not precluded from seeking indemnity by the fact that an action is resolved by settlement rather than judgment]).

“The right to contractual indemnification depends upon the specific language of the contract,” and “[t]he 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 facts and circumstances” (*Roldan v New York University*, 81 AD3d 625, 628 [2d Dept 2011]). In this matter, the express language of the subcontractor agreements entered into by Cava with both Bayridge and Parkside, obligate Bayridge and Parkside to indemnify 133 Greenwich “against all losses, claims..., causes of action, lawsuits, liens, costs, damages, and expenses arising out of the work..., but only to the extent caused by the acts or omissions of Subcontractor, its employees, sub-subcontractors, representatives or other persons for whom Subcontractor is responsible.” The language of the agreement would entitle 133 Greenwich to its costs, including counsel fees, incurred in the defense of the main action (*see Perchinsky v State*, 232 AD2d 34 [3d Dept 1997]), but only upon a showing that the plaintiff’s injury arose out of the work and that the indemnitors were negligent. Here, as there are conflicting versions as to how this incident occurred, and because no determination has been made as to whether plaintiff’s injuries were caused in whole or in part by Cava or Bayridge or Parkside, 133 Greenwich fails to establish its prima facie entitlement to judgment as a matter of law for contractual indemnification against Bayridge or Parkside for its defense costs (*see Shaughnessy v Huntington Hosp. Ass’n*, 147 AD3d 121 [2d Dept 2017]).

“Common-law indemnification is warranted where a defendant’s role in causing the plaintiff’s injury is solely passive, and thus its liability is purely vicarious” (*Balladares v Southgate Owners Corp.*, 40 AD3d 667, 671 [2d Dept 2007]). As part of the recovery under common-law indemnification, a party may seek reimbursement of “attorney’s fees, costs, and disbursements incurred in connection with defending the suit brought by the injured party, but cannot recover any legal expenses incurred in its prosecution of the common-law indemnification claim” (*Swan v Pier 1 Imports (U.S.), Inc.*, 173 AD3d 1105, 1107 [2d Dept 2019] [internal quotation marks and citations omitted]).

In order to establish a claim for common-law indemnification, a party must show not only that it was not guilty of any negligence beyond the statutory liability but also that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident, or exercised actual supervision or control over the injury-producing work (*see McCarthy v Turner Const. Inc.*, 17 NY3d 369 [2011]; *see also Debenedetto v Chetrit*, 2021 NY Slip Op. 00413 [2d Dept 2021]). Here, 133 Greenwich fails to show that Bayridge or Parkside was responsible for the negligence that contributed to the accident or had exercised direction, supervision, and control over the work. Thus, it fails to establish its prima facie entitlement to judgment as a matter of law on its claims for common-law indemnification against Bayridge and Parkside for its defense costs (*see Shaughnessy v Huntington Hosp. Ass’n*, 147 AD3d 994 [2d Dept 2017]). Moreover, as Hidrock’s submissions indicate that it was not the owner of the site and had no involvement in any aspect of this construction project, Hidrock would not be

subject to any vicarious liability for this incident, and, thus, fails to demonstrate its entitlement to common-law indemnification from Bayridge or Parkside for any defense costs (*cf. Perri v Gilbert Johnson Enterprises, LTD*, 14 AD3d 681 [2d Dept 2005])¹.

In view of the above, 133 Greenwich and Hidrock's motion for summary judgment on their cross-claims and/or third-party claim for contractual and/or common-law indemnification as against Bayridge and Parkside is denied, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]).

This constitutes the decision/order of the Court

Dated: February 5, 2020

Enter,



Karen B. Rothenberg
J.S.C.

¹ It is noted that even if 133 Greenwich establishes its entitlement to indemnity, its recovery is limited to the reasonable attorney's fees incurred in defense of the main action up to the point it secured a defense. Any recovery after that point would result in a windfall to 133 Greenwich, and would be improper.